

Freedom Respect Equality Dignity: Action

NGO Submission to the UN Committee on Economic, Social and Cultural Rights

Australia



April 2008

This submission to the UN Committee on Economic Social and Cultural Rights has been prepared by the National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre, with substantial contributions from over 30 NGOs. This submission is supported, in whole or in part, by more than 100 NGOs across Australia.

The National Association of Community Legal Centres is the peak body for over 200 community legal services across Australia. Each year, community legal centres provide free legal services, information and advice to over 250,000 disadvantaged Australians.

The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law.

The Kingsford Legal Centre is a community legal centre in Sydney which provides free advice and ongoing assistance to members of community in relation to a number of areas of law, including discrimination law. Kingsford Legal Centre also undertakes law reform and community education work.

This publication does not contain legal advice and you should seek professional advice before taking any action based on its contents.



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Introduction

ABOUT THIS SUBMISSION

1. This submission to the United Nations Committee on Economic Social and Cultural Rights (**CESCR**) has been prepared by the National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre with substantial contributions from over 30 non-government organisations across Australia. The principal authors of this submission are Teena Balgi of Kingsford Legal Centre, Annie Pettitt of the National Association of Community Legal Centres, and Ben Schokman and Philip Lynch of the Human Rights Law Resource Centre.
2. The National Association of Community Legal Centres is the peak body for more than 200 community legal services across Australia. Each year, community legal centres provide free legal services, information and advice to over 250,000 disadvantaged Australians.
3. The Human Rights Law Resource Centre is a national specialist human rights legal service. It aims to promote and protect human rights, particularly the human rights of people who are disadvantaged or living in poverty, through the practice of law.
4. The Kingsford Legal Centre is a community legal centre in Sydney that provides free advice and ongoing assistance to members of the community in relation to a number of areas of law, including discrimination law. The Kingsford Legal Centre also undertakes law reform and community education work.
5. The authors would like to acknowledge the following organisations and individuals, who made invaluable contributions to this submission: Australian Council for Social Service, Australian Human Rights Centre, Australian Muslim Civil Rights Advocacy Network, Chris Sidoti, Claire Mahon, Clare Ozich, Combined Community Legal Centres NSW, Disability Discrimination Legal Centre NSW, Disability Discrimination Legal Service Inc (Vic), Federation of Community Legal Centres (VIC), Foundation for Aboriginal and Islander Research Action, H el ene C esar, Howard Glenn, Human Rights Law Resource Centre, Indigenous Law Centre, Inner City Legal Centre Sydney, Intellectual Disability Rights Service, JobWatch Victoria, Kingsford Legal Centre, Maria Herminia Graterol, Dr Marie Segrave, Mental Health Legal Centre Victoria, National Association of Community Legal Centres, National Children and Youth Law Centre, National Human Rights Network of the National Association of Community Legal Centres, National Youth Advocacy Network, Olivia Girard, People with Disability Australia Inc, Public Interest Advocacy Centre, Public Interest Law Clearing House (Victoria), Rights Australia, Sisters Inside, Southern Communities Advocacy Legal & Education Service WA, Tenants Advice Service WA, UnitingJustice Australia, Victorian Council for Social Service, Welfare Rights Centre Sydney, Women With Disabilities Australia, Women’s Legal Centre ACT, Women’s Legal Services NSW, Women’s Legal Service Victoria, Young Lawyers NSW and YWCA Australia.

6. This submission is supported, in whole or in part, by over 100 non government organisations.
7. The National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre would like to acknowledge the substantial pro bono assistance of Mallesons Stephen Jaques, a leading commercial law firm, in assisting to research, edit and print this submission,¹ as well as the Keir Foundation and the Reichstein Foundation for the generous assistance provided to authors of this report.

SOCIAL AND POLITICAL CONTEXT OF SUBMISSION

8. Australia's Common Core Document, which incorporates Australia's Fourth Report under the *International Covenant on Economic Social and Cultural Rights (ICESCR)*, was lodged with the CESCR on 25 July 2007. It was prepared under the former Liberal/National Coalition Government (**former Australian Government**), which held federal office from 1996 to November 2007. In November 2007, there was a federal general election at which a Labor Government was elected (**current Australian Government**). Wherever possible, this submission therefore responds to Australia's Common Core Document but also seeks to address actual or proposed changes in relevant Australian law, practice and policy (including Australian Labor Party policy) between lodgement of the Common Core Document in July 2007 and this submission in April 2008.
9. We consider that the Common Core Document is deficient in a number of ways. In particular, the Common Core Document omits a number of very significant human rights issues and largely fails to engage in a constructive assessment of the compatibility of Australian law, policy and practice with the *ICESCR* and the extent to which Australia has, or has not, made progress in the realisation of economic, social and cultural rights. We are also concerned about the lack of consultation and transparency in the former Australian Government's process of preparing the Common Core Document. In these respects, Australia's Common Core Document significantly fails to conform to many aspects of the *Harmonised Guidelines on Reporting under the International Human Rights Treaties*.²
10. It is disappointing that the former Australian Government did not use its Fourth Report under the *ICESCR* as an opportunity to conduct a comprehensive review of the measures it has taken to harmonise Australia's domestic law and policy with its international obligations. Periodic reports to UN treaty bodies should be used by Australian Governments to monitor progress made in promoting the enjoyment of fundamental human rights in Australia and to plan and develop appropriate policies to fully implement the rights contained in the treaties.

¹ The opinions expressed are solely those of the attributed authors and are not those of Mallesons Stephen Jaques or its staff.

² *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents*, UN Doc HRI/MC/2006/3 (2006).

OVERVIEW OF HUMAN RIGHTS FRAMEWORK IN AUSTRALIA

11. The *ICESCR* is not incorporated into Australian domestic law and *ICESCR* rights are not justiciable or enforceable in Australian courts or tribunals. Australia remains the only developed state in the world without a national bill or charter of rights, although the current Australian Government has committed to a ‘consultation’ about the need for enhanced legislative protection of human rights.
12. While Australia’s domestic law contains a number of pieces of legislation that protect certain human rights, particularly the right to non-discrimination, they do not cover all rights provided for in the *ICESCR*. In the absence of a federal bill or charter of rights, there are very significant gaps in the protection of human rights. These gaps and other human rights issues are discussed below under each of the relevant rights.
13. Although Australia does have an independent national human rights institution, the Human Rights and Equal Opportunity Commission, in accord with the Paris Principles, the authority of the Human Rights and Equal Opportunity Commission is limited to enquiry into complaints; it cannot make enforceable determinations and there is no requirement that the Australian Government implement or even respond to its recommendations.

List of Supporting Organisations

This submission is supported, in whole or in part, by the following non government organisations:

A Just Australia	Ethnic Child Care Family and Community Services Co-operative Ltd
Aboriginal Disability Network NSW Inc	Federation of Community Legal Centres (Vic) Inc
ACON (formerly AIDS Council of NSW)	Federation of Ethnic Communities' Councils' of Australia
ACT Council of Social Service	Financial & Consumer Rights Council Inc
Anex	Fitzroy Legal Centre
Arts Access Australia	Health Issues Centre, La Trobe University
Arts Law Centre of Queensland Inc	Homelessness Australia
Asylum Seeker Resource Centre Melbourne	Hotham Mission Asylum Seeker Project
Asylum Seekers Centre Sydney	Human Rights Law Resource Centre
Australian Association of Social Workers, National Social Policy Committee	Immigrant Women's Speakout Association
Australian Bahá'í Community	Indigenous Law Centre
Australian Human Rights Centre	Indigenous Social Justice Association Inc
Australian Council of Social Service	Intellectual Disability Rights Service
Australian Federation of Disability Organisations	International Human Rights Law Working Group, NSW Young Lawyers Human Rights Committee
Australian Lawyers for Human Rights	Jesuit Refugee Service Australia
Australian Manufacturing Workers Union	Job Watch Inc
Australian Muslim Civil Rights Advocacy Network	Jobs Australia Ltd
Australian Prisoners Union	Justice Action
Berry Street Victoria	Kingsford Legal Centre
Brotherhood of St Laurence	Koorie Women Mean Business Inc
Castan Centre for Human Rights Law	Law Institute of Victoria
Central Community Legal Service (SA)	Legal Service Bulletin Cooperative
Centre for Human Rights Education, Curtin University	Liberty Victoria
Centre for Multicultural Youth Issues	Loddon Mallee Accommodation Network
Centre on Housing Rights and Evictions (COHRE)	Mental Health Legal Centre Inc
Child Rights Taskforce	Micah Projects Inc
Combined Community Legal Centres Group (NSW) Inc	Multicultural Centre for Women's Health
Conflict Resolution Network	National Association of Community Legal Centres
Council of Social Service of NSW (NCOSS)	National Children and Youth Law Centre
Council To Homeless Persons	National Council on Intellectual Disability
Disability Discrimination Legal Service (Vic)	National Employment Law Network of National Association of Community Legal Centres
Edmund Rice Centre for Justice and Community Education	

National Human Rights Network of National Association of Community Legal Centres	Springvale Monash Legal Service Inc
National Welfare Rights Network Inc	St Mary's House of Welcome Limited
National Youth Advocacy Network	Tasmanian Association of Community Legal Centres
Northern Community Legal Service (SA)	Tenants Advice Service (TAS)
NSW Council for Civil Liberties	UnitingJustice Australia, Uniting Church in Australia
NSW Disability Discrimination Legal Centre Inc	Victorian Aboriginal Legal Service Co-operative Limited
Older Persons Network of the National Association of Community Legal Centres	Victorian Coalition of Acquired Brain Injury Service Providers
Peninsula Community Legal Centre Inc (Vic)	Victorian Council of Social Service (VCOSS)
People with Disability Australia	Villamanta Disability Rights Legal Service Inc
PILCH Homeless Persons' Legal Clinic (Vic)	Welfare Rights Centre Sydney
Prisoners' Legal Service Inc (Qld)	Women With Disabilities Australia (WWDA) Inc
Public Interest Advocacy Centre	Women's Electoral Lobby (WEL) Australia
Public Interest Law Clearing House (Vic) Inc	Women's Legal Centre (ACT & Region) Inc
Queensland Council of Social Service	Women's Rights Action Network Australia
Queensland Working Women's Service Inc	Women's Legal Services Australia
Refugee Advice & Casework Service (Aust) Inc	Women's Legal Services NSW
Refugee Council of Australia	Working Women's Centre SA Inc
Roma Mitchell Community Legal Centre Inc (SA)	World Vision Australia
SANE Australia	Youth and Family Service (Logan City) Inc
Sisters Inside Inc.	Youth Coalition of the ACT
South Australian Council of Social Service Inc	Youthlaw
South East Community Legal Service (SA)	YWCA Australia
Southern Communities Advocacy, Legal and Education Service Inc.	

Executive Summary

14. Fundamental human rights issues have been at the core of national political and social debate in Australia in the last decade. This report documents areas in which Australia is falling short of its obligations under the *ICESCR* and focuses on areas that have been the subject of extensive NGO activity and research in Australia.
15. This Executive Summary sets out:
 - (a) key developments in the promotion of the *ICESCR* rights since the lodgement of the Common Core Document in July 2007; and
 - (b) key concerns in relation to *ICESCR* breaches and implementation failures in Australia's Third Report under *ICESCR*.
16. This submission also contains the following appendices:
 - (a) [Appendix 1](#) provides a schedule of Proposed Questions to be included in the List of Issues relating to all the articles of the *ICESCR*;
 - (b) [Appendix 2](#) provides a schedule of Proposed Recommendations to be included in the Concluding Observations relating to all articles of the *ICESCR*; and
 - (c) [Appendix 3](#) provides information on the extent to which the Common Core Document deals sufficiently with previous Concluding Observations of the Committee on Economic, Social and Cultural Rights.

RECENT KEY DEVELOPMENTS IN THE PROMOTION OF *ICESCR* RIGHTS

17. Since its election in November 2007, the current Australian Government has taken a number of significant steps towards the realisation of *ICESCR* rights and the promotion of human rights generally, including:
 - (a) committing to a public consultation regarding how best to recognise and protect human rights in Australia;
 - (b) indicating support for the Declaration on the Rights of Indigenous Peoples and an intention to ratify the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of Persons with Disabilities*, and the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*;
 - (c) committing to more extensive and constructive engagement with the UN, including UN treaty bodies and Special Procedures;
 - (d) the establishment of a new Social Inclusion Unit within the Department of Prime Minister and Cabinet, and the appointment of a senior minister to the portfolio of Social Inclusion;

- (e) the appointment of an expert committee to prepare a strategy to tackle the problem of homelessness in Australia through the development of a comprehensive, long-term plan;
- (f) the development of a 'National Rental Affordability Scheme' to address the issue of lack of housing availability and affordability;
- (g) the development of legislation to repeal certain aspects of the Northern Territory Intervention, Work Choices, and Welfare to Work;
- (h) directing the Productivity Commission to undertake an inquiry into the establishment of a national paid parental leave scheme; and
- (i) committing to achieve equality of health status and life expectancy between Indigenous Australians and non-Indigenous Australians by 2030, including ensuring primary health care services and health infrastructure for Indigenous peoples which are capable of bridging the gap in health standards by 2018.

SIGNIFICANT CONCERNS REGARDING THE REALISATION OF *ICESCR* RIGHTS

18. This section summarises key concerns in relation to *ICESCR* breaches and implementation failures since Australia's Third Report under *ICESCR*.

Article 1 — Right of Self-Determination

19. Indigenous Australians are not afforded the right of self-determination and are inadequately politically represented. The Aboriginal and Torres Strait Islander Commission, the only national representative body for Indigenous Australians, was abolished in 2004. There are currently no Indigenous representatives in the Australian Parliament.
20. The Australian Government's historical policy of merely 'consulting' with Indigenous Australians regarding policies which are particularly likely to affect them does not meet the standards of meaningful engagement, participation and empowerment required by the right of self-determination.
21. Although the current Australian Government has recently issued an 'Apology' to the 'Stolen Generations' (Indigenous children forcibly removed from their families during the 20th century), it has not committed to making adequate reparations for the harm and suffering caused by previous government policies and programs.
22. The current 'Emergency Intervention' into the Northern Territory violates the right of self-determination through measures including the compulsory acquisition of land, the suspension and direction of representative community councils, and the quarantining of social security payments.

Article 2 — Treaty Entrenchment and Non-Discrimination

23. The *ICESCR* is not incorporated into Australian domestic law and is not justiciable or enforceable in Australia. Australia remains the only developed state in the world without a national bill or charter of rights.
24. Despite over a decade of unprecedented economic growth and national budgetary surpluses, real expenditure on the realisation of many economic, social and cultural rights has either not increased or has regressed.
25. The right to non-discrimination is protected in a piecemeal way and Australian equal opportunity and anti-discrimination laws do not cover all areas outlined in Article 2 of the *ICESCR*. Furthermore, the laws fail to address adequately the issue of substantive equality or systemic discrimination.
26. There are a number of communities and groups that do not enjoy the rights contained in the *ICESCR* on an equal basis in Australia, including particularly:
 - (a) Indigenous Australians;
 - (b) women;
 - (c) people with disability;
 - (d) people from non-English speaking backgrounds;
 - (e) homeless people;
 - (f) gay, lesbian, bisexual, transgender and intersex people;
 - (g) children and young people; and
 - (h) older persons.
27. Australia does not have a national action plan on human rights education. Human rights are not a formal component of the curriculum at a primary or secondary level in any Australian state or territory.
28. The current Australian Government's commitment to increasing foreign aid from 0.3 per cent to 0.5 per cent of Gross National Income is welcomed but remains short of the 0.7 per cent required by the Millennium Development Goals.

Article 3 — Equal Rights of Men and Women

29. Women remain significantly disadvantaged compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation. Indigenous women, women from non-English speaking backgrounds and women with disability are particularly disadvantaged.
30. Violence against women continues to occur at appalling levels in Australia. While the Australian Government has implemented a 'Women's Safety Agenda' initiative, the resources allocated to both prevention of violence and assistance for women and children who experience violence are inadequate.

Article 6 — Right to Work

31. The 'Welfare to Work' changes to social security legislation introduced by the former Australian Government have resulted in a decrease in income for some marginalised and vulnerable groups. The policy can result in a person being deemed ineligible for any means of social support if they do not accept paid work, even where it may be inappropriate or result in significant disruption to family and private life.
32. There is a range of communities and groups that confront significant barriers to workforce participation, including Indigenous people, asylum seekers and migrants.
33. Prisoners are not fairly remunerated for their work, are often penalised through loss of other opportunities or privileges for refusing to undertake paid work, are not provided with adequate opportunities to acquire vocational skills to assist them to find post-release employment, and are not equally protected in relation to workplace injury as compared with other workers.
34. Australia has not formulated a comprehensive strategy to combat the trafficking of women and children and to address exploitation resulting from sexual servitude or 'debt bondage'.
35. Indigenous Australians have not been adequately compensated for 'Stolen Wages', being the wages of many Indigenous workers whose paid labour was controlled by governments for much of the 19th and 20th centuries.

Article 7 — Right to Just and Favourable Conditions of Work

36. The former Australian Government's industrial relations policy, 'Work Choices', resulted in a significant reduction in workers' rights, including in relation to hours of work, work loads, protection from unfair dismissal, fair wages and conditions, collective bargaining and leave entitlements.
37. Relative to men, women are paid less, occupy significantly fewer managerial positions, are over-represented in many low-paid sectors, and have less job security or predictability.

Article 8 — Freedom of Association and Right to Strike

38. While the former Australian Government's industrial relations policy, 'Work Choices', protected the right of workers to join trade unions, it substantially limited the right to freedom of association, including by denying employees the right to engage in collective bargaining or to be represented by their union in negotiations. Work Choices also restricted the right of unions to determine their own rules or to enter workplaces.
39. The right to strike is not protected by Australian law and is denied to many workers in many situations.

Article 9 — Right to Social Security

40. The right to social security is not enshrined in Australian law.
41. Not all people who require social security are able to access it, including newly arrived migrants, asylum seekers, some New Zealand citizens, people unable to provide adequate proof of identity, and marginalised and disadvantaged people unable to satisfy 'mutual obligation' requirements.
42. Social security payments are pegged around or below the poverty line and, in many cases, are insufficient to support a dignified and adequate standard of living.
43. The conditionality of some social security payments may result in a total loss of income beyond a person's control. People with mental illness and homeless people are particularly vulnerable to termination of payments.

Article 10 — Right to Family

44. Australia remains one of only two Organisation for Economic Co-operation and Development countries without a national paid maternity leave scheme, although the Productivity Commission is currently inquiring into the introduction of such a scheme.
45. Recent amendments to the *Family Law Act 1975* (Cth) concerning the care of children following family separation prioritise parents' claims to equal custody at the expense of the principle that the best interests of the child are paramount in deciding where a child will live and with whom the child will spend time.
46. Australian law does not prohibit holding children in immigration detention centres.
47. Australian immigration law, policy and practice may interfere substantially with the right to family, particularly in cases where:
 - (a) there are moves to deport a non-citizen family member;
 - (b) a family member is denied the ability to bring family members to Australia; or
 - (c) entry is denied to an individual seeking to join family members already residing in Australia.
48. The Human Rights and Equal Opportunity Commission has identified at least 58 Australian laws that discriminate against same-sex couples and their families.
49. Indigenous parents and parents with disability are disproportionately likely to have their children removed by child-protection services.
50. There is a range of areas of Australian law, policy and practice which do not adequately protect the rights or interests of children, including in relation to immigration detention, child labour and contact with parents in prison.

Article 11 — Right to an Adequate Standard of Living

51. It is estimated that, of a population of around 21 million people, between 2 and 3.5 million Australians live in poverty. Despite this, Australia does not have a comprehensive anti-poverty strategy and the current Australian Government has not yet committed to poverty reduction benchmarks or targets.
52. On any given night, there are at least 100,000 homeless people in Australia. Less than 15 per cent of these people are housed in crisis accommodation services, with the demand for homelessness services significantly exceeding supply. The current Australian Government has committed to addressing the issue of homelessness through the development of a comprehensive Homelessness Strategy.
53. Over the last decade, there has been a substantial reduction in the availability of adequate, affordable, accessible and safe housing in Australia. Public housing stock has declined across Australia, resulting in lengthy waiting lists and a substantial tightening of eligibility criteria. In the private market, over 1.1 million low and middle-income people live in housing stress, meaning that they spend at least 30 per cent of their income on housing.
54. A range of communities and groups are particularly vulnerable to poverty and social exclusion, including Indigenous people, asylum seekers, new migrants, people with disability, women, children and young people. The state of Indigenous Australians' housing and homelessness has been described by the UN Special Rapporteur on Adequate Housing as a 'humanitarian tragedy'.
55. Access to adequate and appropriate food, a critical determinant of realisation of the right to an adequate standard of living and the right to the highest attainable standard of health, is limited for many vulnerable groups, such as low-income earners, asylum seekers and Indigenous Australians.
56. The nature and extent of poverty in Australia is such that many disadvantaged Australians, particularly homeless people, asylum seekers, people with disability and Indigenous people, experience significant food insecurity. For all of these groups, lack of access to adequate food and appropriate food has deleterious effects on health, employment and educational attainment.
57. Australia does not have a national strategy to ensure that all Australians have adequate access to affordable drinkable water and sanitation services.
58. Access to clean water is unreliable for many Indigenous Australians, resulting in poor environmental health and Indigenous people suffering related diseases and infections at a higher rate than the non-Indigenous population.

Article 12 — Right to the Highest Attainable Standard of Physical and Mental Health

59. Certain population groups — including poor people, Indigenous people, people in rural and remote areas, homeless people, asylum seekers, prisoners and people from non-English speaking backgrounds — have significantly poorer health and less access to adequate health services than others.
60. The shift in funding from the public health system to private health insurance rebates has resulted in a widening of the gap in health services available to rich and poor Australians.
61. There is a serious shortage in the availability of dental care, with up to 40 per cent of Australians unable to access dental care when they need it.
62. The state of Indigenous health in Australia results from and represents serious human rights breaches. Indigenous Australians do not have an equal opportunity to be as healthy as non-Indigenous Australians. Many Indigenous Australians do not have the benefit of equal access to primary health care and many Indigenous communities lack basic needs, such as adequate housing, safe drinking water, electricity and effective sewerage systems. As a consequence, average life expectancy for Indigenous Australians is over 20 years less than that of non-Indigenous Australians.
63. The demand for mental health services significantly exceeds supply, with major investment required in mental health services in the short to medium term. There are significant correlations between mental illness, imprisonment, unemployment, homelessness, poverty, substance abuse and family dysfunction.
64. Health care in Australian prisons and detention centres is manifestly inadequate. There is significant evidence that conditions of detention may be deleterious to health. The use of solitary confinement (or 'segregation') as a management tool for people incarcerated in Australian prisons and detention centres is widespread. Women prisoners and Indigenous prisoners are particularly susceptible to poor health and inadequate treatments.
65. Certain groups of women continue to be denied access to reproductive technologies (such as artificial insemination and in vitro fertilisation), particularly lesbians, single heterosexual women, and financially disadvantaged women.

Articles 13 & 14 — Right to Education

66. A range of groups confront significant barriers to education and do not have equal access to educational opportunities, including children with disability, Indigenous children, children from low income families, and children from rural and remote areas.
67. The Australian Government has not invested progressively using the maximum available resources in public education, resulting in a substantial resource gap between government and non-government schools. This results in substantially less educational opportunities and resources for children from low income families.
68. Further strategies and resources are required to address the issues of bullying, truancy and exclusion from schools.

69. The level of support provided for children with disabilities to attend mainstream schools is manifestly inadequate, resulting in much lower levels of secondary school completion.
70. A substantial decline in government funding, in combination with significant increases in higher education fees, has resulted in declining and unequal tertiary opportunities for students with disability, Indigenous students, low income students, and students from rural and remote areas.

Article 15 — Cultural and Scientific Progress Rights

71. Inadequate protection of the titles and interests of Indigenous Australians in their native lands denies many Indigenous people the right to take part in cultural life. This is particularly the case in the Northern Territory, where the ‘Emergency Intervention’ provides for the compulsory acquisition of lands and the abolition of permits for entry onto traditional lands.
72. Indigenous cultural and intellectual property rights are not adequately protected by Australian laws.

Article 1 — Right of Self-Determination

Article 1:

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

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A. RIGHT OF SELF-DETERMINATION

A.1 Recognition of Self-Determination for Indigenous Australians

73. Article 1 of the *ICESCR* recognises that all peoples have the right to freely determine their political status and to freely pursue their economic, social and cultural developments. While in office, the former Australian Government made no commitment to full self-determination for Indigenous Australians, but rather supported the principle that Indigenous peoples 'should be consulted over policies which are likely to impact on them in particular'.³ The principle of consultation with Indigenous peoples falls well short of the right of self-determination.

³ Commonwealth Government, *Common Core Document forming part of the reports of States Parties incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (June 2006), [202] available at www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument.

74. The historic dispossession and disenfranchisement of Indigenous Australians was further perpetuated by the abolition in April 2004 of the Aboriginal and Torres Strait Islander Commission. The Aboriginal and Torres Strait Islander Commission was composed of elected Indigenous representatives, was the main policy-making body in domestic Indigenous affairs and also represented the interests of Indigenous Australians internationally. The Aboriginal and Torres Strait Islander Commission was replaced in late 2004 with a 'National Indigenous Advisory Council' that was appointed by the former Australian Government, not Indigenous people, and had only a limited role in monitoring government policy. In early January 2008, this Advisory Council was abolished. No announcement has been made as to what body will now represent Indigenous peoples.⁴
75. In failing to introduce a new representative Indigenous body, the Australian Government has deprived Indigenous Australians of the right to meaningfully participate in policy formulation and public debate, which raises concern in relation to Article 1 of the *ICESCR*. Without national or regional Indigenous-controlled representative organisations, the ability of Indigenous people to contribute to the formulation of Indigenous policy is extremely limited, which restricts their ability to pursue freely the development of their economic, social and cultural rights.
76. In its previous Concluding Observations, the CESCR encouraged Australia to pursue efforts in the process of reconciliation with Indigenous Australians and to improve the disadvantaged situation they are in.⁵ In addition to the CESCR, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women have each expressed their concern that insufficient action has been taken in relation to Indigenous Australians exercising meaningful control over their affairs.⁶
77. In September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples.⁷ Although non-binding, the adoption of the Declaration is seen to be an affirmation of the rights of Indigenous peoples at a time when they face daily threats to their well-being and survival. The Declaration emphasises the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. However, Australia was one of only four countries (along with the United States of America, Canada and New Zealand) to oppose the Declaration. This lack of recognition of the particular rights of Indigenous peoples raises concerns in relation to Australia's compliance with Article 1 of the *ICESCR*.

⁴ Michelle Grattan, 'Labor Disbands Aboriginal Body', *The Age* (Melbourne), 16 January 2008.

⁵ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [25].

⁶ See *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000) [9]; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005) [11]; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) [17]. The Committee on the Elimination of Discrimination against Women recommended that Australia consider the adoption of quotas and targets to increase the number of Indigenous women in political and public life: at [17].

⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/61/L.67 (2007).

78. The current Australian Government has made a commitment to consult with stakeholders about reversing Australia's opposition to the Declaration.⁸ Endorsement of the Declaration would improve consultation between government and Indigenous Australians and would provide a framework for the future recognition and protection of the economic, social and cultural rights of Indigenous Australians. The Australian Government should be strongly encouraged to endorse the Declaration, which would represent an important acknowledgement of the right of Indigenous Australians of self-determination and freedom from discrimination.

A.2 The Stolen Generations

79. In 1997, Australia's national human rights institution, the Human Rights and Equal Opportunity Commission, released a report entitled *Bringing Them Home*.⁹ According to the report, at least 100,000 Indigenous children were removed forcibly or under duress from their families by various government agencies and church missions between approximately 1910 and 1970. This constituted between 10 and 30 per cent of all Indigenous children during that period. The group of children who were removed from their families has become known as the 'Stolen Generations'.

80. Some of the key findings of the *Bringing Them Home* report were that welfare officials failed in their duty to protect Indigenous wards from abuse and that many Indigenous children:

- (a) were placed in institutions, church missions, adopted or fostered;
- (b) received little education;
- (c) were expected to perform low grade domestic and farming work, often without receiving wages for their labour; and
- (d) suffered, or were at risk of suffering, physical, emotional and sexual abuse.

81. The report made 54 recommendations aimed towards restoring justice and dignity to the Stolen Generations and to rectify the ongoing inter-generational effects of family separation. However, many of the recommendations have not been implemented by the Australian Government. The inadequate response to the recommendations has contributed to many of the problems faced by Indigenous Australians in the realisation of economic, social and cultural rights.

⁸ See Adam Gartrell, 'Govt to Endorse UN Indigenous Declaration' (17 February 2008) available at <http://www.news.com.au/story/0,23599,23228520-29277,00.html>.

⁹ 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).

82. Until early this year, the two key components of reparation, namely a formal apology and compensation for those affected, remained the major 'unfinished business' of the *Bringing Them Home* report. However, in February 2008, the current Australian Government formally apologised to Indigenous Australians for past injustices and especially for the forced removal of Indigenous Australian children from their families. The formal apology by the current Australian Government is to be congratulated. However, while the formal apology is a long-awaited gesture towards reconciliation, it must be recognised as only the first step of a long term commitment to meaningful reconciliation and efforts to improve the disadvantage faced by Indigenous Australians in relation to many economic, social and cultural rights.
83. It is concerning that no Australian Government has committed itself to establishing a compensation fund for the people and families of the Stolen Generations. This was one of the key recommendations of the *Bringing Them Home* report and would provide substance to the current Australian Government's formal apology. While there has been funding promised for improving 'Link Up', an Australian Government program which was established in 1997 to assist in the reunification of Indigenous families who were separated as a result of government policies, there has been no such commitment to provide resources for healing and counselling services. Most significantly, there has been no commitment to explore options for individual compensation for the people of the Stolen Generations.

A.3 Intervention into Northern Territory Indigenous Communities

84. In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Indigenous communities, entitled *Little Children are Sacred*.¹⁰ The report detailed the 'extent, nature and factors contributing to sexual abuse of Aboriginal children' and the obstacles and challenges associated with effective child protection mechanisms.¹¹ The report made 97 recommendations, which were intended to offer advice to the Northern Territory Government on how best to support and empower communities to prevent child sexual abuse now and in the future. The recommendations spanned a wide range of areas, including in relation to school education, awareness campaigns, improving family support services and the empowerment of Indigenous communities.
85. In response, the former Australian Government announced a 'national emergency intervention' into Indigenous communities in the Northern Territory and passed a legislative package¹² (**Northern Territory Intervention**) that raises significant concerns in relation to Australia's international obligations to respect and promote the human rights of Indigenous Australians. The Northern Territory Intervention consists of a range of extraordinary measures, including the compulsory acquisition of Indigenous land, the quarantining of social security payments, the banning of alcohol and the deployment of military and police in

¹⁰ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007).

¹¹ *Ibid* 5.

¹² *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); and *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

traditional lands. There was very little relationship between the recommendations to the Northern Territory Government contained in the *Little Children are Sacred* report and the former Australian Government's 'national emergency intervention'.

86. The Northern Territory Intervention legislation was passed without consultation with Indigenous representatives and affected communities, despite the former Australian Government's statement in the Common Core Document that it was committed to consulting and involving Indigenous peoples when policies and programs have an impact on them.¹³ Of particular concern is the haste with which the Northern Territory Intervention legislation was prepared, and enacted. The legislative process took only 10 days, despite the fact that it introduced 480 pages of new legislation. The Northern Territory Intervention undermined the fundamental right of Indigenous peoples to participate meaningfully in decisions which affect them. This severely limits the opportunity for Indigenous peoples to freely pursue their economic, social and cultural development.
87. In addition, the broad legislative measures target, and impact specifically on, Indigenous people. This raises concerns in relation to the right to equality and freedom from discrimination enshrined in Article 2 of the *ICESCR* and is discussed in further detail under Article 2: Indigenous Peoples. The Human Rights and Equal Opportunity Commission has described the Northern Territory Intervention measures as 'punitive and racist'¹⁴ and, in a recently released report, found that the 'racially based legislation' contravenes a number of international human rights conventions and the *Racial Discrimination Act 1975* (Cth).
88. The Human Rights and Equal Opportunity Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, the author of the report, has said that the legislation 'contravened most of the international conventions Australia had signed up to'.¹⁵ Further, he has also said that 'all measures to address family violence and child abuse should themselves respect human rights. It would be outrageous to suggest that it is not possible to achieve this'.¹⁶ Failure to respect human rights in this way is also a clear breach of Articles 4 and 5 of the *ICESCR*.
89. As well as the discriminatory nature of the legislation, there are a number of other human rights concerns which are raised by the Northern Territory Intervention:
- (a) the compulsory acquisition and taking control of specified Indigenous land and community living areas through renewable five year leases raises concerns in relation to the right of self-determination, as well as Indigenous cultural rights. This is discussed in further detail under Article 15: Native Title;

¹³ Common Core Document, above n 3, [181].

¹⁴ Russell Skelton, 'Rights Watchdog Proposes Overhaul of Howard's Emergency Intervention', *The Age* (Melbourne), 12 February 2008 available at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

¹⁵ Ibid.

¹⁶ Tom Calma, 'Essentials for Social Justice: Protecting Indigenous children' (Speech presented at the launch of the *Social Justice Report 2007* and *Native Title Report 2007*, 31 March 2008).

- (b) the legislation introduces an income management regime, which includes measures such as quarantining 50 per cent of welfare payments for food and other essentials and linking welfare payments to children's school attendance. These measures raise particular concerns in relation to the right of self-determination and the right to social security. This is discussed in further detail under Article 9: Indigenous Australians;
 - (c) laws restricting the admissibility of Indigenous evidence and, in particular, Indigenous oral testimony in native title litigation, raise concerns in relation to the right of self-determination, as well as Indigenous cultural rights. This is discussed in further detail under Article 15: Legal Recognition of Indigenous Cultural Laws);
 - (d) powers of the Australian Government to take over representative community councils in order to, for example, direct them to deliver services in a specific way, to transfer council-owned assets to the Commonwealth, to appoint observers or to suspend community councils or to appoint managers to run them. These powers raise concerns in relation to the right of self-determination;
 - (e) the abolition of the Community Development Employment Projects, which employed Indigenous people in a wide variety of jobs directed towards meeting local community needs. This raises concerns in relation to the right of self-determination and the right to work and is discussed in further detail under Article 6: Indigenous People); and
 - (f) the Australian Government's response fails to use a child rights framework to address the complex issue of the protection of children from sexual abuse in Indigenous communities. Notwithstanding its descriptor as a 'national emergency intervention', the Australian Government has made no effort to use children's rights and human rights principles to frame its response.
90. The systematic breaches of human rights evident in the Northern Territory Intervention are particularly worrying as it represents a backward step at a time when there is no representative body for Indigenous people in Australia.¹⁷
91. The former Australian Government consistently rejected calls to entrench any form of constitutional rights protection, taking the position that there is sufficient rights protection in Australia. The Committee on the Elimination of Racial Discrimination has previously expressed its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth.¹⁸ The human rights issues which have resulted from the Northern Territory Intervention are further evidence that such an entrenched guarantee is needed.

¹⁷ The Government announced the abolition of the Aboriginal and Torres Strait Islander Commission on 15 April 2004. This is discussed above at [74].

¹⁸ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005).

92. The current Australian Government has promised to review the welfare quarantines, along with other intervention measures, after the intervention has been in place for a year.¹⁹ This review will be conducted after 12 months of the intervention being in place so that there will be a better assessment of what measures have worked and what needs to be changed.²⁰ The current Australian Government is also working on a reformed version of the Community Development Employment Projects in the Northern Territory and has promised to introduce these reforms as swiftly as possible.²¹ However, to date, no details of the form of these proposed reforms have been released.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 1)

- Please provide information on the steps that the Australian Government is taking to promote the right of Indigenous Australians of self-determination.
- Please provide details of any policies and measures being developed by the Australian Government to establish a representative Indigenous body to ensure that Indigenous persons are able to meaningfully participate in and contribute to relevant policy and decision-making processes.
- Please provide information on the steps that the Australian Government is taking to improve consultation with affected communities and to support the development of better Indigenous governance structures, particularly in light of the abolition of the Aboriginal and Torres Strait Islander Commission and particularly in relation to the Northern Territory Intervention.
- Does the Australian Government propose to implement the remaining recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report that are not already implemented? In particular, what measures are being taken to provide an effective remedy to the Stolen Generations through reparations?
- Please provide information on the steps the Australian Government is taking to implement the recommendations of the Human Rights and Equal Opportunity Commission to ensure that the Northern Territory Intervention is compatible with domestic and international human rights standards.

¹⁹ Annabel Stafford, 'Advice on NT Push "Ignored"', *The Age* (Melbourne), 26 February 2008 available at <http://www.theage.com.au/news/national/advice-on-nt-push-ignored/2008/02/25/1203788246932.html>.

²⁰ Department of Families, Housing, Community Services and Indigenous Affairs, *Emergency Response to Protect Aboriginal Children in the NT* (2008) available at <http://www.facsia.gov.au/nter>.

²¹ 'CDEP Reforms to be Introduced as Quickly as Possible: Macklin', *ABC Local News* (Northern Territory), 7 March 2008.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 1)

THAT the recent formal apology to Indigenous Australians be congratulated.

THAT Australia continue its efforts in the process of reconciliation with Indigenous Australians and its efforts to improve their disadvantaged situation.

THAT the Australian Government provide resources for healing and counselling services for those affected by the Stolen Generations and for reparation options.

THAT all of the recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report be implemented.

THAT, in light of the abolition of the Aboriginal and Torres Strait Islander Commission, the Australian Government establish an Indigenous body that consists of elected Indigenous representatives who can contribute to policy-making in domestic Indigenous affairs.

THAT the Australian Government consider repealing those aspects of the Northern Territory Intervention legislation that are incompatible with domestic and international human rights standards.

Article 2 — Treaty Entrenchment and Non-Discrimination

Article 2:

1. *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

2. *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

3. *Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*

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B. ENTRENCHMENT OF BASIC HUMAN RIGHTS

93. Article 2(1) of the *ICESCR* requires Australia to take concrete, targeted and progressive steps to achieve the full realisation of the economic, social and cultural rights recognised in the Covenant, including through the adoption of legislative measures and appropriate remedies.

B.1 Federal Charter of Human Rights

94. Australia remains the only developed nation without comprehensive constitutional or legislative protection of basic human rights at a federal level. Australian governments have failed to provide clear and effective protection of many of the individual rights contained in both the *ICESCR* and the International Covenant on Civil and Political Rights (**ICCPR**). Indeed, in its previous Concluding Observations, the CESCR strongly recommended that Australia incorporate the Covenant in its domestic legislation.²² Similar concerns have also been expressed by the Human Rights Committee and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism.²³

95. Following his appointment as Commonwealth Attorney-General in December 2007, the Hon Rob McClelland MP confirmed that, during its first term, the current Australian Government intends to conduct a national consultation regarding the need for a federal Charter of Human Rights. This commitment was a key plank of the Australian Labor Party's national policy on 'Respecting Human Rights and a Fair Go for All', which provides that 'Labor will initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians'.²⁴ It is also consistent with the commitment in the Labor Party's National Platform to 'adhere to Australia's international human rights obligations' and to 'seek to have them incorporated into the domestic law of Australia'.²⁵ Details of the public consultation have not yet been announced.

96. As identified in the Common Core Document, at state and territory levels, charters of human rights have been enacted in both the Australian Capital Territory and Victoria.²⁶ However, these instruments are limited to civil and political rights. Recently, both the Tasmanian and Western Australian governments conducted consultations on the need for specific human rights legislation in those states. Both consultations recommended that human rights legislation should be enacted and that these instruments should enshrine economic, social

²² *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [14]–[36].

²³ In 2000, the Human Rights Committee expressed concern that 'there remain lacunae in the protection of Covenant rights in the Australian legal system': *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000). Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Australia: Study on Human Rights Compliance While Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006) [10].

²⁴ Australian Labor Party, *ALP National Platform and Constitution* (2007) chapter 13, [7].

²⁵ *Ibid* [4].

²⁶ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

and cultural rights, as well as civil and political rights.²⁷ To date, neither the Tasmanian nor Western Australian governments have implemented this recommendation.

97. The consequence of the lack of protection of economic, social and cultural rights at both a federal and state and territory level is that it is difficult to achieve the full realisation of many of these rights in Australia.

B.2 Domestic Judicial Remedies

98. Several judgments of the High Court of Australia have reduced or may reduce the availability of remedies for government actions that breach any of the *ICESCR* rights. In the case of *Lam*,²⁸ a majority of the High Court indicated that individuals cannot rely on a legitimate expectation that a government decision-maker will give proper consideration to, or act compatibly with, Australia's international treaty obligations. The precedent set by these decisions means that there is no effective remedy available at the domestic level, either protected through legislation or by the common law, for breaches of the *ICESCR* rights. This raises issues in relation to Article 2 of the *ICESCR*.

B.3 Optional Protocol to *ICESCR*

99. To date, no Australian Government has adopted a positive and constructive role in respect of the negotiation and adoption of an optional protocol to the *ICESCR*. An optional protocol would provide individuals and groups with a forum in which they may seek public accountability and, potentially, relief in respect of violations of their economic, social and cultural rights at the international level, where they are denied one domestically.
100. The current Australian Government has stated its intention to engage more positively with international human rights bodies and demonstrated its commitment by their recent support for the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.²⁹ Australia's performance in this regard could be further enhanced through the adoption of other optional protocols, such as the Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*.
101. Despite its stated intention to engage more positively with international human rights bodies, the current Australian Government has continued to express strong positions that have been counter-productive to the elaboration of an effective and efficient optional protocol to the *ICESCR*. During the drafting negotiations, Australia sought to weaken the protections that such a mechanism would offer to victims of economic, social and cultural rights violations. In the final sessions of the drafting Working Group, Australia did not support an inquiry procedure for gross and systematic violations of economic, social and cultural rights. It

²⁷ See, eg, Tasmanian Law Reform Institute, *Report on A Charter of Rights for Tasmania* (2007) available at http://www.law.utas.edu.au/reform/Human_Rights_A4_Final_10_Oct_2007_revised.pdf; Consultation Committee for a Proposed Human Rights Act, *Final Report* (2007) available at http://www.humanrights.wa.gov.au/final_report.htm.

²⁸ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

²⁹ Cynthia Banham, 'Australia to Sign Torture Treaty that Howard Spurned', *Sydney Morning Herald* (Sydney), 1 March 2008 available at <http://www.smh.com.au/news/national/australia-to-sign-torture-treaty-that-howard-spurned/2008/02/29/1204226991242.html>.

continued to seek to overly restrict the circumstances in which victims of economic, social and cultural rights violations can seek redress, for example through proposing an ‘à la carte’ approach to the rights that would be addressed under an optional protocol to *ICESCR*, and seeking the inclusion of a ‘wide margin of appreciation’ to be granted to States Parties when the CESCR examines complaints.

102. Any optional protocol to the *ICESCR* should be consistent with other mechanisms concerning aspects such as admissibility and interim measures. It should reject incorporation of the doctrine of ‘margin of appreciation’. This doctrine would substantially diminish government accountability under an optional protocol and is clearly incompatible with the ‘core minimum obligations’ that exist under the *ICESCR*, particularly with respect to adequate food, water, housing and health care. An optional protocol should also avoid an approach that allows State Parties to pick and choose which of the Covenant rights would be justiciable, as this approach undermines the universality of human rights and therefore threatens the equal recognition and effective protection of economic, social and cultural rights.
103. In order to give real effect and meaning to the rights contained in the *ICESCR*, the Australian Government should support the adoption of an optional protocol that embodies an effective, comprehensive complaints and inquiries mechanism for the *ICESCR*. It must also seek to ensure that its administrative decision-making processes are, to the maximum extent possible, consistent with the jurisprudence of any decisions made in respect of individual communications lodged under such an optional protocol.

B.4 Progressive Realisation and Implementation Obligations

104. Article 2(1) of the *ICESCR* obliges Australia to take concrete steps, using the maximum available resources, to progressively fulfil economic, social and cultural rights. The steps taken must be targeted and directed towards the most expeditious, effective and full realisation of human rights possible. They should include legislative, financial, social, educational and administrative measures, including budgetary prioritisation.³⁰ Retrogressive measures, such as cuts in funding to homelessness assistance services, public housing or health care, are generally prohibited by international law and may only be justified by exceptional circumstances which do not exist in Australia following over a decade of substantial economic growth and prosperity.³¹
105. Further, even while Australia is developing and implementing measures and progressing towards full realisation of economic, social and cultural rights, it is under a ‘core obligation’ to ensure that certain non-derogable ‘minimum essential standards’ relating to fundamental human rights are met, including in relation to the provision of basic housing, nutrition and health care for marginalised or disadvantaged people.³²

³⁰ CESCR, *General Comment No 3: The Nature of States Parties’ Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

³¹ *Ibid*; CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 4–5, [15]–[18].

³² CESCR, *General Comment No 3: The Nature of States Parties’ Obligations (Article 2, Para 1)*, UN Doc HRI/GEN/1/Rev.5 (2001) 18.

106. The obligations under *ICESCR* apply to Australian governments at both a federal and state and territory level. Article 28 of the *ICESCR* expressly provides that, in federations such as Australia, the obligations of the Covenant are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at state or federal level, must act to respect, protect and fulfil human rights.³³
107. Australia's failure to take progressive steps to ensure the realisation of the *ICESCR* rights is discussed throughout this Report in relation to each of the substantive rights.

B.5 Foreign Aid

108. Article 2 obliges Australia to assist in the realisation of the *ICESCR* 'through international assistance and co-operation ... to the maximum of its available resources'. The CESCR has recognised that this obligation 'is particularly incumbent upon those States which are in a position to assist others in this regard'.³⁴
109. Australia, as an Organisation for Economic Co-operation and Development country and with one of the highest Gross National Incomes (**GNI**) per capita in the world,³⁵ is in a very strong position to make a significant contribution to international cooperation through foreign aid. The ratio of Australia's aid to GNI for 2007-08 is estimated at 0.3 per cent.³⁶ This remains well below the development assistance target of 0.7 per cent of GNI that was set out in United Nations General Assembly Resolution 2626 (XXV) in 1970.³⁷
110. For the 2007-08 aid budget, the former Prime Minister committed to lifting aid to around 0.33 per cent of GNI by 2010.³⁸ At the same time, the then Opposition and now current Australian Government committed to matching this target and to further increase aid spending to 0.5 per cent of GNI by 2015.³⁹ These commitments leave Australia well short of the internationally-agreed 0.7 per cent target.

³³ See also UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [4]. See also article 27 of the *Vienna Convention on the Law of Treaties* which provides that a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty': *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

³⁴ CESCR, *General Comment No 3: The Nature of States Parties Obligations* (1990) [14].

³⁵ World Bank, 'GNI Per Capita 2006, Atlas Method and PPP' (2007) available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>.

³⁶ 'Australia's Overseas Aid Program 2006–07' (Statement by The Honourable Alexander Downer MP Minister for Foreign Affairs, 9 May 2006) x available at <http://www.ato.gov.au/budget/2006-07/ministerial/download/ausaid.pdf>.

³⁷ International Development Strategy for the Second United Nations Development Decade, *UN General Assembly Resolution 2626 (XXV)*, 24 October 1970, [43].

³⁸ See Tear Australia, 'Zero Point Seven' (2008) available at <http://www.tear.org.au/advocacy/campaigns/micah-challenge-make-poverty-history/zero-point-seven>.

³⁹ *Ibid.*

111. World Vision Australia has recently commended the Australian Government's more coordinated action with other donors, as well as its greater transparency, increased focus on basic health and education, improved monitoring and evaluation, granting of untied funding and more in-country management of its aid program.⁴⁰ However, the Australian Government's overseas aid program is inadequate when compared with the contributions of many other countries. Australia's contributions have decreased significantly since 1970 when it was equal first in the ranking of the proportion of national income that went to aid; however, by 2006, Australia had dropped to 15th out of 22 donors.
112. Australia's failure to comply with the development assistance target of 0.7 per cent set out in the Millennium Development Goals raises issues regarding Australia's compliance with Article 2 of the *ICESCR*.

B.6 Extra-Territorial Application of the *ICESCR*

113. There is no clear framework of human rights obligations that applies to Australian corporations in their relationships with host state governments or populations.⁴¹ Similarly, Australia has failed to take steps to properly ensure corporate accountability for activities carried out outside Australia. Australian corporations may operate in areas of relaxed or no regulation or where host governments lack the will or capacity to monitor corporate conduct in their jurisdictions or to enforce standards.⁴² A corporation's dominance and power can enable them to operate as 'independent states outside of the effective control of [host] countries',⁴³ particularly developing countries.⁴⁴
114. The Common Core Documents states that 'Australia's international development cooperation program contributes to the realisation of the right to an adequate standard of living through its primary focus on poverty and through specific initiatives in a number of key areas such as food, water, sanitation, health and education.'⁴⁵ It is particularly concerning then that the Australian Government has failed to adequately monitor and regulate the activities of Australian companies overseas.

⁴⁰ World Vision Australia, *Island Nation or Global Citizen — How is Australia Faring in the Global Challenge to Make Poverty History?* (2007) 14 available at http://www.worldvision.com.au/learn/policyandreports/files/islandnation2007_hi.pdf.

⁴¹ M Sornarajah, *The International Law on Foreign Investment* (2004) 18–22; Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 460.

⁴² Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 11–12; Jordan J Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801, 808.

⁴³ Morehead Dworkin, 'Whistleblowing, MNCs and Peace' (2002) 35 *Vanderbilt Journal of International Law* 457, 460; see also Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities' (Paper presented at ESIL Research Forum on International Law, Geneva, 26 – 28 May 2005) 1 available at <http://www.esil-sedi.eu/english/pdf/Nowrot.PDF>.

⁴⁴ Sarah Joseph (2000) 'An Overview of the Human Rights Accountability of Multinationals Enterprises' in Menno T Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2000) 78.

⁴⁵ Common Core Document, above n 3, [503].

115. Australian companies, particularly mining companies, are having a severe impact on the human rights of people in many parts of the world, particularly the rights to food, water and health.

Case Study

Each year, Tolukuma Gold Mine — owned by Australian-based Emperor Mines Ltd — dumps more than 160,000 tonnes of mine waste into Papua New Guinea's Auga-Angabanga river system. Communities living along these rivers had previously relied on the river for drinking water and for cooking and washing.

For communities living downstream, the consequences of dumping mine waste into the river are severe. Community members attribute illnesses and deaths to drinking and washing in the river. They report that fish have died and that food gardens have been destroyed posing a threat to the community's food supply, and that changes in the river flow have led to flash flooding, making river crossings difficult and preventing access to market gardens.

Women have been particularly affected because they are responsible for the collection, transport, storage and use of water. Women from some villages along the Angabanga River now walk four hours a day to collect clean water from cleaner streams and wells. This has implications for their workloads and safety as they pass through land belonging to other villages.⁴⁶

B.7 Human Rights Education

116. The requirement under Article 2 of the *ICESCR* to take 'appropriate measures' includes an obligation to provide education about human rights. In its previous Concluding Observations, the CESCR called upon Australia to take effective steps to ensure that human rights education is included in primary and secondary school curricula.⁴⁷ Australia has yet to formulate a National Action Plan for human rights education. No formalised human rights education exists in any state or territory. Where it is touched upon, it has been largely superficial and limited to civil and political rights.
117. The Human Rights and Equal Opportunity Commission is the body primarily responsible for official human rights education in Australia. However, its education mandate is limited only to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and Australian legislation concerning racial, sex, disability and age discrimination, none of which comprehensively address all of the *ICESCR* rights.⁴⁸ While there is no restriction on the Human Rights and Equal Opportunity Commission adding economic, social and cultural rights

⁴⁶ Case study provided from the Oxfam Mining Ombudsman Project; for more information, see Oxfam Australia, Tolukuma, 'Papua New Guinea' (2008) available at <http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/tolukuma>.

⁴⁷ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [35].

⁴⁸ See Human Rights and Equal Opportunity Commission, *Annual Report 2006–2007* (2008) Appendix 1 available at http://www.hreoc.gov.au/about/publications/annual_reports/2006_2007/index.html.

to its education programs, equally there is nothing which specifically incorporates a requirement to address these types of rights. Of the commissioners who act under the auspices of the Human Rights and Equal Opportunity Commission, only the Social Justice Commissioner has a specific mandate to give consideration to economic, social and cultural rights.⁴⁹ As a result, economic, social and cultural rights do not receive comparable public attention and exposure to that afforded to civil and political rights, and suffer from a perception that they do not carry the same significance and importance as civil and political rights.

B.8 Statistical Data

118. The Statistical Annex to the Common Core Document provides extensive detail in certain areas, however, it does not provide information in the manner requested by the CESCR. In its previous Concluding Observations in 2000, the CESCR specifically requested that Australia, in its Fourth Report under *ICESCR*, provide additional and more detailed information, including statistical data which is disaggregated according to age, sex and minority groups, concerning the right to work, just and favourable conditions of work, social security, housing, health and education.⁵⁰ It is particularly concerning that the Common Core Document has again failed to provide disaggregated data, as it is an important source in assessing direct and indirect discrimination in relation to the realisation of the *ICESCR* rights.

⁴⁹ See, eg, Human Rights and Equal Opportunity Commission, *Social Justice Report 2006: Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner* (2007) 1–18.

⁵⁰ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) Recommendation 36.

C. NON-DISCRIMINATION

119. Discrimination is both a cause and consequence of poverty and social and economic exclusion. Recognising this, Article 2(2) of the *ICESCR* provides that the Covenant rights are to be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In accordance with Article 2, Australia has enacted laws to prevent discrimination on the basis of race, age, sex and disability. These laws include the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth), together with state and territory anti-discrimination legislation.⁵¹
120. Despite these legislative protections, there are a number of groups within Australian society that remain vulnerable to discrimination and who are therefore particularly disadvantaged in their enjoyment of their *ICESCR* rights.

C.1 Indigenous Peoples

121. A significant gap exists between Indigenous and non-Indigenous Australians relating to many of the rights contained in the *ICESCR*, including:
- (a) the right of self-determination and political participation (see [Article 1: Right of Self-Determination](#));
 - (b) standards of living and access to adequate housing (see [Article 11: Indigenous Peoples](#));
 - (c) the right to water (see [Article 11: Right to Water](#));
 - (d) the right to food (see [Article 11: Right to Food](#));
 - (e) the right to social security (see [Article 9: Indigenous Australians](#));
 - (f) highest attainable standards of health (see [Article 12: Indigenous Health](#));
 - (g) access to education (see [Articles 13 and 14: Indigenous Education](#));
 - (h) the administration of justice (discussed further below at paragraph 124 onwards); and
 - (i) land rights (see [Article 15: Native Title](#)).

This substantive inequality raises serious concerns in relation to Article 2 of the *ICESCR*.

122. Further, Australia has not only failed to ensure similar realisation of economic, social and cultural rights for Indigenous peoples, but has actively discriminated against Indigenous people in relation to the Northern Territory Intervention (see [Article 1: Intervention into Northern Territory Indigenous Communities](#)). As provided for in Article 4 of the *ICESCR*, a State Party's laws may limit rights only insofar as they are compatible with the *ICESCR* and only for the purpose of promoting the general welfare in a democratic society. Contrary to Article 2 of the *ICESCR*, legislative measures associated with the Northern Territory

⁵¹ *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1995* (Vic), *Equal Opportunity Act 1984* (WA).

Intervention contain provisions exempting them from the application of the federal *Racial Discrimination Act 1975* (Cth) and the Northern Territory anti-discrimination legislation.⁵²

123. The Northern Territory Intervention legislation states that the responses are 'special measures' and therefore not unlawful discrimination.⁵³ However, such 'special measures' are supposed to benefit, rather than disadvantage, the targeted group. In providing evidence to a Senate Committee inquiry into the intervention, John von Doussa, President of the Human Rights and Equal Opportunity Commission, raised concerns regarding the measures being exempted from the *Racial Discrimination Act 1975* (Cth), particularly regarding the failure of the former Australian Government to consult with Indigenous communities prior to the intervention.⁵⁴

Administration of Justice

124. Many Indigenous Australians confront serious human rights issues in the justice system, in particular issues resulting from the disproportionate impact of certain criminal laws and the incidence and impacts of incarceration. The issues faced by Indigenous peoples in their interaction with the justice system are further compounded by limited access to legal and interpretative services, both of which are often necessary to ensure a fair hearing.
125. Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2 per cent of the Australian population, around 22 per cent of the prison population is Indigenous (based on 2005 figures).⁵⁵ Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23 per cent.⁵⁶ The incarceration rate for Indigenous Australians is more than 15 times higher than for non-Indigenous Australians and, as at March 2004, Indigenous women were incarcerated at a rate 20.8 times that of non-Indigenous women.⁵⁷
126. While mandatory sentencing provisions for minor property offences in the Northern Territory were repealed in 2001, mandatory sentencing laws for many offences remain in the Northern Territory as well as in the Criminal Code in Western Australia. Indigenous Australians continue to be disproportionately affected by this legislation. Young Indigenous people, who are a small fraction of the total youth population of Western Australia, constitute three quarters of those sentenced in mandatory sentencing cases.⁵⁸

⁵² *Anti-Discrimination Act 1992* (NT).

⁵³ *Northern Territory National Emergency Response Act 2007* (Cth) s 132.

⁵⁴ Address to Senate Standing Committee on Legal and Constitutional Affairs, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills concerning the Northern Territory National Emergency Response*, Parliament of Australia, Canberra, 10 August 2007, 49 (John von Doussa).

⁵⁵ Australian Bureau of Statistics, *Prisoners in Australia* (2005) 5.

⁵⁶ *Ibid.*

⁵⁷ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

⁵⁸ The UN Committee on the Rights of the Child expressed its concern about the over-representation of Indigenous children in the juvenile justice system: see UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [73]–[74].

127. The death of Indigenous Australians in custody also continues to be of serious concern, despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody, which were made over 15 years ago.⁵⁹ In 2003, 75 per cent of deaths in custody were of Indigenous Australians detained for nothing more serious than public order offences. The striking over-representation of Indigenous Australians in prison described above, together with the percentage of Indigenous deaths in custody and the lack of fair treatment within the criminal justice system, raise serious concerns in relation to Article 2 of the *ICESCR* and the ability of Indigenous Australians to fully realise their social, economic and cultural rights.

C.2 Women

128. Women continue to be significantly disadvantaged in relation to the realisation of many of the rights contained in the *ICESCR*. Examples of this include:

- (a) the high levels of violence experienced by women and the inadequate services available to women who experience violence (see [Article 3: Violence against Women](#));
- (b) the significant gap in pay between women and men (see [Article 3: Failure to Ensure Equal Pay](#) and [Article 7: Fair and Equal Remuneration and Conditions for Women](#));
- (c) the diminished work conditions experienced by women, particularly those in lowly paid professions, and an increase in discrimination based on pregnancy and family responsibilities, since the introduction of Work Choices ([Article 7: Fair and Equal Remuneration and Conditions for Women](#));
- (d) the incidence of forced labour of women in the form of sexual servitude (see [Article 6: Trafficking in Human Beings: Sexual Servitude](#));
- (e) the failure of Australia to introduce a paid maternity leave system and the inadequacy of the child care system (see [Article 10: Maternity Leave and Child Care](#));
- (f) recent changes to the family law system relating to family breakdowns (see [Article 10: Family Separations](#));
- (g) the inadequacy of the social security system for single parents, the majority of whom are women, as evidenced by both the insufficiency of single parent payments and the disproportionate affect of the Welfare to Work changes on single parents (see [Article 11: Women](#));
- (h) proposed legislation which, if enacted, would make it easier to forcibly sterilise children, particularly girls, with an intellectual disability (see [Article 10: Forced Sterilisation of Children with Disability](#));
- (i) the lack of access to health services for women with disability (see [Article 12: Women with Disability](#));

⁵⁹ Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

- (j) the inadequacy of health care received by women, particularly Indigenous women, in prisons (see [Article 12: Prisoners](#)); and
- (k) inadequate access to reproductive technology for particular groups of women, especially single women and lesbians (see [Article 12: Access to IVF](#))

This inadequate realisation of the economic, social and cultural rights of women raises serious concerns in relation to Article 2 of the *ICESCR*.

C.3 People with Disability

129. Article 2 of the *Convention on the Rights of Persons with Disabilities* defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶⁰ Australia has recently signed the Disability Convention and is currently considering its ratification.⁶¹
130. The federal *Disability Discrimination Act 1992* (Cth) provides protection from harassment for people with disability in areas of employment, education, and the provision of goods and services.⁶² However, it does not provide any protection from vilification. There are only two states in Australia that provide protection from vilification for people with disability.⁶³

Case Study

Olga has an intellectual disability which impairs her speech. She is a regular visitor to her local public library. Lately, a group of young men who also frequent the library have subjected her to continual teasing, verbal insults and imitation of her speech. On visiting her local community legal centre, Olga was informed that, unfortunately, she was not entitled to redress for this behaviour under either state or federal anti-discrimination law.⁶⁴

⁶⁰ Article 5 of the *Convention on the Rights of Persons with Disabilities*, adopted by the UN General Assembly on 13 December 2006, opened for signature 30 March 2007, prohibits discrimination on the basis of disability. The current Australian Government has indicated that it will be consulting with stakeholders about ratification of convention.

⁶¹ Australia signed the *Convention on the Rights of Persons with Disabilities*. Before reaching a decision on whether or not to ratify an international convention, the Federal Parliament will need to undertake a process of consultation with all federal and state governments to examine the likely implications of implementation in detail. This is likely to include some form of public consultation to which people with disabilities and human rights organisations may contribute. While the consultation process has been initiated, it is likely to take some time to complete.

⁶² *Disability Discrimination Act 1992* (Cth) ss 35–40.

⁶³ New South Wales provides protection against vilification on the basis of HIV/AIDS status: *Anti-Discrimination Act 1977* (NSW) s 49ZXB(1).

⁶⁴ Case study provided by the Disability Discrimination Legal Centre (NSW).

Indigenous People with Disability

131. In 2005, the proportion of the Indigenous population 15 years and over reporting a disability or long-term health condition was 37 per cent (or roughly 102,900 people).⁶⁵ Historically, much of the focus on Indigenous people with disability has been from a health perspective. While this focus on health is essential, particularly in terms of determining primary health interventions, this perspective has come at the cost of failing to recognise the social aspects of Indigenous people with disability. This has meant that the barriers that discriminate against Indigenous people with disability remain firmly entrenched and that their general well being has not improved in any meaningful way.⁶⁶
132. Indigenous people with disability remain significantly under-represented on a population basis in beneficial social programs, including health, community and disability services, due to a number of policy and structural failures. These failures include services that are poorly targeted and located, as well as culturally insensitive or inappropriate services.

Immigration

133. The *Migration Act 1958* (Cth) and its regulations provide for lawful discrimination on the ground of disability by requiring all applicants for visas and members of their family to satisfy strict health requirements.⁶⁷ This issue is addressed in further detail in relation to [Article 10: Immigration](#).

People from Non-English Speaking Backgrounds

134. Australia has failed to allow people from ethnic and linguistic minorities with disability to enjoy their own culture by failing to take steps to ensure equal participation in funded disability support services that allow people from non-English speaking backgrounds with disability to be part of their community. For example, supported accommodation programs aim to provide support for people with disability to live independently in the community. Historically, people from non-English speaking backgrounds are under-represented as users of supported accommodation programs. Although people born in non-English speaking countries account for close to 1 in 5 Australians with disability, only around 1 in 20 Australians from non-English speaking backgrounds with disability access funded supported accommodation services. Thus, of the 35,556 people accessing government funded supported accommodation in 2005-06, a mere 1,885 of these people were from a non-English speaking background.⁶⁸

⁶⁵ Commonwealth Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (2005) [3.6]. This measure of disability did not specifically include people with a psychological disability.

⁶⁶ Aboriginal Disability Network of New South Wales Incorporated, *'Telling It Like It Is': A Report of Community Consultations Conducted Throughout NSW During 2004/2005 with Aboriginal People with Disability and Their Associates* (2007) 2.

⁶⁷ See *Migration Regulations 1994* (Cth) sch 4 cl 40 for the health criteria.

⁶⁸ Data sourced from Australian Institute of Health and Welfare, *Users of CSTDA Funded Services 2005–06* (2007).

C.4 Homelessness and Social Status

135. The norm of non-discrimination prohibits unfair, unjust or less favourable treatment in law, in fact and in the realisation of all human rights, including homelessness.⁶⁹ Discrimination against people who are experiencing homelessness is currently widespread but lawful in all Australian jurisdictions.⁷⁰ Research shows that discrimination is a major causal factor of homelessness and can systematically exclude people from access to goods, services, the justice system, health care, housing and employment.⁷¹
136. In 2006, the UN Special Rapporteur on the Right to Adequate Housing gave special mention of the need for Australian governments to take proactive measures, including changing legislation, to address discrimination on the basis of inadequate housing and other forms of social status.⁷²

Case Study 1

Not long after a new hostel for backpackers opened up in Warrnambool, Victoria a few years ago, the proprietor personally visited all the welfare providers in town and advised them not to refer anyone to him because he didn't want 'those kind of people' in his place.⁷³

Case Study 2

Homeless people are discriminated against because of their status and appearance. Anthony is homeless and has a mental illness. He is often asked to leave services due to his appearance, which is perceived to be threatening and upsetting to other service users. Services that discriminate against people because of their appearance include Centrelink, hospitals, police, schools, banks and boarding houses.⁷⁴

⁶⁹ See decision of the UN Human Rights Committee in *Cavalcanti Araujo-Jongens v Netherlands*, Communication No 418/90, UN Doc CCPR/C/49/D/418/1990 (1993), which found that a difference between employed and unemployed persons constituted discrimination on the basis of 'other status'.

⁷⁰ See, for example, research conducted by the Public Interest Law Clearing House (PILCH) Homeless Persons' Legal Clinic, *Homelessness and Human Rights* (2005).

⁷¹ World Health Organization, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) 6.

⁷² M Kothari, Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing on Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (11 May 2007) Recommendation 130.

⁷³ Case study provided by Salvation Army Social Housing Service, Warrnambool.

⁷⁴ Case study provided by Community Development Worker, St Mary's House of Welcome, Melbourne.

C.5 Religion

137. Federal legislation does not prohibit discrimination or vilification on the ground of religion. However, all states and territories, except New South Wales and South Australia, make religious discrimination unlawful.⁷⁵
138. While the law in New South Wales does cover people who have been discriminated against or vilified on the basis of their 'ethno-religious origin',⁷⁶ it is unlikely that this extends to people who have been treated badly solely because they are Muslim. This gap is particularly problematic given that approximately half of Australia's Muslim population lives in New South Wales.⁷⁷
139. In 2004, the Human Rights and Equal Opportunity Commission released a report, entitled *Isma — Listen*, that involved national consultations on eliminating prejudice against Arabs and Muslims in the Australian community.⁷⁸ The *Isma — Listen* report found that the majority of respondents had experienced some form of harassment and prejudice because of their religion.⁷⁹ In addition, Muslim women experience significantly higher levels of discrimination due to being easily identified as Muslim by their dress.⁸⁰
140. The *Isma — Listen* report recommended, among other things, that a federal law be introduced making discrimination and vilification on the grounds of religion or belief unlawful.⁸¹ To date, this recommendation has not been adopted.

⁷⁵ *Discrimination Act 1991* (ACT) s 66(1); *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19(a); *Racial and Religious Tolerance Act 2001* (Vic) s 7(1); *Criminal Code* (WA) ss 76–80.

⁷⁶ *Anti-Discrimination Act 1977* (NSW) s 20C(1).

⁷⁷ Australian Bureau of Statistics, 'Religious Affiliation by Sex: Australia' and 'Religious Affiliation by Sex: NSW', in *Census Data* (2006) available at <http://www.censusdata.abs.gov.au/ABSNavigation/prenav/TopicList?prenavtabname=Topic%20List&collection=Census&period=2006&breadcrumb=T&navmapdisplayed=true&textversion=false&>.

⁷⁸ Human Rights and Equal Opportunity Commission, *Isma — Listen: National Consultation on Eliminating Prejudice against Arab and Muslim Australians* (2004).

⁷⁹ *Ibid* 3.

⁸⁰ *Isma* consultation participants reported numerous incidents of women in hijabs being spat at, of objects being thrown at them from passing cars and of their hijabs being forcibly removed. See also S Poynting and G Noble, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence Since 11 September 2001* (2004) 6.

⁸¹ Human Rights and Equal Opportunity Commission, *Isma — Listen: National Consultation on Eliminating Prejudice against Arab and Muslim Australians* (2004) 129.

C.6 Sexual Orientation and Gender Identity

141. Article 2 of the *ICESCR* prohibits discrimination on the basis of sexual orientation.⁸² Most state and territory governments have amended their anti-discrimination legislation to prohibit direct and indirect discrimination on the grounds of sexual orientation and gender identity.⁸³ However, the Australian Government has failed to legislate to prohibit discrimination on the basis of sexual orientation at a national level. Indeed, in 2004, the federal *Marriage Act 1961* (Cth) was amended by the former Australian Government specifically to exclude same-sex marriage.⁸⁴
142. In 2007, the Human Rights and Equal Opportunity Commission released a report on discrimination against same-sex couples in relation to financial and work-related benefits and entitlements, entitled *Same-Sex: Same Entitlements*.⁸⁵ The report identified 58 federal laws that discriminate against same-sex couples and their children, including in the areas of employment, tax, workers compensation, veterans entitlements, health care, superannuation, aged care, immigration and family law. To date, none of these recommendations have been implemented by the Australian Government.
143. This issue is discussed in further detail in relation to [Article 10: Same-Sex Couples and their Families](#).

Case Study

Darren is an employee of a local government authority. It is a condition of his employment that contributions are paid to the local government superannuation scheme. Darren is gay and has had a male partner for 7 years. Federal superannuation laws prohibit the trustees of the superannuation fund from paying a death benefit to a same-sex partner of a deceased fund member unless an interdependency relationship is established. Heterosexual married and de facto couples are not required to establish a relationship of interdependency for a death benefit to be paid to a surviving partner.⁸⁶

⁸² CESCR, *General Comment No 18: The Right to Work*, UN Doc E/C.12/GC/18 (24 November 2005). See also CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (11 August 2000) [18].

⁸³ All states and territories have prohibited discrimination on grounds of sexual orientation, though in NSW this is limited to homosexuality. All states and territories have prohibited discrimination on grounds of gender identity.

⁸⁴ The *Marriage Amendment Act 2004* (Cth) introduced a definition of 'marriage' into s 5 of the *Marriage Act 1961* (Cth) that limited marriage to a 'union between a man and a woman to the exclusion of all others'. It also introduced s 88EA into the *Marriage Act* to ensure that same-sex marriages legally performed and recognised in other countries could not be recognised in Australia.

⁸⁵ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements — National Inquiry into Discrimination against People in Same-Sex Relationships* (2007).

⁸⁶ Case study provided by Inner City Legal Centre, NSW.

C.7 Age Discrimination

144. While discrimination on the basis of age is protected at a federal level, the *Age Discrimination Act 2004* (Cth) fails to adequately protect age discrimination in many areas. Discrimination on the basis of age is only protected under the Act where it is the *dominant* reason for doing the potentially discriminatory act.⁸⁷ At the time that the Act was passed, the Human Rights and Equal Opportunity Commission expressed its concern about this provision.⁸⁸ The *Age Discrimination Act 2004* (Cth) also fails to address the issue of youth wages, which are exempt from the provision of the Act.
145. Age discrimination in the workplace manifests in many ways, including older workers being targeted for redundancies, being over-represented in unemployment statistics, taking longer to re-enter the labour market, being offered training opportunities at a much lower rate than other workers or being encouraged to consider taking on less onerous job roles.⁸⁹ Discrimination, often as a consequence of stereotypes, is experienced by both unemployed job-seekers and those currently employed.⁹⁰
146. At the other end of the market, younger workers also face discrimination receiving statutorily protected lower pay which results in lack of job security as they reach the age of full pay rates.

C.8 Exemptions to Discrimination Legislation

147. Despite the introduction of anti-discrimination legislation at both federal and state and territory levels, Australia has recently permitted exemptions from the operation of those laws and thereby failed to prevent discrimination on the basis of race, nationality or national origin. In particular, Australia has failed to prevent discrimination on the basis of race, nationality or national origin by allowing Australian contractors to comply with American regulations, which prohibit 'nationals' of certain countries from accessing particular technology.⁹¹

⁸⁷ Section 16 provides that where a potentially discriminatory act is done for several reasons, it is taken to be done for the reason of a person's age only if it is the dominant reason for doing the act.

⁸⁸ See Senate Legal and Constitutional Committee, *Inquiry into the Age Discrimination Bill 2003* (2003) chapter 3 available at http://www.aph.gov.au/senate/Committee/legcon_cte/completed_inquiries/2002-04/age03/report/report.pdf.

⁸⁹ Chris Kossen, 'Barriers to Employment for Marginalised Mature Age Workers' (Speech delivered at 'Of Working Age — A Seminar on Age Discrimination in the Workplace', Human Rights and Equal Opportunity Commission, Sydney, 10 May 2005) available at <http://www.hreoc.gov.au/age/workingage/speeches/kossen.html>.

⁹⁰ Rob Ranzijn, 'Discrimination against the Older Worker: Psychology and Economics' (Speech delivered at 'Of Working Age — A Seminar on Age Discrimination in the Workplace', Human Rights and Equal Opportunity Commission, Sydney, 10 May 2005) available at <http://www.hreoc.gov.au/age/workingage/speeches/ranzijn.html>.

⁹¹ *ADI Limited v Commissioner for Equal Opportunity* [2005] WASAT 259; see also *ADI Limited (Exemption)* [2004] VCAT 1963; and the exemption notice in *New South Wales Government Gazette* (No 81, 1 July 2005) 3495.

Case Study

ADI Limited and various related companies, who are major defence contractors, were granted an exemption from the provisions of the *Equal Opportunity Act 1994 (WA)*, the *Anti-Discrimination Act 1977 (NSW)* and the *Equal Opportunity Act 1995 (Vic)* relating to race in order to fulfil their obligations under defence contracts they have with the Australian Government.⁹² Fulfilment of those contracts required ADI to access American technology, which was only possible by complying with American regulations prohibiting ‘nationals’ of some countries — including Iran, Syria, North Korea and Sudan — from accessing that technology. ADI is therefore now able to demand birth and citizenship details from prospective and existing employees, contractors and ‘mark’ the nationality of employees by the use of badges.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 2)

- Please provide information as to how the *ICESCR* is incorporated into Australian domestic law, including its enforceability and justiciability before domestic courts and tribunals.
- Please indicate whether the proposed national consultation regarding a federal charter of rights will consider whether economic, social and cultural rights should be enshrined in Australian law.
- Please explain Australia's current position in relation to negotiation and adoption of an Optional Protocol to the *ICESCR* and how this position is compatible with the principle that victims should be entitled to an 'effective remedy' for human rights violations.
- Please also explain how Australia's position is compatible with the notion that all human rights — civil, political, economic, social and cultural — are universal, inalienable, interdependent and mutually reinforcing.
- Please explain why Australia does not support an inquiry procedure for gross and systematic violations of economic, social and cultural rights.
- The current Australian Government's commitment to increasing foreign aid from 0.3 per cent to 0.5 per cent of Gross National Income is welcome. Please explain why, however, the commitment remains short of the 0.7 per cent required by the Millennium Development Goals.
- Please provide information as to the steps being taken to develop a national action plan on human rights education and to ensure that 'human rights' are a formal component of the curriculum at a primary or secondary level in every Australian state and territory.

⁹² Ibid.

- What steps, including legislative measures, is the Australian Government taking to address issues of substantive inequality and systemic discrimination against vulnerable communities and groups, including Indigenous Australians, women, people with disability, people from non-English speaking backgrounds and all religions, homeless people, gay, lesbian, bisexual, transgender and intersex people, children and young people, and older persons?
- Please explain how exemptions to Australian anti-discrimination law which permit discrimination on grounds including race and nationality in the field of employment are compatible with the prohibition against discrimination under the *ICESCR*.
- The current Australian Government has recently recognised that homelessness is a major issue in Australian society. What additional measures, both legislative and educative, have or will the Australian Government introduce to address discrimination based on socio-economic and housing status?

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 2)

THAT Australia incorporate the Covenant in its legislation in order to ensure the applicability of the provisions of the Covenant in domestic courts.

THAT Australia incorporate comprehensive protection of all economic, social and cultural rights into domestic law.

THAT Australia support the adoption of an Optional Protocol to *ICESCR* and commit to promptly signing and ratifying this instrument, including the inquiry procedure component.

THAT Australia increase its foreign aid commitment to meet the target set by the Millennium Development Goals.

THAT Australia include education about human rights, including economic, social and cultural rights, in primary and secondary school curricula.

THAT, as requested in the Committee's 2000 Concluding Observations, the Australian Government provide additional and more detailed information including statistical data that is disaggregated according to age, sex and minority groups, particularly with respect to the right to work, just and favourable conditions of work, social security, housing, health and education.

THAT Australia legislate to prohibit discrimination on the grounds of sexual orientation and gender identity and THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Same-Sex: Same Entitlements* report.

THAT Australia legislate to ensure that any exemptions or exceptions permitted under domestic anti-discrimination law are compatible with the prohibition against discrimination under the *ICESCR*.

THAT Australia legislate to address issues of substantive inequality and systemic discrimination against vulnerable communities and groups.

THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Isma — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

Article 3 — Equal Rights of Men and Women

Article 3:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

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D. EQUAL RIGHTS OF MEN AND WOMEN

148. Article 3 of the *ICESCR* commits Australia to ensure that all economic, social and cultural rights in the Covenant are enjoyed equally by men and women. Indigenous women, in particular, remain significantly disadvantaged in relation to key indicators, including access to health, education, housing and clothing.

D.1 Violence against Women

149. While the federal and state and territory governments have prioritised addressing the issue of violence against women, including in particular through the ‘Women’s Safety Agenda’ initiative, violence against women continues to occur at appalling levels in Australia. Statistics indicate that:

- (a) 19 per cent of all women experience sexual violence during their lifetime;⁹³
- (b) 33 per cent of all women experience at least one incident of physical violence during their lifetime;⁹⁴ and
- (c) approximately half of female homicide victims are killed as a result of a domestic dispute.⁹⁵

⁹³ Australian Bureau of Statistics, *Personal Safety Survey Australia 2005* (2005). See also Janet Phillips and Malcolm Park, *Measuring Domestic Violence and Sexual Assault against Women: A Review of the Literature and Statistics* (2004).

⁹⁴ *Ibid.*

⁹⁵ Australian Institute of Criminology (AIC), *Homicide in Australia: 2003–2004 National Homicide Monitoring Program (NHMP) Annual Report* (2005).

150. These figures are likely to be much higher as reporting of violence against women and sexual assault remains low; in 2005, it was estimated that only 36 per cent of female victims of physical assault and 19 per cent of female victims of sexual assault reported the incident to police.⁹⁶
151. Violence against women is a serious issue in many Indigenous communities. In some areas of Western Australia, the incidence of family violence is 45 times higher than that of non-Indigenous women and Indigenous women are 10 times more likely to be killed as a result of domestic violence than non-Indigenous women.⁹⁷ It has been suggested that, in some Indigenous communities, up to 90 per cent of families are affected by violence.⁹⁸
152. The primary government response to domestic violence requires women to leave their homes, which also impacts on the realisation of the right to adequate housing. While legislative provisions exist in all states and territories for the perpetrator of domestic violence to leave, in practice many of these measures are not implemented.⁹⁹ This causes particular issues for Indigenous women living in remote or rural communities who may be required to leave their family and communities, which is often untenable.¹⁰⁰
153. While significant funds have been committed to address violence against women through the 'Women's Safety Agenda' initiative, the level of government resources provided remains inadequate. Despite the large number of women escaping domestic violence who are assisted, only the needs of a small proportion of women in need are met by temporary housing refuges. In particular, women from non-English speaking backgrounds, women with disability and Indigenous women are not appropriately supported in the majority of refuges.
154. Further, women who leave their homes often struggle to find adequate accommodation. The 'Supported Accommodation Assistance Program', referred to in the Common Core Document as 'Australia's primary service response to homelessness',¹⁰¹ only addresses emergency accommodation rather than long-term housing solutions for women escaping domestic violence. More than 350 people a day are turned away from homelessness services across Australia because of a lack of capacity and resources, with women and children the most likely to be rejected.¹⁰² There is also no systemic program to meet the needs of children who enter refuges with their mothers or who have experienced domestic violence.

⁹⁶ Australian Bureau of Statistics, *Personal Safety Survey Australia 2005* (2005).

⁹⁷ A Ferrante et al, *Measuring the Extent of Domestic Violence* (1996) 10.

⁹⁸ Aboriginal and Torres Strait Islander, Women's Task Force on Violence, *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (1999) 29.

⁹⁹ Robyn Edwards, Australian Domestic and Family Violence Clearinghouse, *Staying Home/Leaving Violence: Promoting Choices for Women Leaving Abusive Partners* (2004).

¹⁰⁰ 22 per cent of Indigenous women report that they had been the victims of violence or threatened violence in the preceding 12 months: Australian Bureau of Statistics, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05* (2007) available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4722.0.55.001>.

¹⁰¹ Common Core Document, above n 3, [356].

¹⁰² Australian Institute of Health and Welfare, *Demand for SAAP Accommodation by Homeless People: 2005–06* (2007) 6, 56 available at <http://www.aihw.gov.au/publications/index.cfm/title/10491>.

155. Violence against women requires the Australian Government to allocate significant resources to prevention in the areas of housing, health, access to support services, education and the reduction of poverty. Instead, current programs and expenditure are focussed on policing and legal services. The current Australian Government has recognised the links between homelessness and family violence and committed to a ‘comprehensive’ approach to address homelessness.¹⁰³ This is discussed in further detail under Article 11 — Right to an Adequate Standard of Living.

D.2 Failure to Ensure Equal Pay

156. While substantial gains have been made over past decades to reduce the pay gap between men and women, women continue to receive lower wages than men in Australia. This issue is addressed in detail in relation to Article 7: Fair and Equal Remuneration and Conditions for Women.

157. In addition to the pay gap that exists between men and women, Australia remains one of only two Organisation for Economic Co-operation and Development countries in the world not to have introduced a national paid maternity leave scheme. In its recent report, entitled *It’s About Time: Women, Men, Work and Family*, the Human Rights and Equal Opportunity Commission recommends that the Australian Government, as a matter of priority, introduce a national, government-funded scheme of paid maternity leave, monitor the pay-gap between men and women and commit themselves to measures to address this issue.¹⁰⁴ This is discussed in further detail under Article 10: Maternity Leave and Child Care.

D.3 Outworkers (or ‘Homeworkers’)

158. In its previous Concluding Observations, the CESCR strongly recommended that Australia undertake measures to protect homeworkers and to ensure that they receive the official minimum wage, that they benefit from adequate social security and that they enjoy working conditions in conformity with the legislation.¹⁰⁵ While some outworker protections are retained under Work Choices (discussed in detail under Article 6: Work Choices), there still remain restrictions on a union’s right of entry to monitor contracting practices. These restrictions are at odds with award provisions for outworkers in Victoria, Queensland, New South Wales, and South Australia, where state legislation allows the union right of entry in order to monitor clothing contracting practices.¹⁰⁶

¹⁰³ Australian Government, *Homelessness: A New Approach* (2008) available at [http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/\\$File/homelessness_a_new_approach.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/vIA/new_approach/$File/homelessness_a_new_approach.pdf).

¹⁰⁴ Human Rights and Equal Opportunity Commission, *It’s About Time: Women, Men, Work and Family* (2007).

¹⁰⁵ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [27].

¹⁰⁶ Fairwear Australia, 'Laws Protected After WorkChoices Campaign' (18 January 2006) available at <http://www.fairwear.org.au/engine.php?SID=1000004&AID=100098>.

159. In particular industries, outworkers, who are predominantly women, continue to be substantially disadvantaged. According to the Textile, Clothing and Footwear Union of Australia, outworkers work for as little as \$1-\$3 an hour, typically work 12-18 hour days and for seven days a week. This pales in comparison to the award rate of \$12.38 per hour for a 38 hour week.¹⁰⁷
160. The voluntary self-regulatory mechanism that governs manufacturing companies has met wide-spread resistance within the industry. In order to increase industry compliance, it is recommended that all states and territories adopt a national Mandatory Code of Practice, modelled on the system used in New South Wales. A whole of government approach is required on this issue, including community and consumer educational campaigns to raise awareness about the situation of outworkers.¹⁰⁸
161. The conditions of work for outworkers disproportionately impact on women, who make up the vast majority of outworkers. The failure to adequately regulate and monitor the conditions of work for these women raises serious concerns under Articles 3, 6 and 7 of the *ICESCR*.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 3)

- What concrete steps, including legislative, budgetary and administrative steps, is Australia taking to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation?
- Please outline the steps and measures that Australia is taking to ensure that women and children who are victims of domestic violence are able to remain in the family home and do not become homeless.
- Please indicate whether the resources allocated to both prevention of violence and assistance for women and children who experience violence, including through the “Women’s Safety Agenda” initiative, are anticipated to meet the demand for services.
- How will the Australian Government support a structure for Indigenous women to have input into deciding on appropriate services and solutions to violence in their own communities?
- Please provide details of policies and programs to protect homeworkers, including by ensuring that they receive the official minimum wage, benefit from adequate social security and enjoy fair working conditions.

¹⁰⁷ Victorian Branch of the Textile, Clothing and Footwear Union of Australia, *Submission to the Senate Employment and Workplace Relations and Legislation Committee* (2002) 4.

¹⁰⁸ Ethical Clothing Trades Council of Victoria, *12 Month Report* (2004) 28.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 3)

THAT Australia take concrete steps, including legislative, budgetary and administrative steps, to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation.

THAT in addition to addressing the underlying causes of domestic violence, Australia increase funding to shelters and support services that are appropriate to women fleeing situations of domestic violence.

THAT Australia ensure that Indigenous women are properly consulted in relation to appropriate services and solutions to address violence in their communities.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

THAT Australia introduce a national Mandatory Code of Practice to protect outworkers and THAT Australia develop policies and programs to protect homeworkers, including by ensuring that they receive the official minimum wage, benefit from adequate social security and enjoy fair working conditions.

Article 6 — Right to Work

Article 6:

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
 2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*
-

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E. RIGHT TO WORK

162. Article 6 of the *ICESCR* requires Australia to recognise the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts, and to take appropriate steps to safeguard this right.

E.1 Work Choices

163. Since the CESCR's Concluding Observations in 2000, the former Australian Government took significant retrogressive measures in passing the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and related amendments (**Work Choices**). Work Choices involved a dramatic regression of workers rights and has been described as the most radical change to Australia's industrial relations system in 100 years.¹⁰⁹
164. The changes deregulated the labour market and encouraged individual contracts, discouraged collective bargaining and removed all restrictions on 'casualisation', the process by which workers are urged onto casual or short term contracts, thereby losing benefits such as sick leave and paid holidays. Under Work Choices, vulnerable workers are under pressure to accept low paid work without appropriate conditions and leave entitlements. The increasingly punitive approach to welfare, discussed further below under Welfare to Work, can also force particularly vulnerable unemployed people into accepting any job they are offered.
165. In summary, Work Choices:
- (a) further reduces the role of the Australian Industrial Relations Commission by removing much of its dispute resolution powers and abolishing the previous assurance of fair wages and conditions set by an independent tribunal;
 - (a) undermines the system of awards as a base of minimum conditions of employment by restricting award content and promoting Australian Workplace Agreements as the primary mechanism for establishing work standards. Australian Workplace Agreements are individual statutory agreements which allow employers to avoid the award safety net;
 - (b) reduces workers' job security by excluding the majority of workers from unfair dismissal protection and by weakening the protections that remain. This is discussed in further detail under [Article 7: Ensuring Job Security](#);
 - (c) weakens the ability of workers to query or enforce wage rates and entitlements with their employer without fear of reprisal; and
 - (d) fails to ensure reasonable hours of work, rest and leisure time.
166. The former Australian Government argued the changes were necessary in order to improve productivity, increase wages, balance work and family life, and reduce unemployment.¹¹⁰ However, the former Australian Government did not undertake detailed analysis to support these claims¹¹¹ and evidence suggests that these claims are false.¹¹²

¹⁰⁹ Joe Isaac, 'Reforming Australian Industrial Relations?' (2007) 1(4) *Insights* 1, 1.

¹¹⁰ Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 1.

¹¹¹ The economic case used to justify the changes was based on a four page literature review: see Josh Gordon, 'IR Overhaul Based on Short "Essay"', *The Age* (Melbourne), 5 June 2006; Andrew Macintosh 'Costello's Less-Than-Model Behaviour on IR Changes', *The Canberra Times* (Canberra), 23 December 2005.

¹¹² A Senate Inquiry found that the former Australian Government's claims that unfair dismissal laws placed an unreasonable time and cost burden on employers were unfounded: see Employment, Workplace Relations and Education References Committee, *The Right to Dismiss Unfairly: The Government's 'Fair Dismissal' Reform Bill* (2004) 28. Rather than reduce productivity, employment protections may enhance it by encouraging employees

167. Of particular relevance to Article 6 is the loss of the unfair dismissal remedy, which according to the Common Core Document was introduced to free business, particularly small business, from the ‘onerous burden’ of unfair dismissal laws.¹¹³ Work Choices denied a significant number of workers access to unfair dismissal laws by exempting employees who work for an organisation with 100 or less employees. This is discussed further in relation to Article 7: Ensuring Job Security.

Case Study

In New South Wales, a snapshot of clients at community legal centres found more than 200 clients had been adversely affected by the Work Choices changes, with many deprived of any unfair dismissal remedy. Many clients reported increased bullying and harassment and, unless they could point to a ground of discrimination, these people could be sacked without legal recourse for simply voicing their concerns. While protection remains against dismissal on discriminatory grounds, there has also been a reported increase in harassment and discrimination against women who are pregnant or are returning from maternity leave.¹¹⁴

168. Australia’s compliance with Article 6 of the *ICESCR* was further undermined by the removal of collective bargaining in securing workplace terms and conditions. While this overlaps with issues arising under Article 7, the ability to determine terms and conditions of employment is relevant to Article 6 given that it influences the validity of an individual’s choice. The former Australian Government’s emphasis on the ability of individual employees and job seekers to negotiate with employers as to the terms of their employment ignores the widely recognised disparity in the respective bargaining positions of employers and employees.

E.2 'Forward with Fairness'

169. The current Australian Government has begun to fulfil its pre-election commitment to reform Work Choices and has announced that a new workplace relations system will be established by 1 January 2010.¹¹⁵ The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (**Transition Bill**) introduces transitional arrangements to the new system. Under these arrangements, individual statutory agreements will be phased out.

to co-operate with employers in the production process and providing employers with an incentive to train and educate their workers: see Organisation for Economic Co-operation and Development, *Economics Department Working Paper No 472*; Anna Chapman, ‘Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege’ (2006) 16(2) *The Economic and Labour Relations Review* 237. Further, there is no proven link between unfair dismissal laws and unemployment: The Australian Government’s own expert witness conceded this when pressed in *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78. The Full Federal Court in that case noted at [95] that there was no basis to conclude that unfair dismissal laws make any difference to employers’ decisions about recruiting labour. This is supported by independent research: see Andrew Creighton and Anthony Stewart, *Labour Law* (4th ed, 2005) 460.

¹¹³ Common Core Document, above n 3, [440].

¹¹⁴ Sara Charlesworth and Fiona Macdonald, *Hard Labour? Pregnancy, Discrimination and Workplace Rights, A Report to the Office of the Workplace Rights Advocate* (2007) available at http://www.business.vic.gov.au/busvicwr/assets/main/lib60148/hard%20labour%20final_artfinal.pdf.

¹¹⁵ See Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (Cth) s 576Y.

170. The current Australian Government has announced that, under the new industrial relations system commencing in 2010, the Australian Industrial Relations Commission will be replaced by a new ‘one stop shop’ to be called Fair Work Australia.¹¹⁶ However, Fair Work Australia will not have as broad powers as the Australian Industrial Relations Commission did prior to Work Choices. For instance, it will not be able to make new awards and the subject matter which awards may cover will be restricted to building on 10 legislated national employment standards and 10 further minimum employment standards.¹¹⁷ Awards will also not apply to workers earning more than \$100,000. Given these restrictions on the scope and content of awards, it is not clear how the new body will be able to adequately ensure that all Australian workers’ employment standards and conditions continue to evolve.
171. The current Australian Government is to be commended for expressing a commitment to reforming Work Choices and establishing a new industrial relations system in which individual statutory contracts are phased out and unfair dismissal rights and minimum standards of employment are strengthened.¹¹⁸ However, it is concerning that the proposed new system will limit the realisation of Article 6 and 7 rights by, for example:
- (a) imposing significant restrictions on unfair dismissal protection, such as:
 - (i) reducing the time limit in which an employee may make an application from 21 days to 7 days;
 - (ii) retaining from Work Choices a 6 month qualifying period for unfair dismissal protection (before Work Choices it was 3 months); and
 - (iii) introducing a 12 month qualifying period for employees of employers with fewer than 15 employees;
 - (b) imposing significant limitations on the award-making powers of the proposed new independent tribunal, including restricting the allowable subject matters of awards and preventing or limiting the making of new awards;
 - (c) excluding workers earning over \$100,000 from award protection; and
 - (d) failing to provide an unqualified guarantee of maximum hours of work and protection from having to work additional hours.¹¹⁹

¹¹⁶ See *Forward with Fairness: Labor’s Plan for Fairer and More Productive Australian Workplaces* (April 2007) for an outline of the Australian Government’s proposed new industrial relations system.

¹¹⁷ *Ibid* 7.

¹¹⁸ See Australian Labor Party, *Forward with Fairness: Labor’s plan for fairer and more productive Australian Workplaces* (April 2007).

¹¹⁹ See See Australian Labor Party, *Forward with Fairness: Labor’s plan for fairer and more productive Australian Workplaces* (April 2007); Australian Labor Party, *Forward with Fairness: Policy Implementation Plan* (August 2007).

E.3 Welfare to Work

172. 'Welfare to Work' changes to social security were introduced in mid 2006 to encourage increased workforce participation. They include new eligibility rules for income support payments, more places in employment services, changes to participation rules and a new compliance system. Welfare to Work has resulted in both a reduction in social security income for some of the most vulnerable and marginalised members of Australian society,¹²⁰ and the threat of no means of support whatsoever if paid work is not accepted.¹²¹ Welfare recipients can now be required to accept work despite major disruption to family where they may be marginally better off financially, it would result in extreme disruption to family life. As a result, this program has been severely criticised by Australian academic and social sector commentators.¹²²
173. The Welfare to Work provisions have not addressed systemic problems, such as access to adequate education and training, health care, child care and transport, that present significant barriers to enjoyment of Article 6 rights. There are serious concerns regarding the fundamental conflict between a program that 'encourages' increased participation and the right to freely chosen work, when 'encouragement' manifests itself as a punitive system.¹²³
174. The implications of the Welfare to Work reforms are discussed further in relation to social security under Article 9: Conditionality of Social Security Payments: Welfare to Work.

E.4 Work for the Dole

175. Work for the Dole is an unpaid labour 'training' program that compels an individual to accept particular employment. This program raises similar concerns to those raised by Welfare to Work and the utility of these programs has been questioned.¹²⁴ The Common Core Document's reference to the success of the program is contradicted by research which found that not only was Work for the Dole not effective, but that 'The main conclusion from the study is that there appear to be quite large significant adverse effects of participation in [Work for the Dole].'¹²⁵ Participation in the Work for the Dole program was 'found to be associated with a large and significant adverse effect on the likelihood of exiting unemployment payments.

¹²⁰ By moving them from parenting payment or disability support pension onto the Newstart Allowance for jobseekers, which provides lower payment and requires that they look for work.

¹²¹ A harsher penalty regime means that certain people can lose their payments for 8 weeks if they refuse a minimum-wage job, have to leave a job or if they refuse or do not meet the requirements for Work for the Dole.

¹²² Australian Council of Social Service, *Welfare to Work — Effects and Solutions* (2005) available at <http://www.acoss.org.au/News.aspx?displayID=99&articleID=366>; Elspeth McInnes, 'When Unpaid Care Work Doesn't Count: The Commodification of Family Life in the New Welfare to Work Order' (Paper presented at 'Road to Where: The Politics and Practice of Implementing Welfare to Work', Brisbane, 17 – 18 July 2006) available at <http://www.ncsmc.org.au/docs/When%20Unpaid%20Care%20Work%20Doesn.doc>.

¹²³ International Labour Organization, *Convention concerning Forced Labour 1930*, ILO No 29, 39 UNTS 55 (entered into force 1 May 1932) article 2(1).

¹²⁴ Jeff Borland and Yi-Ping Tseng, 'Does "Work for the Dole" Work?', Melbourne Institute Working Paper No 14 (2004) available at <http://melbourneinstitute.com/wp/wp2004n14.pdf>.

¹²⁵ Ibid.

The main potential explanation is existence of a 'lock-in' effect whereby program participants reduce job search activity.¹²⁶

E.5 Indigenous People

176. Indigenous people experience significant disadvantages in their right to work. This is reflected by the following statistics:
- (a) in 2001, the unemployment rate for Indigenous peoples was 20 per cent, approximately three times higher than the rate for the non-Indigenous population;¹²⁷
 - (b) in 2006, the median weekly income for Indigenous peoples was \$278.00, compared with \$471.00 for non-Indigenous people;¹²⁸ and
 - (c) Indigenous women are more likely to be working in low income jobs, with over 60 per cent of Indigenous women on a gross weekly income of \$399.00 or less (including 41.6 per cent receiving less than \$250.00 gross each week).¹²⁹
177. Work Choices is also likely to impact unfairly on Indigenous people who will be required to negotiate their own individual work conditions.

Abolition of Community Development Employment Projects

178. A program that was implemented to assist Indigenous people in securing work was the Community Development Employment Projects. This program is essentially a national work for the dole program for Indigenous people which employs 8,000 Indigenous people in about 50 separate community controlled organisations.¹³⁰ The Community Development Employment Projects commenced in 1977 and workers are employed in a wide variety of jobs, directed towards meeting local community needs. Government funding is provided to employer organisations in lieu of unemployment support to the individual employees. Many organisations rely on this workforce funding to provide services, and for some community councils Community Development Employment Projects funds make up half of their budget. Demonstrating the importance of Community Development Employment Projects, the 2001 census found that 69 per cent of Community Development Employment Projects participants were from remote areas.

¹²⁶ Ibid.

¹²⁷ Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2001*, (2001) 66.

¹²⁸ Australian Bureau of Statistics, *2006 Census of Population and Housing, Community Profile Series, Indigenous Profile* (2007) 104.

¹²⁹ Australian Bureau of Statistics, *2006 Census of Population and Housing, Selected Person Characteristics by Indigenous Status by Sex* (2006, revised 14 November 2007).

¹³⁰ Department of Families, Community Services and Indigenous Affairs, *Factsheet: Jobs and Training for Indigenous People in the Northern Territory — Changes to CDEP* (2007) available at http://www.facsia.gov.au/nter/docs/legis_factsheet_05.htm.

179. The Community Development Employment Projects program is being abolished as part of the Northern Territory Intervention in order to 'reduce the flow of cash' into Indigenous communities.¹³¹ Current Community Development Employment Projects workers will be moved to unemployment payments and will be forced to participate in Work for the Dole. Their welfare payments will be subject to the 'income management regime', as discussed in further detail in relation to Article 1: Intervention into Northern Territory Indigenous Communities. The current Australian Government plans to create 2,000 jobs in service delivery, but the large majority of workers will be forced into unemployment.
180. The Community Development Employment Projects program has been important to Indigenous communities particularly those in very remote areas where there may be little choice or opportunity to gain employment.¹³² However, the abolition of Community Development Employment Projects will remove the ability of workers and their families to make economic decisions, and will undoubtedly increase poverty levels. Community organisations relying on Community Development Employment Projects workers will lose the ability to provide services to their communities. There was no consultation with affected communities and Community Development Employment Projects employers about this decision.

E.6 Asylum Seekers

181. An asylum seeker who arrives in Australia on a visa and applies for protection within 45 days is permitted to work pending the outcome of their application for a permanent visa. However, if an asylum seeker fails to apply for protection within 45 days, generally speaking they are not permitted to work.¹³³
182. Furthermore, even if an asylum seeker has had the right to work, this right will be taken away if they get to the point of seeking Ministerial intervention in their case. Decisions from the Minister generally take over 18 months to finalise. This is particularly problematic as an asylum seeker is unable to claim any other form of assistance during this time (see Article 9: Immigration and Social Security). This is despite a Senate Committee recommendation that 'all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application'.¹³⁴

¹³¹ Ibid.

¹³² See, eg, the 2001 census which reported that 69 per cent of CDEP participants were from very remote areas: Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2001) available at <http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyTopic/2B3D3A062FF56BC1CA256DCE007FBFFA?OpenDocument>.

¹³³ Department of Immigration and Citizenship, *Fact Sheet No 62: Assistance for Asylum Seekers in Australia* (2007) available at <http://www.immi.gov.au/media/fact-sheets/62assistance.htm>. An applicant can apply for work rights if a decision on their case has not been made by Department of Immigration and Citizenship within 6 months as long as they can show a 'compelling need to work'.

¹³⁴ Commonwealth of Australia, *Report of the Senate Select Committee on Ministerial Discretion in Migration Matters* (2004) Recommendation 10, [5.44].

183. Since 1992, an asylum seeker who arrives in Australia without a valid visa is mandatorily detained in immigration detention until they are granted a visa or removed from Australia.¹³⁵ If an asylum seeker is released from detention pending the outcome of their protection visa application, they are denied the right to work and are also ineligible for any government assistance (see Article 9: Immigration and Social Security).
184. When in Opposition, the now current Australian Government stated that it would introduce work rights for those asylum seekers denied work rights under the so-called '45 day rule.'¹³⁶

E.7 Migrants

185. The Common Core Document fails to address any of the issues faced by migrants who are unable to undertake work of their choice, either due to a failure to recognise overseas qualifications or the lack of training and assistance provided to them.
186. When first arriving in Australia, new migrants are denied access to social security for a two-year waiting period (see discussion under Article 9: Immigration and Social Security). As a result, migrants are forced to take any form of employment, which often means low paid and menial employment, or are completely dependent on their sponsors to cover their immediate needs. For those whose qualifications are not recognised, no bridging training is provided and no recourse to government programs is available.¹³⁷ Ultimately, many migrants face discrimination, both in having their qualifications recognised and then in obtaining secure employment in Australia.
187. Australia lacks a clear process for recognising overseas skills and qualifications. Instead, the pathway differs depending on the type of occupation, where the qualification was obtained, and the individual's skill and experience. Once people have negotiated their way through the maze of federal and state and territory government agencies, professional bodies and education and training providers, to access the correct information, they face the often prohibitive cost of assessment and registration.¹³⁸
188. Even when skills and qualifications are recognised, many migrants also find difficulty securing work, especially for those migrants from non-English speaking backgrounds. Many perceive that some employers are unwilling to offer them work as a result of their language skills.¹³⁹ Therefore, they are forced into whatever work they can find, rather than work of their choice that fits their skills and qualifications.

¹³⁵ *Migration Act 1958* (Cth) s 189.

¹³⁶ Australian Labor Party, *ALP National Platform and Constitution* (2007) Chapter 13, [155] available at <http://www.alp.org.au/platform/index.php>.

¹³⁷ National Association of Community Legal Centres, *Australian NGO Submission to the Committee on the Elimination of Racial Discrimination* (2005) 44.

¹³⁸ Overseas Qualifications Reference Group, Training and Skills Commission, South Australia, *Final Report* (2005) 910; and Commonwealth of Australia, Joint Parliamentary Standing Committee on Migration, *Negotiating the Maze: Review of Arrangements for Overseas Skills Recognition, Upgrading and Licensing* (2006) 29.

¹³⁹ Overseas Qualifications Reference Group, Training and Skills Commission, South Australia, *Final Report* (2005) 10.

F. FREEDOM FROM FORCED WORK

F.1 Trafficking in Human Beings: Sexual Servitude

189. Articles 6 and 7 of the *ICESCR* uphold the right to 'freely chosen work' and 'to the enjoyment of just and favourable conditions of work'. Practices involved in the trafficking of people, including the trafficking of women into sexual servitude (also known as 'debt bondage'), may involve a range of exploitative practices that include sexual, physical, psychological, criminal and labour exploitation. In 2006, the Committee on the Elimination of Discrimination against Women recommended that Australia formulate a comprehensive strategy to combat the trafficking of women and exploitation resulting from prostitution.¹⁴⁰
190. In October 2003, the former Australian Government introduced the 'Commonwealth Action Plan to Eradicate Trafficking in Persons' to focus on the 'full cycle of trafficking, giving equal weight to the three critical areas of prevention, prosecution and victim support'.¹⁴¹ In 2007, it was announced that this strategy would be renewed for a further four years with additional funding.¹⁴² The major focus of this funding has been dedicated to enhancing the criminal justice response to the trafficking of women into sexual servitude to enable the successful prosecution of offenders.¹⁴³
191. The criminal justice approach to trafficking provides no recognition of the rights of trafficked persons or those in positions of debt bondage, nor is there any clear commitment to safeguarding their rights as workers. Victims of trafficking/sexual servitude are not identified as victims of exploitation within the workplace. Rather, their right to work and to be protected as an *employee* is replaced by a focus on victimisation within a criminal justice framework where the emphasis is on pursuing prosecutions.
192. Those who work under conditions of sexual servitude are most often non-citizens and, in many cases, illegal non-citizens.¹⁴⁴ The rights of victims of trafficking and sexual servitude are therefore limited by their concurrent status as non-citizens. Sex workers are ineligible to apply for temporary work visas, and generally enter Australia on short-term travel visas, such as a tourist visa, rather than on a work permit visa. The majority of persons identified as potential victims of trafficking in Australia will be repatriated back to their country of origin at the completion of the criminal justice process. A visa system was introduced in 2004 to

¹⁴⁰ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) [21].

¹⁴¹ Minister for Justice and Customs, 'Australian Government Announces Major Package to Combat People Trafficking' (Press Release, 13 October 2003).

¹⁴² Attorney-General's Department, 'More Resources to Combat People Trafficking' (Press Release, 8 May 2007) available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP7561D03F6952FB64CA2572D4000BB873>.

¹⁴³ This criminal justice framework reflects the emphasis of the international framework encapsulated within the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (UN Doc A/RES/55/25) — one of three supplementary protocols to the *UN Convention Against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex I, UN Doc A/RES/55/25 (2000).

¹⁴⁴ 52 per cent of potential trafficking victims referred by the Department of Immigration and Multicultural and Indigenous Affairs to the Australian Federal Police up to 2005 were reported to be illegal non-citizens at the time. See Department of Immigration and Multicultural and Indigenous Affairs, *Evidence to Supplementary Inquiry into the Trafficking of Women for Sexual Servitude* (2005).

enable the Minister of Immigration to grant a temporary or permanent Witness Protection (Trafficking) Visa to trafficking victims who he/she is satisfied have played a 'significant' role in the criminal justice process and/or who are 'in danger' if they return to their country of origin.¹⁴⁵ However, these visas are made accessible by the Minister on a case-by-case basis and the decision is not subject to review or appeal. This visa system does not recognise Australia's obligation to acknowledge their exploitation as an abuse within the workplace.

Case Study

X travels to Australia after agreeing to work in the sex industry to repay a set fee for a broker to arrange a tourist visa, travel and accommodation. Upon her arrival in Australia she is taken to her workplace where her passport is taken from her for 'security', the agreed fee is tripled and the work conditions are changed substantially (increased work hours and limited, if any, days off).

Working illegally with a tourist visa that has expired, X is picked up by Department of Immigration and Citizenship compliance officers six months after her arrival. During this time she has managed to pay off three-quarters of her debt but has not been able to save any money, as the majority of her earnings have gone directly to her employer. As she works in a brothel and does not have easy access to her passport, she is put onto a bridging visa¹⁴⁶ and passed on by DIAC officers to the Australian Federal Police and the victim support agency as a potential victim of trafficking.

Unable to share any information about the broker who assisted her to Australia and/or to provide any useful information about those operating the business she was working in, X's case is dropped and she is no longer eligible to remain in Australia on the bridging visa. As she is ineligible for any other visa, X is returned to her country of origin with no money and without any financial support to assist her upon her return.¹⁴⁷

¹⁴⁵ Department of Immigration and Citizenship, 'New Visas for Witnesses in Trafficking Cases' (1 January 2004) available at <http://www.immi.gov.au/legislation/amendments/2004/040101/lc01012004-05.htm>.

¹⁴⁶ In Australia, there are five classes of 'bridging visas', which are used to make 'non-citizens' lawful who otherwise would be unlawful in the following situations: (a) during the processing of an application, made in Australia, for a substantive visa; (b) while arrangements are made to leave Australia; and (c) at other times when the 'non-citizen' does not have a visa (for example, when seeking judicial review) and it is not necessary for the person to be kept in immigration detention.

¹⁴⁷ Case study based on experiences of victims of trafficking involved in the research of Dr Marie Segrave, University of Western Sydney.

F.2 Indigenous Stolen Wages

193. In December 2006, the Senate Legal and Constitutional Affairs Committee published a report entitled *Unfinished Business: Indigenous Stolen Wages*.¹⁴⁸ 'Stolen wages' is a term used to refer to the wages of 'Indigenous workers whose paid labour was controlled by Government' under the 'protection acts' of the 19th and 20th centuries.
194. That legislation enabled states and territories to control the conditions of Indigenous people at work, including for whom they worked, for how long and under what conditions, and absolutely controlled the wages earned in that employment. In many cases, Indigenous people did not receive any wages. In this regard, practices under this legislation may have constituted slavery and certainly raise serious concerns in relation to Article 6 of the *ICESCR*.
195. This control resulted in government practices including:
- (a) failing to pay wages and entitlements to Indigenous workers;
 - (b) deliberately paying lower wages to Indigenous workers than non-Indigenous workers;
 - (c) withholding the wages and entitlements of Indigenous workers in government trust and savings accounts, and
 - (d) failing to provide safe and healthy working conditions.
196. Some states have provided schemes and processes for the repayment money held by them under this legislation to the people who earned it. However, that redress is in many regards inadequate because it fails to address all the consequences flowing from the control of Indigenous wages by governments.
197. The Senate Legal and Constitutional Affairs Committee found that Indigenous stolen wages affected every Australian jurisdiction and made extensive recommendations for redress.¹⁴⁹ However, no coordinated response to Indigenous stolen wages has been initiated by Australian governments, despite the Senate Committee's finding that '[I]t would be an abrogation of moral responsibility to delay any further, particularly with the knowledge that the age and infirmity of the Indigenous people affected by these practices limit their capacity to pursue claims [in the courts]'.¹⁵⁰

¹⁴⁸ See Commonwealth of Australia, Senate Legal and Constitutional Affairs Committee, *Unfinished Business: Indigenous Stolen Wages* (2006) available at http://www.aph.gov.au/senate/committee/legcon_cte/stolen_wages/index.htm.

¹⁴⁹ Ibid xiii–xiv.

¹⁵⁰ Ibid [1.15].

Case Study

Bruce arrived at Caring Home for Aboriginal Boys when he was 7 years old and lived there until he was 14. From the day he arrived, Bruce worked from 4:30am to 8:30am chopping wood, milking cows and cleaning. Between 9am and 3pm he went to school. From 4pm to 7pm he worked at a neighbouring farm.

While working at Caring Home, Bruce's leg was broken and he chopped off three toes on his right foot while cutting wood. While working at the neighbouring farm, Bruce broke his hand. He did not receive compensation for any of the injuries he suffered while working.

The manager of Caring Home sometimes imposed additional work on Bruce as a punishment for trivial matters, made him 'run the gauntlet' and sexually abused him. The 'gauntlet' comprised two rows of boys who were forced to beat another boy forced to run between the rows. If a boy did not try hard enough (in the view of the manager) to hurt another boy, he was required to run the gauntlet himself.

Bruce was not paid for any of the work he did between the ages of seven and 14. From the age of 14 to 21, the government sent Bruce to work at a factory in a nearby town, where he privately boarded.

The government required the employer to pay most of Bruce's wage into a government account, his board to be paid direct to the boarding house and a small amount to be paid to him as pocket money. Bruce did not receive any pocket money while employed by the factory and when he turned 21 he was refused access to the government account containing his wages.¹⁵¹

F.3 Prison Labour

198. In its previous Concluding Observations, the CESCR recommended that Australia ensure that labour in private prisons is voluntarily undertaken and properly remunerated.¹⁵² While the Common Core Document addresses this issue,¹⁵³ it fails to identify the following concerns:
- (a) the 'unemployment rate' for prisoners who are unable to work is entirely inadequate;
 - (b) convicted prisoners who refuse to work or who are dismissed from a position are not entitled to the miniscule unemployment rate;
 - (c) convicted prisoners who refuse to work may suffer penalties such as limitation of freedom of movement within the prison, transfer to other prisons or damage to early release opportunities;

¹⁵¹ This case study is drawn from real life experiences of clients at the Public Interest Advocacy Centre, Sydney.

¹⁵² *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [30].

¹⁵³ Common Core Document, above n 3, [431]–[436].

- (d) the type of work required, such as cleaning, kitchen, and laundry duties, provides no opportunity to acquire useful skills, does not involve vocational training in useful trades, and so provides little or nothing by way of rehabilitative value;
- (e) prisoners do not have the same rights as other workers in relation to workplace injuries; and
- (f) the remuneration rates for prisoners are well below the minimum wage and lower than the rate for workers undergoing training.

199. These concerns illustrate the issues faced by many prisoners in relation to the realisation of their right to freedom from forced work, as well as their conditions of work under Article 7 of the *ICESCR*.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 6)

- Please provide information as to how the tribunal arm of Fair Work Australia will facilitate the evolution of working conditions given the restrictions on its proposed award-making powers.
- Is the Australian Government committed to having all workers' conditions set by an independent tribunal, regardless of the amount they earn?
- Is the Australian Government committed to giving the independent tribunal sufficiently broad award-making powers to allow for the evolution of working conditions?
- How does the Australian Government envisage this will be possible within their proposed policy of preventing new awards from being made and limiting the allowable subject matters and types of employees that awards may cover?
- Please provide information as to whether the Welfare to Work changes to social security legislation introduced by the former Australian Government have resulted in a decrease in income for some marginalised and vulnerable groups.
- Please provide details of the rate of underemployment in Australia, including disaggregated data according to gender, race and age.
- Please provide disaggregated data according to gender, race and age regarding the proportion of working poor (that is, people working but earning less than poverty-line income) in the labour force.
- How will the Australian Government ensure social inclusion issues — particularly education and training, child care and health — are incorporated into any 'mutual obligation' policies it intends to maintain in its regulation of Welfare to Work and Work for the Dole?
- Please provide details of any special programs or measures designed to address the significant barriers to workforce participation faced by many Indigenous people, asylum seekers and migrants.
- What steps has/will the Australian Government take to introduce work rights for asylum seekers in the community?

- How does the Australian Government intend to allow such work rights to continue pending the finalisation of any applications before the Minister for Immigration under section 417 of the *Migration Act 1958* (Cth)?
- Please provide details of any national strategy to combat the trafficking of women and children and to address exploitation resulting from sexual servitude.
- What steps is Australia taking to ensure that adequate compensation is paid to Indigenous Australians for stolen wages?

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 6)

THAT special programs and measures be designed to address the significant barriers to workforce participation faced by many Indigenous people, asylum seekers and migrants.

THAT Australia extend work rights to all asylum seekers regardless of how and when they entered Australia.

THAT Australia ensure that recognition is given to qualifications of skilled migrants who are educated overseas and that access to bridging training is promptly available. In addition, that Australia ensure that effective programs are implemented to address negative community and employer perceptions regarding migrant workers.

THAT Australia develop and implement a comprehensive national strategy, including within a workers' rights framework, to combat the trafficking of women and children and to address exploitation resulting from sexual servitude or debt bondage.

THAT Australia implement the recommendations contained in the *Unfinished Business: Indigenous Stolen Wages* report, including the establishment of a national compensation plan.

THAT Australia implement laws to ensure that prisoners are:

- (a) fairly remunerated for their work;
- (b) not penalised through loss of other opportunities or privileges for refusing to undertake paid work;
- (c) provided with opportunities to acquire vocational skills to assist them to find post-release employment; and
- (d) equally protected in relation to workplace injury as other workers.

Article 7 — Right to Just and Favourable Conditions of Work

Article 7:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) *Remuneration which provides all workers, as a minimum, with:*
 - (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
 - (ii) *A decent living for themselves and their families in accordance with the provisions of the present Covenant;*
- (b) *Safe and healthy working conditions;*
- (c) *Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*
- (d) *Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

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G. RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK

200. Article 7 requires Australia to recognise the right of everyone to the enjoyment of just and favourable conditions of work. Australia is obliged to ensure, in particular, that workers are afforded:

- (a) fair and equal remuneration and conditions without distinction of any kind and a decent living for themselves and their families;
- (b) rest, leisure, reasonable limitation of working hours and paid public holidays; and

(c) job security and protection from arbitrary dismissal.¹⁵⁴

201. In its previous Concluding Observations on Australia, the Committee expressed concern that the *Workplace Relations Act 1996* (Cth), as it stood at that time, favoured individual negotiation over collective bargaining, reduced the role of the Australian Industrial Relations Commission and restricted job security, wages and temporary employment protections.¹⁵⁵ Since these comments by the CESCR, the previous Australian Government took further retrogressive measures in passing the Work Choices legislation.

G.1 Fair and Equal Remuneration

202. Prior to Work Choices (which is discussed in detail under Article 6 — Right to Work), approximately 80 per cent of employees were protected by awards that ‘set fair and enforceable minimum wages and conditions of employment maintained at a relevant level’.¹⁵⁶ The Australian Industrial Relations Commission, an impartial tribunal independent of government, was charged with the responsibility of ensuring, so far as it could, that the system of awards provided a safety net for fair, secure, relevant and consistent wages and conditions of employment.¹⁵⁷

203. Work Choices removed the Australian Industrial Relations Commission’s wage-setting role and established the Australian Fair Pay Commission to review and set minimum wages for employees. The Australian Fair Pay Commission is not governed by the same guarantees of transparency, impartiality and independence from government. The Australian Fair Pay Commission’s prescribed overarching objective is to promote economic prosperity.¹⁵⁸ Unlike the Australian Industrial Relations Commission, which was required to have regard to the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the community,¹⁵⁹ the Australian Fair Pay Commission is not required to guarantee that workers’ remuneration be fair or provide a decent living for workers and their families.

204. In relation to children, the Australian Fair Pay Commission is currently undertaking a review of youth wages and practices within Australia¹⁶⁰ that raise issues in relation to Article 6 of the *ICESCR*. This issue is discussed in further detail in relation to [Article 10: Child Labour](#).

¹⁵⁴ The right to work in article 6 of the *ICESCR* includes the right to job security and protection from unfair dismissal: CESCR, *General Comment No 18: The Right to Work*, UN Doc E/C.12/GC/18 (24 November 2005) [4]. Articles 6, 7 and 8 of the *ICESCR* are interdependent: at [8].

¹⁵⁵ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [17].

¹⁵⁶ Colin Fenwick ‘How Low Can You Go? Minimum Working Conditions under Australia’s New Labour Laws’ (2006) 16(2) *Economic and Labour Relations Review* 85.

¹⁵⁷ *Ibid.*

¹⁵⁸ See s 23 of the *Workplace Relations Act 1996* (Cth).

¹⁵⁹ See s 88B(2) of the *Workplace Relations Act 1996* (Cth) as it stood prior to the WorkChoices amendments.

¹⁶⁰ Australian Fair Pay Commission, ‘Commission Launches Pay Scale and Junior and Training Wages Reviews’ (Press Release, 26 September 2007).

G.2 Fair and Equal Conditions

205. Work Choices prohibits the Australian Industrial Relations Commission from creating new awards and invalidates all existing award conditions outside 20 prescribed 'allowable matters'.¹⁶¹ Despite concerns previously expressed by the CESCR, the Work Choices amendments encourage terms and conditions of employment to be negotiated in individual agreements between an employer and an employee by allowing employers to offer employment on condition that the employee sign an Australian Workplace Agreement, which may legally undermine or exclude remaining award conditions.
206. Prior to Work Choices, Australian Workplace Agreements were required to meet a 'no disadvantage test' which ensured workers on those instruments were not worse off than they would be under an award. However, Work Choices abolished the 'no disadvantage' test, meaning that award conditions such as penalty rates, public holidays and rest breaks could be excluded without compensation. In response to community concern, the former Australian Government introduced a 'fairness test' to be applied to some agreements lodged on or after 7 May 2007. This test is less beneficial to workers than the 'no disadvantage' test.
207. Australian Workplace Agreements are typically drafted by employers and presented to employees on a 'take it or leave it basis'.¹⁶² Given the inherent disparity in bargaining power between employer and employee in most circumstances, it is rare for employees to exert any more than a marginal influence upon the content and conditions of any agreement that may emerge from such negotiations.¹⁶³ Statistics show that Australian Workplace Agreements lodged in the 6 months following the introduction of Work Choices significantly undermined employees' conditions, particularly entitlements to penalty rates, overtime and shift allowances, which were previously ensured through the system of awards and collective bargaining.¹⁶⁴
208. While the current Australian Government's proposed new industrial system is welcomed, the many aspects of the new system contain limitations of Article 6 and 7 rights, as discussed under Article 6: 'Forward with Fairness').

¹⁶¹ See s 515 of the *Workplace Relations Act 1996* (Cth). Non-allowable matters include rights of conversion from casual to other types of employment, minimum hours of work for part-timers, prohibitions on employers employing a certain type of employee and trade union training leave.

¹⁶² Josh Borstein, 'Australians Should Be Told the Truth on AWAs', *The Age* (Melbourne), 4 May 2007; Andrew Creighton and Anthony Stewart, *Labour Law* (4th ed, 2005) 263.

¹⁶³ Andrew Creighton and Anthony Stewart, *Labour Law* (4th ed, 2005) 251.

¹⁶⁴ In the first 6 months following the Work Choices amendments, 45 per cent of AWAs stripped away all award conditions, 76 per cent removed shift loading, 59 per cent removed annual leave loading, 70 per cent removed incentive payments and bonuses, 22.5 per cent removed declared public holidays, and 33.3 per cent provided no wage increases during the life of the agreement: Mark Davis, 'Revealed: How AWAs Strip Work Rights', *Sydney Morning Herald* (Sydney), 17 April 2007 available at <http://www.smh.com.au/news/national/revealed-how-awas-strip-work-rights/2007/04/16/1176696757585.html>.

G.3 Fair and Equal Remuneration and Conditions for Women

209. The Common Core Document states that the Australian Fair Pay Commission, when setting and adjusting wages, is required to apply the principle that men and women should be paid equal remuneration for work of equal value.¹⁶⁵ However, statistics show that women working full-time on individual workplace awards earn 81 cents for every \$1 made by a man, while women on collective agreements earn 90 cents.¹⁶⁶
210. In sectors that are predominately female-based, such as child care, aged care, hospitality and the retail and cleaning industries, rates of pay and conditions reflect a relative lack of bargaining power, whereas previously awards provided standard employment conditions.¹⁶⁷ This pay disparity extends beyond female dominated sectors to Australia's top 200 companies. Women in top earning positions in the Australian Stock Exchange's top 200 companies earn much less than their male counterparts.¹⁶⁸
211. Since the introduction of Work Choices, women have reported experiencing diminished work conditions, including intensification of workloads, less job security and unpredictable working hours.¹⁶⁹ There has also been a reported increase in discrimination against women who are pregnant or returning from maternity leave¹⁷⁰ (see the Case Study under [Article 6: Work Choices](#)).
212. Australia remains one of only two Organisation for Economic Co-operation and Development countries in the world not to have introduced a national paid maternity leave scheme. This issue is discussed in further detail under [Article 10: Maternity Leave and Child Care](#).

¹⁶⁵ Common Core Document, above n 3, [421].

¹⁶⁶ Keeli Cambourne, 'In the Land of Unequal Opportunity', *Sydney Morning Herald* (Sydney), 17 November 2007 available at <http://www.smh.com.au/news/national/in-the-land-of-unequal-opportunity/2007/11/16/1194766968090.html>. See also David Peetz and Alison Preston, *AWAs, Collective Agreements and Earnings: Beneath the Aggregate Data* (Report to Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, Victoria, 2007).

¹⁶⁷ A Preston, J Jefferson and R Seymour 'Women's Pay and Conditions in an Era of Changing Workplace Regulations: Towards a "Women's Employment Status Key Indicators" (WESKI) Database' in Sara Charlesworth and Fiona MacDonald, *Going Too Far: WorkChoices and the Experience of 30 Victorian Workers in Minimum Wage Sectors Report to Industrial Relations Victoria* (2007) 12.

¹⁶⁸ The EOWA report found that women hold just 7 per cent of the top earner positions (80 positions out of 1136) compared with 93 per cent held by men. Female Chief Financial Officers and Chief Operating Officers earn just half the wage of their male equivalents and even in human resource positions, where women are more common, the pay gap is still 43 per cent. In CEO positions, a female CEO earns two thirds of the salary earned by her male counterpart. See Equal Opportunity for Women in the Workplace Agency, *Gender Income Distribution of Top Earners in ASX200 Companies — 2006 EOWA Census of Women in Leadership* (2008).

¹⁶⁹ See Jude Elton *et al*, *Women and WorkChoices: Impacts on the Low Pay Sector* (2007).

¹⁷⁰ Sara Charlesworth and Fiona Macdonald, *Hard Labour? Pregnancy, Discrimination and Workplace Rights, A Report to the Office of the Workplace Rights Advocate* (2007) available at http://www.business.vic.gov.au/busvicwr/assets/main/lib60148/hard%20labour%20final_artfinal.pdf.

G.4 Ensuring Job Security

213. In its previous Concluding Observations, the CESCR recommended that Australia ensure that legislative provisions concerning job security are strengthened and effectively implemented, especially for vulnerable groups of workers.¹⁷¹ However, changes implemented under Work Choices excludes 62 per cent of the Australian workforce (4.2 million employees) from access to unfair dismissal laws by exempting employees who work for an organisation with 100 or less employees, including all related bodies corporate.¹⁷² This exclusion therefore applies not only to small business employees but also to employees of medium and large businesses. Employees of any sized organisation are also excluded from access to unfair dismissal during the first 6 months of their employment, or at any time where the reason for their dismissal includes a 'genuine operational reason'.¹⁷³
214. Employees excluded from unfair dismissal protection may therefore be dismissed without a valid reason and without procedural fairness. In most cases, they are denied any judicial remedy in relation to their dismissal unless the dismissal has occurred for an otherwise unlawful reason, such as discrimination. The ability of state and territory governments to strengthen protections is hampered by the fact that most employees are covered by the federal system.¹⁷⁴
215. The possibility of being arbitrarily dismissed impacts not only on workers' job security and right to a secure income to support themselves and their families but it also has the potential to mute the voices of workers wishing, for example, to query breaches of their wage rates and entitlements or occupational health and safety protections.¹⁷⁵
216. While the current Australian Government's proposed new industrial system is welcomed, the many aspects of the new system contain limitations of Article 6 and 7 rights, as discussed under Article 6: 'Forward with Fairness').

¹⁷¹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000), [26].

¹⁷² Anthony Forsythe, *Freedom to Fire: Economic Dismissals under WorkChoices Report for the Victorian Office of the Workplace Rights Advocate* (2007) [5.16].

¹⁷³ The term 'genuine operational reason' has been interpreted broadly. The operational reason does not have to be the sole or dominant reason for dismissal. Where a genuine operational reason exists, the Australian Industrial Relations Commission is precluded from addressing the unfairness of the dismissal.

¹⁷⁴ Up to 85 per cent of Australian employees are covered by the federal system: see Kevin Andrews, [former] Minister for Employment and Workplace Relations, 'WorkChoices and the Corporations Power: Toward a Simpler System' (Media Release, 9 October 2005) 1.

¹⁷⁵ Sara Charlesworth and Fiona MacDonald, *Going Too Far: WorkChoices and the Experience of 30 Victorian Workers in Minimum Wage Sectors Report to Industrial Relations Victoria* (2007) ii.

Case Study

Lauren is a 41 year old female who works as a full time cleaner. She recently discovered that she is being paid under her award rate and that she is entitled to penalty rates, which she has not been receiving. Lauren is worried that if she approaches her employer to query her entitlements she will be dismissed. Lauren needs the income the job provides to support her two children. She feels it is better to remain silent and put up with below par conditions than to risk having no job at all.¹⁷⁶

G.5 Working Hours

217. Work Choices fails to ensure that employees are receiving adequate rest and leisure time from their work. Maximum ordinary hours of work is no longer an allowable award condition under Work Choices. Instead, Work Choices provides that the maximum ordinary hours of work are 38 hours plus *reasonable additional hours*. Whether additional hours are reasonable depends on the business's requirements as well as those of the employee. An employee may be compelled to work reasonable additional hours. An employee resisting such a request may risk reprisal if a court ultimately finds that the additional hours were reasonable within the meaning of the Act. There is no provision for ordinary working hours to be performed within a specified spread of hours as was common in awards.¹⁷⁷
218. In addition, without access to unfair dismissal protection, workers may be unable to insist on family-friendly conditions, such as freedom from working nights, weekends and/or public holidays.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 7)

- Please provide further detail on the steps being taken to address the impact of the former Australian Government's industrial relations policy, Work Choices, including in relation to hours of work, work loads, protection from unfair dismissal, fair wages and conditions, collective bargaining and leave entitlements.
- What steps will the Australian Government take to remedy the unequal conditions of employment enjoyed by women?
- What steps will the Australian Government take to ensure better guarantees of maximum hours of work and reasonable rest and leisure time for Australian workers?
- What steps will the Australian Government take to ensure the progressive realisation of Australian workers' rights under article 7?

¹⁷⁶ Based on the experiences of callers to JobWatch Employment Rights Legal Centre's Inquiry Line, post-WorkChoices.

¹⁷⁷ Andrew Creighton and Anthony Stewart, *Labour Law* (4th ed, 2005) 399.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 7)

THAT Australia be congratulated for its commitment to abolish Work Choices and for taking steps to phase out individual statutory agreements and restoring some unfair dismissal rights.

THAT Australia take steps to ensure that the realisation of Australian workers rights under Article 7 continues to evolve. In particular, that Australia take steps to ensure the award-making powers of any future award-making tribunal be sufficiently broad to allow for such evolution.

THAT Australia remove restrictions on unfair dismissal protection and refrain from reducing the time limit in which employees may apply for unfair dismissal remedies.

THAT Australia take steps to prevent further casualisation of the workforce and to promote job security.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

THAT Australia introduce a compulsory paid maternity leave scheme consistent with the internationally-recognised standard of 14 weeks.

Article 8 — Freedom of Association and Right To Strike

Article 8:

1. *The States Parties to the present Covenant undertake to ensure:*
 - (a) *The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*
 - (b) *The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*
 - (c) *The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*
 - (d) *The right to strike, provided that it is exercised in conformity with the laws of the particular country.*
2. *This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*
3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

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H. FREEDOM OF ASSOCIATION

219. Freedom of association covers the rights of workers to join and be represented by trade unions, to organise and to collectively bargain. Rights are also extended to the organisations themselves to draw up rules and constitutions, vote for officers, and organise administrative functions without interference from public authorities.

220. As discussed generally in relation to Articles 6 and 7, Australia's industrial relations laws are primarily found in the *Workplace Relations Act 1996* (Cth), which was significantly amended by the Work Choices amendments in 2005 (see [Article 6: Work Choices](#)). These amendments have further eroded freedom of association rights, which were already limited.
221. While the *Workplace Relations Act 1996* (Cth) protects the right of workers to join trade unions, Work Choices did not protect the benefits and consequences of being a member of a trade union. Work Choices laws limited the right to freedom of association by providing that:
- (a) employees have no right to engage in collective bargaining if their employer refuses;
 - (b) employees have no automatic right to be represented by their union in individual discussions and negotiations;
 - (c) union officials are restricted from entering worksites to speak to or recruit members; and
 - (d) members of unions are denied the right to freely draw up their own rules by mandating what matters may be included in union rules.
222. The former Australian Government was repeatedly reprimanded by the International Labour Organisation (**ILO**) for restricting freedom of association. In 2007, the ILO Committee of Experts on the Application of Conventions and Recommendations requested that the Australian Government amend sections of the *Workplace Relations Act 1996* (Cth) that interfere with the right of members to freely draw up the rules of their union and commented on the restrictive conditions imposed on the right of union representatives to visit workplaces.¹⁷⁸
223. As discussed in relation to Article 7, Work Choices also encouraged employers to use Australian Workplace Agreements, which undermine union membership and representation and the process of collective bargaining (see [Article 7: Fair and Equal Conditions](#)).

¹⁷⁸ International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Individual Direct Request concerning Freedom of Association and Protection of the Right to Organise Convention: Australia* (2007).

I. RIGHT TO STRIKE

224. Article 8 of the *ICESCR* provides that Australia is to ensure the right to strike. The right to strike is also considered an integral part of the principle of freedom of association. As discussed in relation to the freedom of association, *Work Choices* severely interferes with the rights of workers to take industrial action, including strike action.
225. The restrictions on the right to strike include:
- (a) lawful strikes can only be taken in pursuit of a collective agreement which does not contain prohibited content;¹⁷⁹
 - (b) strikes are unlawful if in pursuit of common wages and conditions for more than one agreement (pattern bargaining);
 - (c) multi-employer bargaining requires the pre-approval of the authorities, and industrial action cannot be taken in pursuit of a multi-employer agreement;
 - (d) a requirement for secret ballots before lawful strikes;
 - (e) the Australian Industrial Relations Commission must terminate a bargaining period in certain circumstances. When a bargaining period is terminated any strike action is then unlawful;
 - (f) the Minister has unprecedented powers to halt strikes, beyond an essential services exemption; and
 - (g) strikes are outlawed during the life of an agreement.
226. These measures combine to effectively deny the right to strike for many workers in Australia.
227. Both the *CESCR*, in its previous Concluding Observations,¹⁸⁰ and the International Labour Organisation have recommended that Australia limit its prohibitions on the right to strike to essential services, in accordance with the *Freedom of Association and Protection of the Right to Organise Convention (ILO Convention No 87)*.¹⁸¹ Instead of acting on these recommendations, Australia has since increased its prohibitions on the right to strike.¹⁸²

¹⁷⁹ 'Prohibited content' is defined by regulation and is content that cannot be included in agreements made under the Act. Examples of prohibited content includes a term of an agreement that allows employees to receive leave to attend union training sessions or paid leave to attend union meetings; deals with the rights of employee or employer organisations to be involved in dispute resolution (unless the organisation is the representative of the employer or employee's choice); or deals with right of entry by unions and employer associations.

¹⁸⁰ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [29].

¹⁸¹ See, eg, International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention: Australia* (2007).

¹⁸² See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

Case Study

The *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) effectively abolished the right to strike for workers in the building and construction industry. Along with the prohibitions on the right to strike referred to above in paragraph 225, the BCII Act also provides for financial penalties of up to \$110,000 for unions and \$22,000 for individuals who engage in 'unprotected' strike action.

The building and construction laws also restrict the right to freely associate by establishing the Australian Building and Construction Commissioner which has wide ranging powers to monitor and investigate the activities of unions and their members.

The ILO has requested Australia amend these laws to comply with the *Freedom of Association and Protection of the Right to Organise Convention (ILO Convention No 87)*.¹⁸³

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 8)

- Please explain how the right to strike is protected by Australian law and how restrictions on the right under domestic law are compatible with the *ICESCR*.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 8)

THAT Australia ensure that industrial relations laws and practices reflect the principle that the right to freedom of association and the right to strike encompass both the right to join a trade union and extend to the membership of a union.

¹⁸³ International Labour Organization, *Complaint against the Government of Australia Presented by the Australian Council of Trade Unions (ACTU) and Supported by the Trade Unions International of Workers of the Building, Wood and Building Materials Industries (UITBB)*, Report No 338, Case No 2326, Document No 0320053382326 (2005).

Article 9 — Right to Social Security

Article 9:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

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J. RIGHT TO SOCIAL SECURITY

228. An adequate income is necessary to ensure an adequate standard of living, to ensure that a person lives with dignity and free from want and to facilitate participation in the civil, political, economic, social and cultural aspects of community life.¹⁸⁴ An adequate income is also necessary for, and interdependent with, the realisation of other human rights including, particularly, the rights to health, sufficient food and water, education, housing and participation.
229. The social security system in Australia is set out in various pieces of legislation.¹⁸⁵ This legislation and social security policy is administered by a statutory authority called Centrelink. The entitlement of a person to social security in Australia is circumscribed by qualification and payability criteria which is set out in the legislation. Payments made are funded by general tax revenue, as distinct from other types of social security systems that are funded by contribution or insurance.

¹⁸⁴ Amartya Sen, *Development as Freedom* (1999) 87.

¹⁸⁵ *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth), the *Social Security (International Agreements) Act 1999* (Cth), *A New Tax System (Family Assistance) Act 1999* (Cth) and *A New Tax System (Family Assistance (Administration) Act 1999* (Cth).

J.1 Availability of Social Security Payments

230. Social security payments should be available to all people who experience a loss of income beyond their control or who require income support to ensure the realisation of their human right to an adequate standard of living.
231. In Australia, however, the *Social Security Act 1991* (Cth) has been interpreted and applied such that social security is ‘no more than a gratuity, to payment of which a person can have no rights enforceable at law’.¹⁸⁶ Not all people in Australia who require social security are able to access it. Such people include newly arrived migrants, people unable to provide adequate proof of identity and people unable to satisfy ‘mutual obligation’ requirements.¹⁸⁷ The mutual obligation requirements have a particularly adverse impact on marginalised and disadvantaged people.

J.2 Adequacy of Social Security Payments

232. A sufficient amount of social security should be paid to people to ensure the achievement of human dignity and an adequate standard of living. The benefits provided should ensure that the recipient does not fall below a clearly defined minimum subsistence level or poverty line. The Common Core Documents fails to address at all the issue of the adequacy of social security payments.
233. In Australia, social security payments are pegged at around or below the Henderson Poverty Line. In September 2007, Newstart, the base unemployment benefit, was paying \$212.15 per week to single unemployed adults, which was 43 per cent below the Henderson Poverty Line which required payment of \$374.27. For a couple with three children, the maximum welfare payments available provided an income 11 per cent below the Henderson Poverty Line.¹⁸⁸

J.3 Conditionality of Social Security Payments: Welfare to Work

234. In Australia, the provision of social security is conditional on meeting certain ‘mutual obligation’ requirements under the Welfare to Work program, which is discussed in more detail under [Article 6: Welfare to Work](#).
235. The Welfare to Work program has undermined what had previously been a strong safety net for those in need of income support. Unemployment benefits have been transformed by this program into ‘wage-like payments’ paid in return for job search and the achievement of other activity requirements. Under this system, ‘beneficiaries’ are required to sign contracts detailing their ‘reciprocal obligations’ and the vast majority of unemployed persons are

¹⁸⁶ See, eg, *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; contra, *Green v Daniels* (1977) 13 ALR 1.

¹⁸⁷ According to the Australian Institute of Health and Welfare, 8 per cent of homeless people have no form of income or income support: Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP National Data Collection Annual Report 2003–04* (2005) 63.

¹⁸⁸ See generally, Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia* (September Quarter, 2007).

- required to sign an ‘activity’ or ‘participation’ agreement. Failure to enter into such an agreement may render a person ineligible to receive the benefit claimed.¹⁸⁹
236. Those experiencing significant labour market barriers, such as homeless people, single parents, people with disability, people with a drug or alcohol disorder and women escaping domestic violence, are not excused from the mutual obligation requirements. These people are more likely than others to fail to comply with their obligations and, as a result, to breach their agreements. People with a mental illness, who constitute a substantial proportion of income support recipients,¹⁹⁰ are particularly disadvantaged by the mutual obligation requirements as they are often less capable of complying with and are therefore more likely to breach their agreements.
237. Breach of the provisions of an activity agreement may result in benefits being reduced or terminated. Immediate eight week no payment periods can be imposed where a person fails to accept a suitable job offer, becomes voluntarily unemployed, becomes unemployed due to misconduct or fails to commence, participate in or complete the Work for the Dole program (discussed under [Article 6: Work for the Dole](#)). ‘Participation failures’ can be imposed for failure to attend appointments and other administrative requirements and the incurring of three ‘participation failures’ over a twelve month period can also result in the imposition of an eight week no payment period.
238. The eight week no payment periods are a punitive measure intended to promote compliance with the activity requirements designed to facilitate entry into the workforce. In practice, however, such punitive measures are likely to have an effect opposite to that intended. Eight week no payment periods leave people unable to meet the basic costs of living and are ultimately counter-productive to labour market participation. These penalties have had a particularly harsh impact on vulnerable and disadvantaged groups, including Indigenous Australians¹⁹¹ and young people.¹⁹² For a discussion on the inadequacy of Youth Allowance, see [Article 11: Children and Young People](#).

¹⁸⁹ In the case of *Faure v Australia*, Communication No 1036/2001, UN Doc Supp No CCPR/C/85/C/1036/2001 (2005), the UN Human Rights Committee held that Australia is in breach of article 8 of the ICCPR by imposing ‘forced and compulsory labour’ on dole recipients under the ‘work for the dole’ scheme.

¹⁹⁰ A study commissioned by the Department of Family and Community Services in 2003 found that over a 12 month period 30 per cent of all income support recipients had a diagnosable mental health disorder. Over the same period it was found that 45 per cent of single parents receiving income support had a diagnosable mental health disorder; P Butterworth, ‘Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings’ (Department of Family and Community Services, Policy Research Paper Number 21, 2003).

¹⁹¹ Research undertaken in 1999 indicated Indigenous Australians were up to twice as likely as non-Indigenous Australians to be penalised under the old penalty regime: Will Sanders, *Unemployment Payments, the Activity Test and Indigenous Australians: Understanding Breaching Rates* (1999). The numbers of no payment periods imposed on Indigenous Australians under the new Welfare to Work penalty regime more than doubled in the second quarter after the introduction of the regime (September to December 2006): Department of Employment and Workplace Relations, *Job Seeker Compliance Data* (2006) available at <http://www.workplace.gov.au/workplace/Publications/ResearchStats/Participation+and+compliance+data>.

¹⁹² See generally *Report of the Breaching Review Taskforce* (2004) tabled in the Senate on 12 May 2005.

239. The Welfare to Work penalties can result in a loss of income beyond a person's control and to an extent that violates both the right to social security and, in turn, the right to an adequate standard of living.

Case Study

Michael suffers from a mental illness. He was deemed to have refused a suitable job offer and an eight week no payment period was imposed. During the eight weeks with no income he was unable to meet rent payments, was evicted and became homeless. He was unable to eat well and his mental health deteriorated to a point that he was involuntarily hospitalised.¹⁹³

J.4 Indigenous Australians

240. As a result of the intervention into Northern Territory Indigenous communities, Indigenous peoples are now subject to a rigorous income management regime. The Northern Territory Intervention is discussed in further detail at [Article 1: Intervention into Northern Territory Indigenous Communities](#).
241. As part of the income management regime, welfare payments, usually paid as cash deposits into bank accounts, are now quarantined for the majority of people living on Indigenous land in the Northern Territory. The majority of people will have 50 per cent of their welfare payments quarantined, however Indigenous parents who do not send their children to school will face the quarantining of 100 per cent of their payments. The income management regime requires that welfare payments to Indigenous peoples be made in vouchers, rather than cash, with which they can only purchase food and other basic needs from designated providers. These measures raise concerns in relation to the right to social security, as well as the right of self-determination for Indigenous people.

J.5 Immigration and Social Security

Newly Arrived Migrants

242. In its previous Concluding Observations, the CESCR called upon Australia to ensure that the two-year waiting period for the receipt of social security assistance by new immigrants does not infringe upon their right to an adequate standard of living.¹⁹⁴ However, newly arrived migrants to Australia must still, generally, wait for two years before being able to access any social security payments.¹⁹⁵ People serving the waiting period can only access a safety net payment if they are in financial hardship and have 'suffered a substantial change in circumstances beyond their control' after they have arrived in Australia.¹⁹⁶

¹⁹³ Case study provided by Welfare Rights Centre, Sydney.

¹⁹⁴ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [32].

¹⁹⁵ See Centrelink, *Recently Moved to Australia? A Guide to your Options and Our Services* (2007). People who come to Australia through the Offshore Refugee and Humanitarian Program are exempt from the two year waiting period.

¹⁹⁶ See, eg, *Social Security Act 1991* (Cth) s 739A(7).

243. The waiting period of two years and the requirement to establish a 'substantial change in circumstances' leaves many migrants in severe hardship. Most affected are people migrating on the basis of their skills and experience and who are unlikely to have family or community support in Australia. If they are unable to find employment, they are left with no money for basic food, shelter and health care needs. Research has shown the waiting period has a devastating affect on both individuals and families, with some people being forced into exploitative and even illegal employment to survive.¹⁹⁷

New Zealand Citizens

244. New Zealand citizens arriving in Australia are generally granted a 'special category visa' allowing them the right to live and work indefinitely in Australia. However, due to amendments to the *Social Security Act 1991* (Cth), New Zealand citizens arriving in Australia after 26 February 2001 are unable to claim social security payments unless they apply for and are granted Australian permanent residency status or citizenship.¹⁹⁸

Case Study

Helen is a New Zealand citizen residing as a permanent resident in Australia. She had lived and worked in Australia for 25 years from the age of 16 years. In 2000, Helen left Australia to work overseas for three years, returning in 2003. In 2006, she became seriously ill and had to leave work. As a New Zealand citizen who was absent from Australia at the time the law changed in 2001, Helen is not eligible to claim any social security payments.¹⁹⁹

Asylum Seekers

245. Asylum seekers have no right to access Australia's mainstream social security system. An asylum seeker who arrives in Australia on a visa and has applied for a protection visa more than six months ago may be eligible for some financial assistance through the Asylum Seeker Assistance Scheme.²⁰⁰ There are also some special categories of asylum seekers, such as unaccompanied minors, who are also eligible. Asylum Seeker Assistance Scheme payments are 89 per cent of the amount received under the Special Benefit Payment which is, in turn, pegged at a level significantly below the Henderson Poverty Line.

¹⁹⁷ See I Kaufman, *Prophets Among Us: New Residents Show How Social Security Law is Creating Poverty* (1999). See also Welfare Rights Centre, *Waiting to Settle, The Impact of the Social Security Two Year Newly Arrived Resident's Waiting Period on New Migrants and Our Community* (1998).

¹⁹⁸ There are some limited exemptions for people arriving after 26 February 2001 who are 'protected category visa holders'. People aged 65 or over and who meet length of residence requirements can be paid Age Pension under an International Social Security Agreement between New Zealand and Australia. In limited circumstances, Disability Support Pension and Carer payments may also be paid under this agreement.

¹⁹⁹ Case study provided by Welfare Rights Centre, Sydney.

²⁰⁰ A scheme funded by the Department of Immigration and Citizenship and administered by the Australian Red Cross. In order to be eligible for ASAS, asylum seekers must be in financial hardship and must have lodged a valid Protection Visa application more than six months previously.

246. Asylum seekers cease to be eligible for the Asylum Seeker Assistance Scheme when their protection visa application has been decided by the Department of Immigration and Citizenship under the *Migration Act 1958* (Cth) or when the Refugee Review Tribunal makes a decision on their application. Therefore, those asylum seekers who are seeking judicial review or ministerial intervention are not eligible for the Asylum Seeker Assistance Scheme. An asylum seeker may be waiting for at least 18 months to 2 years for the Minister or a court to make a decision on their case.
247. Asylum seekers who have been released from detention pending the outcome of their protection visa applications are also ineligible for Asylum Seeker Assistance Scheme assistance.
248. In 2004, a Senate Select Committee recommended that:

Children who are seeking asylum should have access to social security ... throughout the processing period of any applications for ministerial discretion ...²⁰¹

Currently, however, if a person applies for refugee status 45 days after arriving in Australia, they cannot work and they have no right to welfare payments.

Case Study

A young woman from the Horn of Africa, who lodged her protection visa application in 2000, has spent most of her time since then with no income and is chronically homeless, moving between friends until her welcome was outstayed, then moving on. Her days were spent trying to access food banks and looking for housing. She said she was often treated like a servant and felt scared much of the time. She faced high levels of anxiety, depression and health issues. At one point she was hospitalised for malnutrition before Hotham Mission Asylum Seekers Project was contacted and found housing for her.²⁰²

²⁰¹ Commonwealth of Australia, *Report of the Senate Select Committee on Ministerial Discretion in Migration Matters* (2004) Recommendation 10, [5.44].

²⁰² Case study in A McNevin, *Seeking Safety, Not Charity: A Report in Support of Work-Rights for Asylum-Seekers Living in the Community on Bridging Visa E* (2005) 20.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 9)

- Please explain how social security is enshrined as a right under Australian law.
- Please advise whether social security is available to all persons who experience a loss of income beyond their control and who require income support to ensure realisation of their human right to an adequate standard of living.
- What steps is the Australian Government taking to make social security payments accessible to newly arrived migrants, asylum seekers, people unable to provide adequate proof of identity, and marginalised and disadvantaged people unable to satisfy mutual obligation requirements?
- Please provide information as to whether the level of social security payments is adequate to support a dignified life and adequate standard of living.
- Please provide the Committee with further information on any research that has been undertaken to investigate the impact of no payment periods in facilitating return to employment.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 9)

THAT all necessary legislative and administrative steps be taken to ensure that:

- (a) social security payments are available to all people who experience a loss of income beyond their control or who require income support to ensure realisation of their human right to an adequate standard of living;
- (b) social security payments are increased to levels above the Henderson Poverty Line so that recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate housing, health care and an adequate standard of living; and
- (c) the breach penalty regime under the *Social Security Act 1991* (Cth) be amended so that people are only penalised if they wilfully and intentionally breach their mutual obligations. Penalties should be no longer than 8 weeks duration, no greater than 25 per cent of income and recoverable on compliance or reasonable steps.

THAT the waiting period for all newly arrived residents, including New Zealand citizens, be reduced to six months and that where a person is in financial hardship they have access to the special benefit – regardless of whether there has been a 'substantial change in circumstances beyond a person's control'.

THAT Australia ensure that asylum seekers are not left destitute and that they have access to social security payments, Medicare, higher education funding schemes and other social assistance.

Article 10 — Right to Family

Article 10

The States Parties to the present Covenant recognize that:

1. *The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.*
2. *Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.*
3. *Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.*

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K. RIGHT TO FAMILY

249. Article 10 highlights the key role of ‘family’ as the fundamental unit of society. Under Article 10, the Australian Government is required to protect and assist *all* families, whatever form those families may take. Article 10(2) provides that mothers should be provided with paid maternity benefits for a reasonable period before and after childbirth. Article 10(3)

requires special measures to be taken to ensure that children do not suffer discrimination by reason of their parentage or other conditions.

K.1 Maternity Leave and Child Care

250. Despite the recommendation in CESCR's previous Concluding Observations that Australia consider enacting legislation on paid maternity leave,²⁰³ Australia remains one of only two Organisation for Economic Co-operation and Development countries in the world not to have introduced a national paid maternity leave scheme. Under Work Choices, the current system requires women to negotiate paid maternity leave with their employers, which is inadequate for a number of reasons:

- (a) women in low-pay, casual positions rarely receive any maternity support;
- (b) as the sole financiers of paid maternity leave, employers may discriminate against women of child bearing age during employment and promotional processes; and
- (c) under Work Choices, any paid maternity leave entitlements that exist are easily lost as a result of negotiations.

251. In relation to child care, the Common Core Document refers to the entitlement of families to a lump sum 'Baby Bonus' after the birth or adoption of a child to recognise 'the extra costs associated with the birth or adoption of a child, including the loss of income while on unpaid maternity leave'.²⁰⁴ However, the lump sum of \$4,187.00²⁰⁵ awarded for each child is inadequate to cover the costs of pregnancy, childbirth and the first year of a baby's life. While government contributes to the cost of childcare, long day childcare services are scarce with extensive waiting lists.²⁰⁶

252. Article 10 of the *ICESCR* provides that families should be afforded the widest possible protection and assistance, particularly while it is responsible for the care and education of dependent children. Consequently, the Australian Government should provide a supportive framework for parents and/or guardians to care for their children, and provide the special protection minors require. Supporting parents to care for their children can be achieved in a range of ways; for example, by increasing subsidised childcare, income support, tax relief, statutory-paid maternity leave and employment opportunities for parents.

²⁰³ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [28].

²⁰⁴ Common Core Document, above n 3, [347].

²⁰⁵ Department of Families, Housing, Community Services and Indigenous Affairs, *Family Assistance Guide* (2008) 3.3 available at http://www.facsia.gov.au/guides_acts/fag/faguide-3/faguide-3.3.html. Unlike other mothers, mothers under the age of 18 are paid the amount in 13 equal fortnightly payments rather than a lump sum: at 2.4.3.

²⁰⁶ Rebecca Bartel, 'The Child-Care Problem Can't Be Denied Away', *The Age* (16 May 2006) available at <http://www.theage.com.au/news/opinion/the-childcare-problem-cant-be-denied-away/2006/05/15/1147545259719.html>.

253. Prior to its election to government in November 2007, the current Australian Government promised to increase the childcare tax rebate from 30 per cent to 50 per cent and to pay the rebate quarterly.²⁰⁷ It also committed to invest \$77 million into improving the quality of childcare.²⁰⁸ The current Australian Government's pre-election commitment to increase the childcare tax rebate is welcomed. However, it is encouraged to provide details of the proposed implementation timeline for this initiative.
254. In February 2008, the current Australian Government released terms of reference for a Productivity Commission inquiry into the introduction of a paid maternity, paternity and parental leave scheme, which is to be released by February 2009.²⁰⁹

K.2 Family Separations

255. Amendments to the *Family Law Act 1975* (Cth) in 2006²¹⁰ were 'designed to bring about a generational change in how family conflicts are managed after separation'.²¹¹ However, there are significant concerns that the changes will cause a decline in Australia's protection of, and assistance to, families responsible for the care of dependent children, as well as a decline in the protection of children following dissolution of marriage.
256. The *Family Law Act 1975* (Cth) now places a greater emphasis on the role of both parents in the life of a child. The 'best interests of the child', which is the paramount consideration in making decisions about parenting orders,²¹² has been re-defined to include primary considerations of 'the benefit to the child of having a meaningful relationship with both of the child's parents' and 'the need to protect the child from physical or psychological harm from being subject to, or exposed to, abuse, neglect or family violence'.²¹³ In addition, there is now a presumption that 'equal shared parental responsibility' is in the best interests of the child, although this presumption does not apply if there are reasonable grounds to believe that family violence or child abuse is involved.²¹⁴ Where a court makes an equal shared responsibility order, it must consider giving parents equal time, or if not equal time then 'substantial and significant time' with the child.²¹⁵

²⁰⁷ Kevin Rudd and Jenny Macklin, 'Federal Labor's Affordable Child Care Plan — A 50 per cent Child Care Tax Rebate Paid Quarterly' (Press Release, 22 October 2007); Australian Labor Party, *Policy Document: Labor's Affordable Child Care Plan* (2007).

²⁰⁸ Kevin Rudd and Jenny Macklin, 'Federal Labor's Plan for High Quality Child Care — Giving Parents Peace Of Mind' (Press Release, 23 October 2007).

²⁰⁹ Julia Gillard, Jenny Macklin and Wayne Swan, 'Productivity Commission to Investigate Paid Maternity Leave' (Press Release, 17 February 2008) available at <http://www.alp.org.au/media/0208/msewrfcstres170.php>.

²¹⁰ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

²¹¹ Phillip Ruddock, 'Family Law: A New System, A New Culture' (Press Release, 12 May 2005).

²¹² *Family Law Act 1975* (Cth) s 60CA.

²¹³ *Family Law Act 1975* (Cth) s 60CC.

²¹⁴ *Family Law Act 1975* (Cth) s 61DA.

²¹⁵ *Family Law Act 1975* (Cth) s 65DAA.

257. While there are some legislative safeguards for cases involving family violence or abuse,²¹⁶ concern remains that the safety of children and their families is inadequately protected in practice. There was already a pro-contact culture that permeated family law practice prior to the 2006 amendments, which promoted the right to contact over a child's safety.²¹⁷ There is a concern that this is likely to be exacerbated by the 2006 amendments and that the emphasis on 'the benefit to the child of having a meaningful relationship with both of their parents may directly conflict with and override the provisions that are intended to recognise the need to protect children from family violence and abuse'.²¹⁸
258. A further concern is that the provisions requiring the consideration of equal time or substantially shared time arrangements prioritise parents' claims to equality and diminish the significance of the principle that the best interests of the child are paramount in deciding where a child will live and with whom the child will spend time.²¹⁹ Early research into the impact of these new provisions indicates that children in shared care arrangements may be subject to significant parental conflict, impacting on a child's development over time.²²⁰
259. In its Concluding Observations in 2005, the Committee on the Rights of the Child referred to the need to address issues such as alternative care and protection from abuse and violence.²²¹ Considerable concern remains regarding the inadequacy of services and systems for care and protection of children that are provided at a state and territory level. This deficiency continues to impact the ability of many children to be afforded the protection required for them under Article 10 of the *ICESCR*. While the New South Wales Government has recently instigated a Special Commission of Inquiry into Child Protection, it is clear that national coordination, best practice development and adequate resourcing in the area is required to ensure that special protection and assistance measures are provided to these particularly vulnerable children.

K.3 Immigration

260. A family's right to live together is protected by Article 10 of the *ICESCR*, which provides that Australia must provide the 'widest possible protection and assistance' to the family 'which is the natural and fundamental group unit of society'. The right to family unity is not limited to citizens and it is particularly common for refugee families to be separated. In this respect, the United Nations High Commissioner for Refugees has stated that 'respect for the right to family

²¹⁶ *Family Law Act 1975* (Cth) ss 60I(9)(b) and 61DA(2).

²¹⁷ Women's Legal Services Australia, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 3 available at http://www.apf.gov.au/Senate/committee/legcon_ctte/family_law/submissions/sublist.htm.

²¹⁸ *Ibid* 4.

²¹⁹ *Ibid*.

²²⁰ J E McIntosh and C Long, *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes* (Report to the Family Court of Australia, 2007). The study found that found that 73 per cent of parents involved in shared care arrangements following a court decision reported as 'almost never' cooperating with each other and 39 per cent reported that they are 'never' able to protect their children from their conflict.

²²¹ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [14], [28] and [37]–[44].

unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and to reunite family members who have been separated'.²²²

261. In the area of Australian immigration law, family unity issues arise most frequently where:
- (a) there are moves to deport a non-citizen family member;
 - (b) a family member is denied the ability to bring family members to Australia; or
 - (c) entry is denied to an individual seeking to join family members already residing in Australia.
262. In Australia, only people who are on a permanent visa may sponsor family members, including spouses and dependant children. Individuals with a temporary protection visa²²³ must wait the three to five years until they can apply for a permanent visa before being able to sponsor family members to join them, while others cannot apply for a permanent visa at all unless the Minister for Immigration permits them to do so.²²⁴ Several studies have noted the damaging effects of temporary visas on the mental health of refugees, which is often compounded by pre-existing trauma.²²⁵ Prior to its election to government, the current Australian Government stated that it would abolish temporary protection visas.²²⁶ However, to date, this has not occurred.
263. In addition, all family members migrating to Australia must pass strict health criteria.²²⁷ Most permanent visas require all members of the family unit to undergo health examinations and satisfy the health requirement. This applies regardless of whether that family unit member is a visa applicant and/or intends to join the visa applicant in Australia. Thus 'where one member of the family fails any of the public interest criteria, the entire family unit fails'.²²⁸ There is provision for Department of Immigration and Citizenship officers to exercise discretion and to 'waive' the requirement. Particularly in relation to people with disability, this policy provides for lawful discrimination and raises concerns in relation to Article 2 of the *ICESCR*.

²²² UN High Commissioner for Refugees, *Summary Conclusions on Family Unity* (Geneva Expert Roundtable, 8 – 9 November 2001) [5].

²²³ The temporary protection visa (**TPV**) was introduced in 1999. Persons holding a TPV are assessed to be genuine refugees, but are only provided protection for three years. After 30 months, TPV holders are eligible to apply for Permanent Residency: see further Department of Immigration and Citizenship, *Fact Sheet 64: Temporary Protection Visas* (2007).

²²⁴ Those on Refugee Humanitarian (Class XB) Subclass 447 Secondary Movement Offshore Entry are only able to apply for a permanent visa if the Minister for Immigration and Citizenship personally exercises his or her discretion to allow them to apply.

²²⁵ See, eg, Shakeh Momartin et al, 'A Comparison of the Mental Health of Refugees with Temporary Versus Permanent Protection Visas' (2006) 185 *Medical Journal of Australia* 357.

²²⁶ T Burke, 'Immigration Policy' (Speech presented to the Australian Labor Party National Conference, 27 April 2007).

²²⁷ Health criteria are found in *Migration Regulations 1994* (Cth) sch 4, cl 40.

²²⁸ Commonwealth Ombudsman, *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application* (2001) 2.

Case Study

Shahraz was recognised as a refugee in 1996. He attempted to sponsor his family members to Australia several times over a period of four and a half years. The Department of Immigration and Citizenship refused to exercise its discretion to waive the health requirement in respect of his disabled child who, together with his wife and two daughters, were seeking to join him.

Shahraz lost all hope of ever being reunited with his wife and children and died as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. As a result of an investigation, the Commonwealth Ombudsman stated that 'the history of this case is one of administrative ineptitude and of broken promises' and recommended that the health requirements for immediate family members be no different than those for their proposers.²²⁹ To date, this recommendation has not been implemented.

264. Section 501 of the *Migration Act 1958* (Cth) can also operate in a manner inconsistent with the right to family under Article 10 of the *ICESCR*. Section 501 entitles the Minister to refuse or cancel a visa, including a permanent residency visa, on character grounds. There are numerous cases where this has resulted in the separation of families, including families with children.

Case Study

Stefan Nystrom was born in Sweden in 1973. His mother, Britt, a permanent resident of Australia, was pregnant and had travelled to Sweden to visit family members. When it became clear that it would be difficult to return to Australia because of her advanced state of pregnancy, his mother stayed in Sweden for Stefan's birth. When he was 25 days old, Stefan travelled to Australia and, until recently, had not left Australia since. Stefan is now 33 years old.

In November 2006, following an unsuccessful appeal to the High Court, Stefan's residency was cancelled because of his failure to pass the 'character test' specified in section 501(6) of the *Migration Act 1958* (Cth) due to his 'substantial criminal record'. Prior to being notified that the Minister intended to cancel his visa in 2004, Stefan thought he was an Australian citizen. He is a Swedish citizen but has no relevant ties to Sweden or any State other than Australia.

Stefan, who knows no country other than Australia, was deported to Sweden on 29 December 2006. He does not speak Swedish and has no relevant ties or connections with Sweden other than being born there while his mother was travelling. His detention and deportation have resulted in significant physical and mental deterioration. It has also resulted in his permanent separation from his mother and father, and his sister (who is an Australian citizen) and her children.²³⁰

²²⁹ Ibid 1.

²³⁰ Case study provided by the Human Rights Law Resource Centre. This case is now the subject of a communication to the Human Rights Committee under the First Optional Protocol to the ICCPR: *Nystrom v Australia*, Communication No 1557/2007 (2007).

K.4 Same-Sex Couples and their Families

265. As discussed in relation to Article 2: Sexual Orientation and Gender Identity, the Australian Government has failed to rectify discrimination on the basis of sexual orientation at a national level. The Australian Government passed legislation in 2004 to ensure that the marriage of same-sex couples could not be recognised under Australian law.²³¹ The current Australian Government, which was in opposition at the time, supported the substance of the legislation.²³²
266. In relation to the right to work, people in same-sex relationships are not provided with the same entitlements as equivalent workers in opposite sex relationships. Same-sex couples experience discrimination by the failure to extend legislative carer's leave, compassionate leave and parental leave protections to same-sex partners and same-sex co-parents.²³³
267. The Human Rights and Equal Opportunity Commission found that these discriminatory laws impact negatively on the rights of children in numerous areas and that 'the best interests of children would be better protected if federal, state and territory laws changed to recognise the relationship between a child and both parents in a same-sex couple'.²³⁴
268. As a signatory to both the *ICESCR* and the *Convention on the Rights of the Child*, Australia has an obligation to ensure that the best interests of *all* children, without discrimination based on the marital status or sexual orientation of a child's parents, is to be a primary consideration in all government actions that concern children.²³⁵
269. Prior to the November 2007 election, the Australian Labor Party committed to removing discrimination on the basis of sexual orientation in federal laws.²³⁶ In March 2008, an 'audit' by the current Australian Government revealed that approximately 100 laws discriminate against same-sex couples.²³⁷ While the Australian Capital Territory has recently stated its intention to legislate to allow both partners in a same-sex relationship to access parental

²³¹ See footnote 84 above.

²³² Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 June 2004, 314460 (Nicola Roxon, Shadow Attorney-General).

²³³ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements — National Inquiry into Discrimination against People in Same-Sex Relationships* (2007) 118–20.

²³⁴ *Ibid* chapter 5; Human Rights and Equal Opportunity Commission, 'Simple Changes Could End Discrimination for Thousands of Australian Couples' (Press Release, 21 June 2007). The Human Rights and Equal Opportunity Commission noted that in the majority of cases, ending discrimination would only require a simple amendment to the definition of 'de facto relationship' in existing legislation.

²³⁵ ICESCR art 10; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990) art 2(2).

²³⁶ Shadow Attorney-General Joe Ludwig, 'Labor Welcomes Human Rights and Equal Opportunity Report on Same-Sex Entitlements' (Media Statement, 21 June 2007). The Australian Labor Party Platform also commits the party to providing equitable treatment to same-sex couples, including in respect of superannuation: Australian Labor Party, *ALP National Platform and Constitution* (2007) [195].

²³⁷ Patricia Karvelas, '100 Laws Ignore Same-Sex Couples', *The Australian* (Sydney), 1 March 2008 available at <http://www.theaustralian.news.com.au/story/0,25197,23300057-5013871,00.html>.

leave,²³⁸ no amendments have yet been made to the discriminatory federal laws. Federal Attorney-General, Robert McClelland, reported that much of the current Australian Government's reform in this area will be implemented in the May 2008 budget.²³⁹

K.5 Parents with Intellectual Disability

270. The lack of appropriate parenting support services in Australia has contributed to a disproportionate number of parents with intellectual disability having their children removed by child-protection services.²⁴⁰ General parenting support services, particularly those provided by state and territory child-protection authorities, often do not have the knowledge, skills and resources to provide appropriate services to parents with intellectual disability. Moreover, child protection workers commonly hold stereotypical views about the parenting capacity of people with intellectual disability.²⁴¹
271. There is a tendency for workers to favour removing the child of a parent with intellectual disability rather than instituting early-intervention measures and providing services to support the adult's parenting capacity.²⁴² Further, child protection workers often lack knowledge of specialist support services that are available for parents with intellectual disability such as the Commonwealth funded program 'Healthy Start'.²⁴³

K.6 Prisons

272. Article 10(1) of the *ICESCR* provides that all families, including those where a parent is imprisoned, are entitled to protection and assistance from the State. The majority of female prisoners in Australia are mothers of dependent children, who are most likely to be under the age of 12.²⁴⁴ Approximately 5 per cent of all Australian children and 20 per cent of Indigenous children have experienced the incarceration of one of their parents.²⁴⁵ Children who have parents in prison are more likely to have emotional, social and behavioural problems, as well as health problems and difficulties at school.²⁴⁶

²³⁸ ABC News, 'ACT to Pass Same-Sex Parental Laws' (3 February 2008) available at <http://www.abc.net.au/news/stories/2008/02/03/2153007.htm>.

²³⁹ Patricia Karvelas, '100 Laws Ignore Same-Sex Couples', *The Australian* (Sydney), 1 March 2008 available at <http://www.theaustralian.news.com.au/story/0,25197,23300057-5013871,00.html>.

²⁴⁰ Robyn Mildon, Catherine Wade and Jan Matthews, 'Intellectual Disability and Parenting' (2006) 12 *Every Child* 12.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ For more information on the 'Healthy Start' program, see <http://www.healthystart.net.au>.

²⁴⁴ R Woodward, 'Families of Prisoners: Literature Review on Issues and Difficulties' (Department of Family and Community Services, Occasional Paper No 10, 2003) 6.

²⁴⁵ Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of Legal Process* (2006) Executive Summary, 2.

²⁴⁶ Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *Crime Prevention through Social Support: First Report* (1999); Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of Legal Process* (2006) 6.

273. Protocols and policies for arresting and incarcerating parents with dependent children are minimal and inconsistent between jurisdictions.²⁴⁷ To use Victoria as an example:
- (a) Victoria Police has no guidelines or policies that cover the apprehension, arrest, charging or detention of primary carers with dependent children;²⁴⁸
 - (b) Victorian bail laws do not refer to the needs of dependent children, and there are no court, police, prisons or human services guidelines or policies in place regarding who takes responsibility for children when a mother is unable to obtain bail;²⁴⁹ and
 - (c) on entering a Victorian prison, no policy exists for ascertaining the existence of dependent children and whether the children are currently at risk.²⁵⁰
274. Where a parent must be incarcerated, all attempts should be made to maintain the parent-child relationship. Whilst parents may have statutory rights to personal visits, Australian prisoners frequently report difficulties in maintaining a relationship with their children.
275. Article 10(2) of the *ICESCR* also requires States to accord mothers special protection during a reasonable period before and after childbirth. This includes mothers who are in prison. Pregnant women need to be provided with pre- and post-natal care within prison contexts. Further, shackling of women during birth must be prohibited, as it endangers the health of the mother and the baby.²⁵¹ Community organisation 'Sisters Inside' report at least one known case of a woman in Queensland giving birth in shackles.²⁵²

²⁴⁷ Renee Lees, *Stop the Women's Jail Anti-Prisons Resource Kit* (2001).

²⁴⁸ Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of Legal Process* (2006) Executive Summary, 3.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid* 4.

²⁵¹ K Healey, D Foley and K Walsh, 'Families Affected by the Imprisonment of a Parent: Towards Restorative Practices' (2001) 26(1) *Children Australia* 14.

²⁵² Sisters Inside, *Report on Women and Housing in Queensland* (undated) available at <http://www.sistersinside.com.au/media/housing.doc>.

L. PROTECTION OF CHILDREN

276. The Australian Government has no national policy for children, despite previous recommendations of the UN Committee on the Rights of the Child.²⁵³ This is reflected in the discussion in this submission in relation to the following issues:
- (a) the lack of a human rights framework in its response to the identified problem of child sexual abuse in remote Indigenous communities (see Article 1: Intervention into Northern Territory Indigenous Communities);
 - (b) the inadequate provision of emergency accommodation to children experiencing domestic violence (see Article 3: Violence against Women);
 - (c) discrimination against same-sex couples and their children (see Article 2: Sexual Orientation and Gender Identity and Article 10: Same-Sex Couples and their Families);
 - (d) the higher risk of poverty of young people receiving social security payments and risk of an inadequate standard of living (see Article 11: Children and Young People); and
 - (e) the funding inequity between public government schools and private schools (see Articles 13 and 14: Primary and Secondary School Education).
277. In addition to the concerns that these issues raise in relation to Article 10 of the *ICESCR*, the following issues also require particular mention.

L.1 Children in Immigration Detention

278. In 2004, a Human Rights and Equal Opportunity Commission inquiry found that Australia's immigration detention laws, which are administered by the Australian Government and apply to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the Convention on the Rights of the Child.²⁵⁴ While the removal of children from mainland detention centres in 2005 was a positive step, refugee and asylum seeker children and families remain inadequately protected. The non-detention of children is not legislatively guaranteed; rather, the legislation gives the Minister a non-compellable discretion to determine that a person is to reside somewhere other than in immigration detention 'if the Minister thinks that it is in the public interest to do so'.²⁵⁵

²⁵³ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [14].

²⁵⁴ Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

²⁵⁵ *Migration Act 1958* (Cth) s 197AB. The current Australian Government has maintained since 2002 (during which time it was in opposition) that 'immigration detention centres are no place for children': Stephen Smith, 'Howard Government Slammed by HREOC for Children in Detention Policy and Administration' (Press Release, May 2004).

L.2 Child Labour

279. Western Australia, Tasmania, Northern Territory, and New South Wales do not impose restrictions on the number of hours that children can work, nor do they prescribe a minimum age for most industries. This legislative gap demonstrates the Australian Government's failure to work with state and territory governments to ensure Australia's child-employment laws are consistent with Article 10 of the *ICESCR*.
280. Unlike all other industrialised nations, Australia has not ratified *ILO Convention 138 Concerning the Minimum Age for Admission to Employment*.²⁵⁶ ILO Convention 138 states that the minimum age of admission into paid employment should be no less than the age of completion of compulsory schooling, although light work may be undertaken below this age with a restriction on the number of hours.²⁵⁷
281. Australia lacks uniform laws across industries that specifically protect children from the particular health risks in the workplace. While health and safety among child workers has not been extensively studied in Australia, the Victorian Government has recognised that factors including inexperience, failure to recognise unsafe conditions and a reluctance to ask for assistance puts children at increased risk in an employment environment. Specific industries of risk include farming, construction sites and clothing manufacture outsourcing — industries in which children frequently work with parents.²⁵⁸ Consistent with this recognition, Victoria has enacted the *Child Employment Act 2003* (Vic), which seeks to protect the health, safety and moral welfare of children who work.²⁵⁹ However, it is important to note that this statutory protection is only available at the state level and lacks the coordinated national treatment required of Australia consistent with its obligations under Article 10(3) of the *ICESCR*.
282. The Australian Fair Pay Commission is currently undertaking a review of junior wages rates in the Australian labour market.²⁶⁰ Competency-based wages would be a positive step for young people in removing state-sanctioned discrimination on the basis of age.

²⁵⁶ International Labour Organization, *Ratifications by Country* (2008) available at <http://www.ilo.org/ilolex/english/newratframeE.htm>.

²⁵⁷ International Labour Organization, *Minimum Age Convention*, adopted 26 June 1973, ILO No C138 (entered into force 19 June 1976) articles 2(3) and 7(3).

²⁵⁸ Work Safe Victoria, *Keeping Children Safe in the Workplace* (September 2006) 5–6 and 10 available at http://www.worksafe.vic.gov.au/wps/wcm/resources/file/eb5a6b4176b9155/children_workplace_guidance.pdf.

²⁵⁹ See Business Victoria, *Key Aspects of the Child Employment Act* (2008) available at http://www.business.vic.gov.au/BUSVIC/STANDARD//PC_50560.html.

²⁶⁰ Australian Fair Pay Commission, 'Commission Launches Pay Scale and Junior and Training Wages Reviews' (Press Release, 26 September 2007).

L.3 Forced Sterilisation of Children with Disability

283. Forced sterilisation refers to 'surgical intervention resulting either directly or indirectly in the termination of an individual's capacity to reproduce' that is undertaken without the informed consent of the individual.²⁶¹ The Committee on the Rights of the Child has expressed its deep concern about the practice of forced sterilisation of children with disability, particularly girls with disability, and has emphasised that forced sterilisation 'seriously violates the right of the child to her or his physical integrity and results in adverse life-long physical and mental health effects'.²⁶²
284. The Human Rights and Equal Opportunity Commission has also expressed similar concerns in its 2001 report, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*.²⁶³ In that report, the Commission highlighted the need for uniform national standards prescribing the circumstances in which children can be sterilised and recommended that the Commonwealth and State Attorneys-General debate possible avenues of legislative reform to achieve increased accountability in relation to sterilisation decisions, such as, for example, through increased judicial oversight.²⁶⁴
285. In its previous Concluding Observations, the Committee on the Rights of the Child encouraged Australia to 'prohibit the sterilisation of children, with or without disability'.²⁶⁵ Despite this, Australian legislation still fails to prohibit forced sterilisation.
286. In 2001, Women With Disabilities Australia, the national peak body representing women and girls with disability in Australia, completed a national research study into sterilisation and reproductive health of women and girls with disability. Its report, entitled *Moving Forward*, recommended the banning of all sterilisations of girls under the age of 18 years and the prohibition of sterilisation of adults in the absence of informed consent, except in circumstances where there is a serious threat to health or life.²⁶⁶
287. Despite these recommendations, the former Australian Government released draft legislation which set out procedures relating to authorisation of the sterilisation of children with an intellectual disability.²⁶⁷ While the current Australian Government's position on the proposed legislation is not clear, the development of a measured and considered approach to this issue

²⁶¹ Women With Disabilities Australia, *The Development of Legislation to Authorise Procedures for the Sterilisation of Children with Intellectual Disabilities: Policy and Position Paper* (2007).

²⁶² Committee on the Rights of the Child, *General Comment No 9 (2006): The Rights of Children with Disabilities*, UN Doc CRC/C/GC/9 (2007).

²⁶³ Human Rights and Equal Opportunity Commission, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress* (2001) available at http://www.hreoc.gov.au/disability_rights/sterilisation/index.html.

²⁶⁴ *Ibid* chapter 6.

²⁶⁵ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [46(e)].

²⁶⁶ Leanne Dowse and Carolyn Frohmader, *Moving Forward: Sterilisation and Reproductive Health of Women and Girls with Disabilities, A Report on the National Project Conducted by Women with Disabilities Australia* (2001).

²⁶⁷ Standing Committee of Attorneys-General, *Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006 (Cth)* (draft).

is required that is consistent with the rights contained in Article 10 of the *ICESCR* and the recommendations of the Committee on the Rights of the Child.

288. In addition to concerns regarding Article 10 of the *ICESCR*, the processes and procedures outlined in the draft legislation raise serious concerns under Article 17 of the *Convention on the Rights of Persons with Disabilities* (to which Australia has recently become a signatory), which relates to respecting every woman's physical and mental integrity on an equal basis.²⁶⁸

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 10)

- Please provide details of the outcomes of Productivity Commission inquiry the establishment of a paid parental leave scheme.
- Please provide details as to whether there are currently any children being held in both on-shore and off-shore immigration detention.
- Prior to being elected as the current Australian Government in November 2007, the Australian Labor Party committed to removing discrimination on the basis of sexual orientation in Federal laws.²⁶⁹ Please provide further information on the Australian Government's plans to implement the recommendations of the Human Rights and Equal Opportunity Commission's *Same-Sex: Same Entitlements* report and also to amend the other laws that the Australian Labor Party has found to discriminate against same-sex couples and their families.
- Please provide further information on whether the Australian Government intends to proceed with the draft Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 10)

THAT Australia consider implementing a comprehensive national paid parental leave scheme, including compulsory paid maternity leave consistent with the internationally-recognised standard of 14 weeks.

THAT Australia make it a priority to resettle family members of individual refugee and humanitarian permanent residents.

THAT Australia abolish temporary protection visas for refugees and replace them with permanent protection or permanent residency visas.

THAT Australia commit to working with state and territory governments towards a nationally consistent approach to relationship recognition, in particular one that includes both same-sex and, mixed-sex couples on terms of equality, and also other interdependent relationships.

²⁶⁸ *Convention on the Rights of Persons with Disabilities*, adopted by the UN General Assembly on 13 December 2006, opened for signature 30 March 2007, article 17.

²⁶⁹ Shadow Attorney-General Joe Ludwig, 'Labor Welcomes Human Rights and Equal Opportunity Report on Same-Sex Entitlements' (Media Statement, 21 June 2007).

THAT Australia take immediate steps to ensure minimum entitlements such as personal/carer's leave, compassionate leave and parental leave are afforded to all employees regardless of sexual orientation.

THAT Australia legislate to remove discrimination against same-sex couples and their families, including by implementing the recommendations contained in the Human Rights and Equal Opportunity Commission's report on *Same-Sex: Same Entitlements*.

THAT Australia take steps to ensure that families can access housing, health and employment services following the release of a parent from prison.

THAT Australia ensure that all states and territories implement consistent policies addressing the needs of dependent children during the arrest and incarceration of their primary carer, in particular by considering alternative sentencing options such as the suitability of home detention, periodic detention or community-based orders.

THAT Australia legislate comprehensively to ensure that no child may be held in an immigration detention centre.

THAT Australia commit to a specific timeframe for all Australian state and territory governments to provide a minimum age for paid employment and/or a maximum number of allowable work hours for children subject to compulsory schooling.

THAT Australia ensure all states and territories abolish junior or youth rates of pay replacing them with equal rates of pay for equal work, with payments based on responsibilities and skills required in the job, not age.

THAT Australia ratify ILO Conventions 138 Concerning the Minimum Age for Admission to Employment and 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

THAT Australia adopt legislation to prohibit the sterilisation of children, including children with disability.

Article 11 — Right to an Adequate Standard of Living

Article 11:

1. *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*
2. *The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*
 - (a) *To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*
 - (b) *Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.*

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M. RIGHT TO AN ADEQUATE STANDARD OF LIVING

289. Article 11 of the *ICESCR* states that everyone has the right to an adequate standard of living. What constitutes an adequate standard of living can be assessed by reference to those items that the community perceives to be social necessities or essentials.²⁷⁰ In Australia, items regarded by the community to be social necessities or essentials include, in particular, access to medical services and treatment, a substantial meal at least once a day, clothing and bedding and an adequate and secure home.²⁷¹

M.1 Extent of Poverty

290. In 2004, a Senate Community Affairs Reference Committee produced a report on poverty and financial hardship in Australia entitled *A Hand Up Not a Hand Out: Renewing the Fight against Poverty*.²⁷² The Report listed a number of different estimates of poverty in Australia, which generally ranged between 2 to 3.5 million people.²⁷³ Recent research conducted by the Australian Council of Social Service indicates that 10 per cent of Australians live below the 50 per cent Median Income Poverty Line, which translates to about 2 million Australians living in poverty.²⁷⁴

291. The *A Hand Up Not a Hand Out* report recommended, among other things, that a comprehensive anti-poverty strategy be developed at the national level to coordinate action to reduce poverty across policy areas such as employment, health, education, income support, community services and housing.

292. The Report also recommended that the Australian Government establish benchmarks and targets to measure progress against anti-poverty objectives.²⁷⁵ To date, the Australian Government has not implemented these recommendations. In the same direction, the CESCR in its previous Concluding Observations recommended that Australia establish an official poverty line.²⁷⁶ This has not been done despite the utility that a comprehensive official poverty line would have in Australia.

²⁷⁰ Peter Saunders, Yuvisthi Naidoo and Megan Griffiths, *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia* (2007) 11.

²⁷¹ See 'Chapter 4: The Essentials of Life' in Peter Saunders, Yuvisthi Naidoo and Megan Griffiths, *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia* (2007).

²⁷² Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not A Hand Out: Renewing the Fight Against Poverty* (2004).

²⁷³ *Ibid* xv–xvi.

²⁷⁴ Australian Council of Social Service, *Australia Fair: Update on Those Missing Out* (2007) 4.

²⁷⁵ Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not A Hand Out: Renewing the Fight Against Poverty* (2004) Recommendations 94 and 95.

²⁷⁶ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [33].

293. The Common Core Document states that simplistic income poverty lines tend to obscure the wide range of factors that lead to disadvantage.²⁷⁷ Without the establishment of a comprehensive official poverty line, a credible assessment cannot be made of the extent of poverty in Australia and Australia will continue to fail to enable measurement of its movement towards (or away from) the progressive realisation of the rights contained in the *ICESCR*.

M.2 Homelessness

294. Article 11 of the *ICESCR* recognises that all people have the right to adequate housing, which includes a right to live somewhere in security, peace and dignity.²⁷⁸

295. Evidenced by the statistics on homelessness, the former Australian Government failed to ensure that all members of society had access to adequate and secure housing regardless of age or economic status. According to the Australian Bureau of Statistics, over 100,000 people experience homelessness across Australia on any given night. This includes over 14,000 people sleeping rough or in squats, more than 14,000 in crisis accommodation or refuges, almost 23,000 in boarding houses and nearly 49,000 people staying with friends or relatives.²⁷⁹ A further 23,000 people across Australia live temporarily in caravan parks.²⁸⁰ Further, the available evidence suggests that between 35 per cent and 50 per cent of homeless people fail to gain access to emergency accommodation services, hiding the true extent of homelessness.²⁸¹

296. The causes of homelessness in Australia are complex and varied. However, they are generally acknowledged to include: poverty, severe financial hardship and lack of access to adequate income support, unemployment, lack of affordable housing, domestic and family violence, mental illness and lack of access to health care, drug and alcohol disorders and lack of access to drug treatment services, problem gambling, discrimination, disability and evictions.²⁸² In many cases of homelessness, these causes are intersectional and inter-related.

297. The current Australian Government has commissioned a Green Paper on Homelessness which will take into consideration the ideas and views of the community as to how Australia should address homelessness over the next decade.²⁸³ This will then be followed by a White Paper and a plan for action, which is expected to be completed by August 2008.

²⁷⁷ Common Core Document, above n 3, [483].

²⁷⁸ CESCR, *General Comment No 4: The Right to Adequate Housing (Article 11)*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

²⁷⁹ Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 2.

²⁸⁰ *Ibid* 6.

²⁸¹ *Ibid*.

²⁸² See generally Australian Bureau of Statistics, *Counting the Homeless 2001* (2003); Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2003–04* (2005); Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004).

²⁸³ Australian Government, *Homelessness: A New Approach* (2008) 7.

Supported Accommodation Assistance Program

298. The primary government response to homelessness in Australia is through the national Supported Accommodation Assistance Program. This program is jointly funded by Australian federal and state governments and is administered by the states within a legislated national policy framework.²⁸⁴ The Supported Accommodation Assistance Program provides financial assistance to non-government organisations and local government authorities that provide a range of supported accommodation and related support services to people who are temporarily or permanently homeless.
299. Recent data from the Australian Institute of Health and Welfare, demonstrates that, in 2005-06, approximately 161,200 people accessed homelessness assistance services provided through the Supported Accommodation Assistance Program.²⁸⁵ While this is evidence that the Supported Accommodation Assistance Program is a well-accessed program, the demand for homelessness assistance services continues to significantly exceed supply. In 2003-04, 56 per cent of requests for crisis accommodation by homeless people were unmet and 63 per cent of requests from homeless families with children were unmet.²⁸⁶
300. The Supported Accommodation Assistance Program requires an increase in funding of 15 per cent simply to sustain the viability of the service. In order to meet the demand, funding needs to increase by 40 per cent.²⁸⁷ Despite this, the current Supported Accommodation Assistance Program agreement shows an accumulative loss of nearly \$50 million over 5 years.²⁸⁸
301. The New South Wales Ombudsman's report of 2004 found that those groups that find it particularly hard to access Supported Accommodation Assistance Program services include people with substance disorders (61 per cent), mental illness (53.7 per cent) and intellectual disabilities (33.3 per cent).²⁸⁹ The absence of a guaranteed minimum income and the fact that social security payments are generally set at around or below the Henderson Poverty Line are significant contributors to people either living in or being at risk of poverty and homelessness. Australia's failure to provide sufficient housing services to ensure all homeless people can access crisis accommodation as of right raises serious concerns in relation to Article 11 of the *ICESCR*.

²⁸⁴ See the Second Reading Speech for the Supported Accommodation Assistance Bill 1995 (Cth) in Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 27 March 1985, 1020 (the Hon Brian Howe MP, Minister for Social Security).

²⁸⁵ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2005-06* (2007) 2.

²⁸⁶ *Ibid.*

²⁸⁷ Australian Labor Party, *New Directions for Affordable Housing: Addressing the Decline in Housing Affordability for Australian Families* (2007).

²⁸⁸ *Ibid.*

²⁸⁹ NSW Ombudsman, *Assisting Homeless People: The Need to Improve their Access to Accommodation and Support Services* (2004).

Youth Homelessness

302. Despite the Taskforce report of 1998 and the subsequent Reconnect Program established to assist and prevent young people becoming homeless, the program has not made a significant impact on youth homelessness in Australia.
303. Every year as many as 100,000 young people (aged 12 to 24 years) experience homelessness with about 37,000 young people without a home on any given night.²⁹⁰ The true extent of the problem is hidden as many young people stay with friends or other family, stay in squats or camp out. These figures reveal a failure to ensure the right to an adequate standard of living for many young people in Australia.

Marginal Housing and Caravan Parks

304. Testimony to the growing housing affordability crisis in Australia is the increased use of caravan parks as a housing solution.²⁹¹ Caravan parks are used as long-term, temporary and crisis accommodation. The 2001 Census revealed that 61,463 people were permanent residents of Australia's caravan parks. This was an increase of about 6,263 since the 1996 Census.²⁹² In 2001, some 23 per cent of people permanently living in caravan parks were aged over 65 years with many on low, fixed incomes.
305. Many people move into caravan parks as a last resort because they do not have the financial means to access mainstream housing and are on waiting lists for public housing.²⁹³ In 2001, 62 per cent of permanent caravan park households earned less than \$500 per week, being more than twice the 29 per cent of households in the whole of Australia in the same financial position.
306. The extent to which caravan parks are being used by crisis accommodation agencies is indicative of the severe shortage in the supply of low cost housing, especially for people in urgent need of accommodation.²⁹⁴ People living in caravan parks have been described as living at the margin of Australian society.²⁹⁵ Most people living in caravan parks permanently live in very basic conditions with minimal facilities and amenities compared to conventional forms of housing. They lack security of tenure, endure inadequate housing standards, face the risk of homelessness, have minimal access to community, health and education services as well as lack the knowledge and support to assert their tenancy rights.²⁹⁶

²⁹⁰ Mission Australia, *Youth Homelessness: Scope the Facts* (2001) available at http://www.mission.com.au/cm/Resources/documents/SPR17_Youth%20Homelessness.pdf.

²⁹¹ E Wensing, D Holloway and M Wood, 'Housing Risk among Caravan Park Residents' (2004) 40 *AHURI Research and Policy Bulletin* 1.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

M.3 Housing Stress, Affordability and Availability

Housing Stress and Housing Affordability

307. In addition to those experiencing homelessness and marginal housing, it is estimated that up to 35 per cent of low income people experience 'housing stress', meaning that their housing costs are so great relative to their income so as to jeopardise their ability to meet other basic needs. This equates to 750,000 lower income households being in housing stress. Further, almost 10 per cent of people with a low income experience 'extreme housing stress', meaning that they are required to spend more than 50 per cent of their income on rent to avoid homelessness.²⁹⁷

Case Study

Over the past 5 years, a 37 year old single woman renting a small flat on her own has found it difficult to find private rental accommodation that is both affordable and close to her workplace. She recently moved into a new flat when she was forced to resign from her job due to pre-existing work-related injuries. She was earning \$600 per week and paying \$130 per week on rent (22 per cent of her income).

Since becoming unemployed she receives \$210 per week from her Newstart allowance. Her rent now consumes 62 per cent of her income. This leaves her with little over \$10 per day for living expenses. While she has the option of moving to a cheaper area to reduce her rent, this will take her further from specialist medical services she requires as well as reducing her employment prospects. She may then risk breaching the conditions of her Newstart allowance because Centrelink can impose penalties on recipients who move to an area with high unemployment.²⁹⁸

308. Accessibility to affordable, appropriate and safe housing in Australia has dramatically decreased as a direct result of increasing house prices relative to income, increasing private rental costs and an ongoing reduction in the funding for public housing. The cost of housing relative to the median income has escalated sharply in recent years. Sydney is the seventh most expensive city in the world to purchase a house, having a median multiple (median house price to median household income multiple) of 8.5. Perth now has a multiple of 8.0 (severely unaffordable), Hobart a multiple of 7.0 and Melbourne a multiple of 6.6.²⁹⁹ In 2007 the average house price in Australia relative to average household income almost doubled, with average monthly mortgage repayments on new loans rising by more than 50 per cent.³⁰⁰

²⁹⁷ Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004) 123–4. See also Julian Disney, *Election 2007: Affordable Rental Housing* (2007) available at <http://www.australianreview.net/digest/2007/election/disney.html>.

²⁹⁸ From Brotherhood of St Laurence, 'What People Told Us' (2003) 12 *Changing Pressures* 4 available at http://www.bsl.org.au/pdfs/Changing_Pressures_Feb03.pdf.

²⁹⁹ Pavletich Properties Limited, *3rd Annual Demographia International Housing Affordability Survey, 2007: Ratings for Major Urban Markets* (2007) available at <http://www.demographia.com/dhi2007.pdf>.

³⁰⁰ Julian Disney, *Election 2007: Affordable Rental Housing* (2007) available at <http://www.australianreview.net/digest/2007/election/disney.html>.

309. As a direct result of decreasing affordability in home ownership, the proportion of people able to purchase their own home has decreased. Those aged 25 to 44 years have been hardest hit.³⁰¹ Over the past 10 to 15 years the proportion of first home buyers has fallen by approximately 20 per cent,³⁰² placing increased pressure on the private rental and social housing markets.

Housing Availability

310. Private rental vacancy rates have reached their lowest levels in 20 years across Australia with such high demand causing the cost of renting to increase. For example, in Perth, the capital city of Western Australia, the median rent increased by 60 per cent between June 2001 and September 2006.³⁰³ Moreover, between June 2006 and June 2007, the median rent in Perth's metropolitan area increased by 20.8 per cent.³⁰⁴ The working poor are now paying too much of their disposable income on housing costs with the effect that, in 2004, 250,000 households in Australia struggled to meet their housing costs as well as provide one meal a day for their family.³⁰⁵

311. There is a continuing decline in the stock of affordable housing throughout Australia due in part to an ongoing reduction in funding for public housing, under-investment in the low-cost end of the private rental market as well as rapidly increasing median house prices. There is no national program to encourage or require developers to set apart a proportion of their new accommodation for low income households. In 2000, there was an estimated shortage of 150,000 units of affordable housing nationally.³⁰⁶ If the current trend continues, it is estimated that by 2020 there will be 1 million Australians living in housing stress.³⁰⁷ Sydney, Melbourne and Canberra have been identified as cities with insufficient supply of affordable housing to meet demand.³⁰⁸

312. Despite this, Australia does not have a national housing strategy or a national homelessness action plan that addresses both the provision of homelessness services and the issue of housing affordability. Given the absence of government leadership in the area of housing and homelessness, the community sector has been forced to fill the gap.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Western Australia, Department of Treasury and Finance, *Housing Stress in Western Australia* (2007).

³⁰⁴ Real Estate Institute of Western Australia, 'Property Market Indicators' (June Quarter 2007) available at <http://www.reiwa.com>.

³⁰⁵ Brotherhood of St Laurence, *Productivity Commission Urged Not to Ignore Low-Income Households* (Media Release, 9 February 2004).

³⁰⁶ J Yates and M Wulfe 'W(h)ither Low Cost Private Rental Housing?' (2000) *18 Urban Policy Research* 1, 45.

³⁰⁷ Brotherhood of St Laurence, 'Housing Stress: How Have Low-Income Households Fared During the Housing Boom?' (2003) *12 Changing Pressures* 1 available at http://www.bsl.org.au/pdfs/Changing_Pressures_Feb03.pdf.

³⁰⁸ Tenants Union of Victoria, *Rental Housing Affordability Bulletin: A National Perspective* (2006).

M.4 Public Housing

313. Australian public housing is funded by the Commonwealth, states and territories under the Commonwealth State Housing Agreement. This agreement is the only source of funding to the public housing sector and is negotiated for five year periods. The role of public housing is to assist those in most need who are unable to find adequate and affordable accommodation in the private market. Public housing in Australia is woefully inadequate to meet existing needs and eligibility criteria have been tightened in all jurisdictions due to the severe lack of stock to meet demand.
314. Over the past ten years, the former Australian Government reduced their share of funding under the Commonwealth State Housing Agreement by 25 per cent and state governments made matching cuts.³⁰⁹ The result of these cuts is that public housing stock is now severely depleted and subject to excessive targeting to only the most severely disadvantaged households.
315. The supply of public housing is about 100,000 fewer dwellings than if it had remained at the same proportion of all dwellings as it was 15 years ago. Non-profit and community housing accounts for only about 0.5 per cent of Australia's total housing stock.³¹⁰ The reduction in stock has led to a tightening of eligibility criteria, which means that very few people can obtain community housing without being on extremely low incomes combined with other high needs.³¹¹

A Snapshot of the Decline in Public Housing Stock

In Western Australia, public housing stock has been reduced by 1,500 dwellings in the last 8 years³¹² and the creation of new public housing tenancies fell by around 40 per cent despite an increase in the number of households requiring low cost housing.

In 2005-2006, the number of available public housing dwellings in the Northern Territory went from 6,130 to 5,555, a decrease of 9 per cent despite the fact that there was a 12 per cent increase in housing applications the year before.³¹³

316. While supply has decreased, the number of people seeking access to public housing has either remained the same, or in many cases, increased. As a result, people can spend several years on public housing waiting lists. Even for priority allocations in the case of, for example, recurring homelessness, extreme housing crisis or imminent risk of homelessness, it is common for people to wait for up to one year to access public housing.

³⁰⁹ Shelter WA, *Newsletter* (October 2007) available at http://www.shelterwa.org.au/publications/regularpubs/newsletters/2007/Shelter_WA_October_Newsletter_2007.pdf.

³¹⁰ National Affordable Housing Summit, *Improving Housing Affordability: A Call to Action* (2007) (this summit included the Australian Council of Social Service, HIA Ltd, the Australian Council of Trade Unions, National Shelter, and the Community Housing Federation of Australia).

³¹¹ Julian Disney, *Election 2007: Affordable Rental Housing* (2007) available at <http://www.australianreview.net/digest/2007/election/disney.html>.

³¹² *Ibid.*

³¹³ Information provided by Northern Territory Shelter (2006).

A Snapshot of Public Housing Waiting Lists

In the Australian Capital Territory, the average waiting time for even the most urgent allocation of public housing is 212 days, over seven months. In the case of standard or less urgent allocations, the waiting time is approximately 3 years.³¹⁴

As at 30 June 2006, in Queensland and South Australia there were 35,038 and 25,000 applicants waiting for public housing, respectively. Housing allocations in Queensland in the same period totalled 4,623 and the average waiting time for an allocation is currently 2.43 years.³¹⁵

In 2005, there were about 12,500 households waiting for public housing in Western Australia.³¹⁶

317. In the face of insufficient public housing stock and long waiting lists, people are forced to find alternative housing, no matter how precarious, and in general move between short-term and crisis accommodation options while they wait for public housing to become available.
318. In addition to the difficulties surrounding public housing availability, are those that relate to its appropriateness for different groups in Australian society. In particular, there are insufficient public housing options targeted to specific groups such as large sized families, single parents, Indigenous Australians and people with disability and complex needs. A report published by the Disability Support and Housing Alliance entitled *Living Not Existing* noted that ‘many people with disabilities remain in or are at risk of moving into inappropriate housing’.³¹⁷

M.5 Commonwealth Rent Assistance

319. Over the past 20 years, the Australian Government has shifted its policy of housing assistance from the provision of public housing towards providing subsidies for low income households to enter into the private rental market.³¹⁸ Commonwealth Rent Assistance is the major form of direct housing assistance provided by the Australian Government to assist people in the private rental market living on low incomes.
320. Private rentals account for 80 per cent of all renting households in Australia.³¹⁹ Commonwealth Rent Assistance has failed to significantly alleviate housing stress among low income households in the private market for numerous reasons including the rapidly rising cost of renting and the ‘one size fits all’ approach which does not take into account the different costs of housing across Australia. As such, the value of Commonwealth Rent Assistance is eroded in areas of high rental costs such as cities and mining towns.

³¹⁴ Information provided by Australian Capital Territory Council of Social Services (2006).

³¹⁵ Information provided by South Australia Homeless Persons' Legal Clinic (2006).

³¹⁶ Western Australia, Department of Treasury and Finance, *Housing Stress in Western Australia* (2007).

³¹⁷ C McNamara, Disability Support and Housing Alliance, *Living Not Existing* (2001).

³¹⁸ Tenants Union of Victoria, *Rental Housing Affordability Bulletin. A National Perspective* (2006).

³¹⁹ Western Australia, Department of Treasury and Finance, *Housing Stress in Western Australia* (2007).

Commonwealth Rent Assistance lacks horizontal equity in that while it provides assistance to income support recipients, it excludes low income workers with a similar income.³²⁰

321. Commonwealth Rent Assistance is increased through indexation to the Consumer Price Index; however, rent in Australia is increasing at a much faster rate. For example, between June 2001 and December 2006, Commonwealth Rent Assistance increased 18 per cent while the median rent in Perth increased by 83 per cent.³²¹ In March 2005, some 85,122 Western Australians received Commonwealth Rent Assistance payments, however 27.6 per cent of those people remained in housing stress.³²²

M.6 Tenancy Protection and Evictions

322. Tenancy legislation in Australia is a matter for each state and territory. Each Australian jurisdiction regulates how often rent increases may occur and makes provision for tenants to apply to an independent body for a determination as to whether rent or a rental increase is excessive.³²³ Stakeholder groups have consistently called for Australia to develop a federal housing strategy that includes provisions to protect tenants from arbitrary or unreasonable evictions and arbitrary and excessive rent increases.³²⁴

M.7 Right to Food

323. Article 11(1) of the *ICESCR* specifically recognises the right to food, while Article 11(2) recognises that more immediate and urgent steps may be needed to ensure 'the fundamental right to freedom from hunger and malnutrition'. The right to the highest attainable standard of health enshrined in Article 12 of the *ICESCR* also extends to the underlying determinants of health, including the right to food. The right to food specifically includes economic and physical access at all times to adequate food or means for its procurement.
324. The Common Core Document fails to address the issue of the right to food, especially food insecurity, which is commonly experienced by some of the most socially and economically disadvantaged groups in Australia. While Australia is a developed country and has experienced increased economic prosperity in recent years, access to and quality of food are key concerns for particularly vulnerable groups such as low-income earners, asylum seekers and Indigenous Australians.

³²⁰ Brotherhood of St Laurence, 'Housing Stress: How Have Low-Income Households Fared During the Housing Boom?' (2003) 12 *Changing Pressures* 2–3 available at http://www.bsl.org.au/pdfs/Changing_Pressures_Feb03.pdf.

³²¹ Western Australia, Department of Treasury and Finance, *Housing Stress in Western Australia* (2007).

³²² Shelter WA, *State of Affordable Housing in Western Australia 2006* (2006) available at <http://www.shelterwa.org.au/publications/resandproj/Shelter%20Affordable%20Housing,%202006%20Final%20Master%20Copy.pdf>.

³²³ *Residential Tenancies Act 1997* (Vic); *Residential Tenancies Act 1987* (NSW); *Residential Tenancies Act 1987* (WA); *Residential Tenancies Act 1995* (SA); *Residential Tenancies Act 1994* (Qld); *Residential Tenancies Act* (NT); *Residential Tenancy Act 1997* (Tas); *Residential Tenancies Act 1997* (ACT).

³²⁴ Victorian Council of Social Service, *Analysis of Australian Government's Draft Core Document in light of the previous Concluding Comments* (undated).

325. The realisation of the right to food in Australia has not been monitored in accordance with the CESCR's guidelines. No information has been provided in the Common Core Document on the nutritional status of Indigenous people, homeless people, sole-parent families, children, unemployed people, low-income earners, older people, people with disability, rural people, refugees and asylum seekers, nor their ability to access adequate, affordable and appropriate food and water.
326. The Common Core Document inadequately addresses the effect of employment and social security policies upon nutrition and access to affordable food in circumstances where food is often viewed as the only expendable item in a low income budget. The casualisation of the Australian labour force (discussed above at paragraph 164), and the denial of social security payments to certain newly arrived migrants, non-permanent residents, asylum seekers and refugees, combined with harsher compliance requirements for all social security recipients (see discussion under Article 9: Right to Social Security), are likely to have a detrimental impact in the realisation of the right to food.
327. The most recent available data, from 2006, shows that just over 5 per cent of Australians reported running out of food during the past 12 months and being unable to purchase more, with women being more likely than men to exhaust their food supplies (5.5 per cent of women, compared with 4.9 per cent of men).³²⁵ 15 per cent of clients of major welfare agencies do not enjoy a decent meal at least once a day, with the proportion increasing to 16 per cent for households with children and to 18 per cent for clients with disability or restrictive medical conditions.³²⁶
328. Many households also worry about food running out, having to cut meal sizes or go without meals, and experiencing hunger.³²⁷ This study, conducted by an emergency relief service in Wollongong, New South Wales, and involving 121 respondents, found that :
- (a) 95 per cent were food insecure — meaning that they experienced some level of food insecurity at least once in the three months prior to being surveyed;
 - (b) food insecure respondents were mostly aged between 30-49 years (62 per cent) and born in Australia (89 per cent);
 - (c) a significant number were of Aboriginal or Torres Strait Islander origin (13 per cent);
 - (d) children were found in over half of all food insecure households (59 per cent);
 - (e) 70 per cent of the households with children did not have enough food and children in 22 per cent of such households experienced hunger;

³²⁵ Australian Institute of Health and Welfare, *Towards National Indicators: An AIHW View Reporting against the Dietary Guidelines for Australian Adults* (2006).

³²⁶ Mission Australia, Anglicare, Australian Council of Social Service, Social Policy Research Centre and the Brotherhood of St Laurence, *Left Out and Missing Out: Voices from the Margins* (2007) and *Left Out and Missing Out: Disability and Disadvantage* (2007).

³²⁷ Anglicare Diocese of Sydney, *When There Isn't Enough to Eat* (November 2007) available at http://www.anglicare.org.au/live3/index.cgi?E=hcatfuncs&PT=SL&X=getdoc&Lev1=web_res&Lev2=0043.

- (f) the majority of food insecure respondents were either single parents (30 per cent) or lived alone (28 per cent), and rented (82 per cent); and
- (g) the sole source of household income for 75 per cent of food insecure households was government benefits.³²⁸

329. While this reflects the nature of the service, it identifies a harsh reality for people who have been left out of the spoils of Australia's economic growth. Revealing the experience of households living with food insecurity, the research also found that:

- (a) 80 per cent cut the size of their meals;
- (b) 74 per cent skipped meals; and
- (c) 52 per cent did not eat for a whole day.

330. Among households with children, 67 per cent of respondents could not afford to feed their children the variety of food they thought their children needed. Furthermore, parents were forced to cut the size of their child's meal in 35 per cent of cases and 14 per cent of children skipped meals. These experiences mostly occurred because of a lack of money for food.

331. The Australian Government has recently requested the Australian Competition and Consumer Commission to hold a public inquiry into the competitiveness of retail prices for standard groceries pursuant to Part VIIA of the *Trade Practices Act 1974*.³²⁹ However, it is concerning that the impact of rising grocery costs on socio-economically and geographically disadvantaged consumers was not included in the terms of reference.

Indigenous people

332. Indigenous Australians have generally less access to nutritious foods than the wider population. Remoteness and poverty are more common for Indigenous than non-Indigenous Australians, and are major factors which often severely limit access to food. The much higher prevalence of illnesses related to food and nutrition in the Indigenous community is a clear indicator of the extent of the food access problems faced by Indigenous Australians.³³⁰

³²⁸ Ibid 5.

³²⁹ From Australian Competition and Consumer Commission, 'ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries' (2008) available at <http://www.accc.gov.au/content/index.phtml/itemId/809228>.

³³⁰ See National Aboriginal and Torres Strait Islander Nutrition Working Party, *National Aboriginal and Torres Strait Islander Nutrition Strategy and Action Plan 2000–2010* (2001).

Case Study

The Northern Territory Intervention introduced welfare quarantining, which included segregating parts of the welfare payments, so that part may be used only for food. Although the aim was to increase access to food for people in Indigenous communities, the operation of the system has in some cases hindered access to food. There have been a number of negative effects on Indigenous peoples access to food including:

- The purchase of food can only be made from Government-approved and specially licensed stores, which must keep detailed records of all supplies made. This means that small community stores may be closed down, or that people must travel long distances to access food.
- The high amount of administration required to implement the scheme means that errors have occurred, including insufficient store vouchers being available at the Centrelink offices. This has meant that some people have received vouchers for food that were valued at a lower amount than they are actually entitled to.³³¹
- The restrictions on shops approved to receive quarantined money and the slow process for approval of other spending reduce Indigenous peoples' ability to provide their own sustenance. For example, money for repairs to four-wheel drive vehicles that are required for hunting, as well as other hunting supplies, is difficult or impossible to get approved. This effectively removes Indigenous peoples' rights to use their land for food or to access their traditional sources of food.

333. While the Northern Territory Intervention recognises the importance of food and nutrition, it does not protect the rights of Indigenous people to make decisions about sources of food, or to make economic decisions about where to spend their money. These are rights that are particularly important for Indigenous peoples, who are often living on their traditional lands and also relates to their right to self-determination (see Article 1: Right of Self-Determination). This is a breach of the right to food, particularly in so far as it relates to cultural or consumer acceptability, which implies the need to take into account perceived non nutrient-based values attached to food.³³²

Asylum Seekers

334. Thousands of asylum seekers fleeing persecution in their homelands and seeking asylum in Australia are denied the right to food by the Australian Government. Under Australia's harsh refugee policies, many asylum seekers are denied the right to work, are unable to access government-sponsored medical services, and unable to receive income support while they await the outcome of their protection visa applications (see Article 6: Asylum Seekers and Article 9: Immigration and Social Security).

³³¹ For example, Rachel Willika of Eva Valley in the Northern Territory received a \$50.00 store voucher for food when she was entitled to \$147.00: see R Willika, 'Christmas Spirit in the Northern Territory', *ABC News* (15 June 2008) available at <http://www.abc.net.au/news/stories/2008/01/15/2138459.htm>.

³³² CECSR, *General Comment 12: The Right to Adequate Food (Article 11)*, UN Doc E/C.12/1999/5 (12 May 1999).

335. Due to their lack of income, asylum seekers are often unable to provide themselves with adequate food. There are numerous reported cases of asylum seekers, including children, suffering from malnutrition and hunger-related illnesses who are then also unable to seek medical assistance due to the denial of Medicare.³³³

Obesity

336. The only reference in the Common Core Document to the right food relates to a ten-year agenda for action in public health nutrition, 'Eat Well Australia', which was developed during 1999-2000. Eat Well Australia priority areas include: prevention of overweight and obesity; increasing the consumption of fruits and vegetables; promotion of optimal nutrition for women, infants and children; and improving nutrition for vulnerable groups.
337. This is an important initiative, as like many developed countries, Australia faces a growing public health problem due to obesity and unhealthy eating. More Australian adults were overweight or obese and more drank alcohol at risky or high risk levels in 2004-5 than in 2001.³³⁴ Further, the proportion of adults classified as overweight or obese increased over the last ten years: from 52 per cent to 62 per cent for men and 37 per cent to 45 per cent for women. In 2004-05, 54 per cent of adults were classified as overweight or obese. The proportion of men in these categories was significantly higher than that for women (62 per cent of men compared to 45 per cent of women). This difference is most evident in the overweight category, where 43 per cent of men were overweight compared to 28 per cent of women. The median age of men who were overweight or obese (45 years) is lower than that of women (48 years).³³⁵
338. This demonstrates a lack of nutritional awareness and education programs within Australian society — something the Australian Government should be doing more to address.

M.8 Right to Water

339. Water is essential to guarantee an adequate standard of living and to life itself. As identified by the CESCR in its General Comment No 15:

Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.

340. The right to water is inextricably related to the right to the highest attainable standard of health³³⁶ and ensuring sustainable access to water resources for agriculture to realise the right to adequate food.³³⁷

³³³ Asian Human Rights Commission, *Australia: Asylum Seekers Denied the Right To Food* (2006) available at <http://www.ahrchk.net/ua/mainfile.php/2006/1698>.

³³⁴ Australian Bureau of Statistics, *National Health Survey 2004–05* (2006).

³³⁵ Australian Bureau of Statistics, *Overweight and Obesity in Adults, Australia, 2004–05* (25 January 2008) available at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4719.0Main%20Features22004-05?opendocument&tabname=Summary&prodno=4719.0&issue=2004-05&num=&view>.

³³⁶ CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12)*, UN Doc E/C.12/2000/4 (11 August 2000).

341. While the adequacy of water required for the right to water to be realised may vary according to different conditions, the following factors apply in all circumstances: availability; accessibility; and quality. Further, attention to ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology, is essential as limitations on water access and affordability may have a negative impact on the right to food.
342. Australia is the world's driest and flattest inhabited continent with the lowest percentage of rainfall reaching our rivers as runoff, the lowest amount of water found in our rivers and the smallest surface area of permanent wetlands. Much of inland Australia is either arid or desert. Over 50 per cent of Australia receives less than 500 mm, and over 80 per cent receives less than 600 mm.³³⁸ At present, a significant proportion of Australia is experiencing a prolonged dry period, which has been officially declared a period of drought.³³⁹
343. The current Australian Government is to be congratulated on recently ratifying the Kyoto Protocol and for creating a new position of Minister for Climate Change and Water.
344. In 2000, Australia ranked third among 31 Organisation for Economic Co-operation and Development countries in daily urban water consumption (321 L per person), behind the USA (515 L per person) and Canada (438 L per person). Denmark ranked lowest at 120 L per person.³⁴⁰ Australia does not have adequate programs in place for treating and recycling the water we use in our day-to-day activities. Foremost among the reasons why Australia consumes large quantities of water and is slow to harness stormwater, despite suffering from long-term drought, can be attributed to a lack of active leadership from governments across our federal system.

Access and Affordability

345. Water is regulated on a state and territory basis and there is no national consistency with regard to water pricing. This may result in a disproportionate impact on people living in rural and regional areas and those more seriously affected by drought in accessing both affordable and quality water.
346. Climate change and/or sustained periods drought have led to increasing numbers of households, especially low-income households, not having reliable and affordable access to fresh clean water. Climate change, drought and government policies have made water price rises inevitable; however, the Australian Government must ensure that progressive pricing principles are used so that essential water use remains affordable and accessible to all.

³³⁷ CESCR, *General Comment No 12: The Right to Adequate Food (Article 11)*, UN Doc E/C.12/1999/5 (12 May 1999).

³³⁸ Australian Bureau of Statistics, *Year Book: Australia, 2005* (2005) 16–19.

³³⁹ Watermark Australia Project, coordinated by Victorian Women's Trust, 'The Big Picture: Severe Drought' (2008) available at <http://www.watermarkaustralia.org.au/ourwatermark.html>.

³⁴⁰ Organisation for Economic Co-operation and Development Environment Directorate, *Environmental Outlook* (2001) 97–102.

347. Inclining block tariffs, where the amount of water needed for essential use is cheap while excess usage is increasingly expensive, have been introduced in most capital cities. Similar tariffs could be introduced nationally so that everyone can meet their basic needs and big users pay more of the increased cost of the water supply system. However, rebates are required for large households to ensure that they do not pay a higher rate for excess water they cannot avoid using. Further, water concessions must effectively assist disadvantaged households, and should be increased to match rises in the price of essential water.³⁴¹
348. In addition to managing the affordability of water, it is essential that all Australian governments also introduce measures to facilitate consumer reduction in water usage. Water efficiency incentives and assistance with water efficient appliances are valuable ways to assist low-income households to reduce demand.
349. Water has long been managed in Australia as a common good belonging to all and able to be shared. However, in 1994, the Council of Australian Governments adopted a water-reform framework that set in train a number of important developments which have changed the nature and allocation of water entitlements and removed restrictions on water trading, including where trading can occur. A decade later, the Council of Australian Governments meeting of June 2004 reached agreement on the National Water Initiative, recognising the ‘continuing national imperative to increase the productivity and efficiency of Australia’s water use, the need to service rural and urban communities and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction’.³⁴²
350. A central concern is that with the separation of water entitlements from land ownership, parties can now acquire substantial rights to water, causing price spikes that will be difficult for many farmers to contend with. The fear is that an open water market will allow ‘water barons’ to buy water and manipulate supply in a tight market — pushing prices to high levels, particularly in times of drought. In an open water market, city water retailers will always be able to outbid farmers, as urban authorities can spread their costs over businesses and across households.³⁴³
351. There are further concerns regarding farmers’ (particularly food producing farmers) access to affordable water and the potential flow on impact on the right to food, and that commercialisation of water and sanitation services may lead to unaffordability for low-income earners.

³⁴¹ Victorian Council of Social Service, ‘Protect Households from Water Price Shock’ (Media Release, 20 June 2007).

³⁴² *Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, The Australian Capital Territory and the Northern Territory* (25 June 2004).

³⁴³ P Byrne et al, *High and Dry: How Free Trade in Water Will Cripple Australian Agriculture* (2006) 45.

Indigenous communities access to drinkable water and sanitation services

352. Access to clean water is unreliable for many Indigenous Australians, who also continue to suffer from poor environmental health and related diseases and infections at a higher rate than the non-Indigenous population.³⁴⁴ Figures from a 2006 survey of Indigenous communities show a positive increase in the number of communities connected to town water (rising from 186 in 2001 to 209 in 2006).³⁴⁵ However, people living in discrete remote Indigenous communities rely on various small-scale systems of water delivery, including bores, soaks, ponds and cartage. Access to treated water and water quality testing is frequently inadequate, although this varies between communities because the systems are usually maintained at the community level. 2006 statistics for discrete Indigenous communities not connected to town water show that, in the preceding twelve months:
- (a) nearly 50 per cent of communities experienced interrupted water supply (182 communities);
 - (b) 68 communities had no treatment of drinking water (141 communities did treat drinking water); and
 - (c) 45 communities did not have any test done of the quality of their drinking water.³⁴⁶
353. Indigenous people in remote areas continue to be severely limited in the enjoyment of their human rights, including the rights to health and human dignity, because of the lack of sustainable systems for delivering clean water for drinking, cooking and washing.
354. An unpublished internal government review of water supply and sewerage services in NSW Indigenous communities in 2006 found that while all communities in NSW have access to drinking water and sewerage treatment, many of them are inadequately monitored and suffer system breakdowns. The report recommended that money be allocated to a proper monitoring program, as the first stage in upgrading these services. The report's recommendations are currently being acted on by the relevant departments, however, the monitoring has not yet commenced.³⁴⁷

³⁴⁴ For example, hospitalisations for bacterial diseases occurred at four times the rate for Indigenous people than non-Indigenous people: Steering Committee for the Review of Government Service Provision, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007) 10.7.

³⁴⁵ *Ibid* 10.4.

³⁴⁶ Australian Bureau of Statistics, *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities, Australia, 2006* (reissued 2007) 28.

³⁴⁷ NSW Aboriginal Community Water and Sewerage Working Group, *Draft Status Report* (2006).

Case Study

Mulga Bore is a small community in Central Australia, which has a school with approximately 45 children enrolled, of whom around 30 attend regularly. In summer temperatures often reach 45 degrees Celsius, so people need to drink a lot of water. Water from Mulga Bore is high in nitrates, containing nitrate at 150 per cent of the rate in the World Health Organisation's standards for developing countries. This problem was known to the Australian Government for sometime and yet it did not act. In February 2008, the water stopped running and Mulga Bore School had no water. This meant that toilets could not be flushed, children could not wash their hands before eating their lunch, and children became dehydrated. There were also problems with the community's power generator. The result is that the school has been closed down and students are no longer able to enjoy their right to education. The current Australian Government has announced that it will consult with the community and will work to get the problems fixed and the school reopened.³⁴⁸

M.9 Indigenous Peoples

355. In its previous Concluding Observations, the CESCR identified the urgent nature of concerns relating to the exclusion and poverty facing Indigenous Australians.³⁴⁹

Adequate Standard of Living

356. Despite the concerns expressed by the CESCR in 2000, a recent project has found that Indigenous peoples continue to be more frequently deprived than all other sub-groups in the community in all aspects of an adequate standard of living.³⁵⁰ The *Left Out and Missing Out* project found that:

- (a) 10.5 per cent of Indigenous Australians did not have a substantial daily meal;
- (b) one in three Indigenous Australians were deprived of prescribed medications;
- (c) 22.2 per cent were deprived of a safe and secure home; and
- (d) the overall rate of deprivation for Indigenous Australians was 19.9 per cent, compared with 14.2 per cent for sole parent families and 13.5 per cent for unemployed people.³⁵¹

³⁴⁸ See R Skelton, 'No Water, Blackouts: Mulga Bore's Students Get a Lesson in Neglect', *The Age* (Melbourne), 28 February 2008 available at <http://www.theage.com.au/news/national/a-lesson-in-neglect/2008/02/27/1203788442683.html>.

³⁴⁹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [10].

³⁵⁰ Peter Saunders, Yuvisthi Naidoo and Megan Griffiths, *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia* (2007) 52–3.

³⁵¹ *Ibid* 67.

357. In 2006, the unemployment rate for Indigenous Australians was 14 per cent³⁵² in contrast to the rate for non-Indigenous Australians of 4.3 per cent.³⁵³ Contributing to these high levels of poverty among Indigenous people are lower levels of education, higher likelihood of being unemployed and greater reliance on social security for income.³⁵⁴

Indigenous Housing and Homelessness

358. Indigenous communities in both urban and rural areas face a severe housing crisis. Indeed, the UN Special Rapporteur on Adequate Housing was 'particularly disturbed' by the adverse housing conditions he observed in Indigenous communities during his country visit to Australia in 2006, describing it as a 'humanitarian tragedy'.³⁵⁵ Lack of affordable housing, lack of appropriate support services, significant levels of poverty and underlying discrimination are all factors that contribute to the situation facing Indigenous Australians.

359. Indigenous people are overrepresented as SAAP clients relative to their proportion of the whole Australian population. In June 2002, fewer than 2 per cent of Australians aged over 10 years were estimated to be Indigenous, yet in 2002-03 Indigenous people accounted for 18 per cent of SAAP clients.³⁵⁶ This is a clear indication of the severe lack of assistance and housing for Indigenous people in Australia.

360. Indigenous people experience substantial levels of housing overcrowding. The 2001 Australian Census showed an average of 3.5 persons in an Indigenous household compared with 2.6 in other households.³⁵⁷ Indigenous people are 5.6 times more likely to live in overcrowded accommodation. This figure increases to 18.8 times more than the average in remote areas.³⁵⁸ Overcrowding decreases the standard of housing because utilities break from overuse and children become exposed to inappropriate sexual activities and the use of illicit substances.³⁵⁹

³⁵² Australian Bureau of Statistics, *Occasional Paper: Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Experimental Estimates from the Labour Force Survey* (2007) available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6287.0>.

³⁵³ Australian Bureau of Statistics, *Labour Force, Australia* (2007) available at <http://www.abs.gov.au/ausstats/abs%40.nsf/mf/6202.0>.

³⁵⁴ Peter Saunders, Yuvisthi Naidoo and Megan Griffiths, *Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia* (2007) 67.

³⁵⁵ M Kothari, Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing on Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (11 May 2007).

³⁵⁶ Australian Federation of Homelessness Organisations, *2002/2003 National Statistics* (2004) available at http://afho.org.au/facts/stats/archives/2002_03/2002_2003.htm.

³⁵⁷ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (August 2006) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

³⁵⁸ M Kothari, Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing on Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (2007) [82].

³⁵⁹ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children Are Sacred* (2007) 195.

361. In addition to overcrowding, there is a lack of culturally appropriate housing for Indigenous people. Many European style dwellings do not adequately accommodate Indigenous cultures because Indigenous people often host extended families.³⁶⁰ Significantly, there is an absence of consultation and community initiatives to hear what Indigenous housing needs are.³⁶¹ Housing and infrastructure policies for Indigenous Australians must involve genuine Indigenous participation in the development of policies and the allocation of funding.
362. The causal links between, on the one hand, inadequate housing, severe overcrowding and inappropriate styles of housing, particularly in remote areas, and, on the other hand, adverse health and justice outcomes, is well established, as is the disproportionate impact on women and children. Indeed, in its previous Concluding Observations, the Committee on the Rights of the Child recommended that Australia increase its efforts to provide affordable housing and take all possible measures to raise the standard of living of Indigenous children.³⁶²

M.10 Asylum Seekers

363. As referred to in other sections of this report, many asylum seekers cannot access work, welfare benefits or healthcare. In 2004, a Senate Select Committee recommended that:
- Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion.³⁶³
364. Currently, there is no mechanism to ensure that asylum seekers, and their children, receive adequate nutrition and healthcare. If a person applies for refugee status 45 days after arriving in Australia, they cannot work and have no right to welfare payments or healthcare. These factors raise issues in relation to the realisation of asylum-seekers of the right to an adequate standard of living.

M.11 New Migrants

365. As referred to in relation to the right to social security (see [Article 9: Immigration and Social Security](#)), new migrants to Australia must wait two years before being eligible for social security payments. In the interim they become completely reliant on sponsors if they cannot find work.³⁶⁴ This causes major issues for new migrants to enjoy an adequate standard of living. Employment can be very difficult to find since English proficiency and Australian work experience may be prerequisites to getting a job.³⁶⁵

³⁶⁰ M Kothari, Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing on Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (2007) [95].

³⁶¹ Ibid [96].

³⁶² Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [57].

³⁶³ Commonwealth of Australia, *Report of the Senate Select Committee on Ministerial Discretion in Migration Matters* (2004) Recommendation 10, [5.44].

³⁶⁴ Federation of Ethnic Communities Councils of Australia, *Initial Contribution to the Fourth Report under the ICESCR* (2004) 7.

³⁶⁵ Ibid.

M.12 People with Disability

366. People with disability tend to face greater living costs. The *Left Out and Missing Out* project, discussed further below at paragraph 356, found that the deprivation rate, a measure of the proportion of resources lacking for a specified group of persons,³⁶⁶ was 7.7 per cent for people with disability.
367. The Disability Support Pension is inadequate to support people with disability. In 2004, the Senate Community Affairs Reference Committee, in a report entitled *A Hand Up Not a Hand Out: Renewing the Fight against Poverty*, found widespread poverty among people with disability, and recommended that a new welfare allowance be introduced to address the extra costs associated with disability, such as the need for professional carers, special education and employment support.³⁶⁷ To date, these recommendations have not been adopted by the Australian Government. Indeed, the situation for people with disability has worsened under the Welfare to Work program,³⁶⁸ as discussed under Article 9: Conditionality of Social Security Payments: Welfare to Work.

M.13 Women

368. Since 83 per cent of sole parents in Australia are women, the inadequacy of the parenting payment affects women the most. Currently, a sole parent receives \$537.70 per fortnight in Parenting Payment, while a partnered parent receives \$387.80 per fortnight. When Family Tax Benefits for children are added in, the overall incomes of those reliant on income support is close to, but often below, the poverty line estimates listed in section 1.2.³⁶⁹ The situation has worsened in recent years for parents under the Welfare to Work program (see Article 9: Conditionality of Social Security Payments: Welfare to Work).
369. Prior to its election to government in November 2007, the Australian Labor Party promised to increase the childcare tax rebate from 30 per cent to 50 per cent and to pay the rebate quarterly.³⁷⁰ It also committed to invest \$77 million into improving the quality of childcare.³⁷¹
370. Currently, by the time they retire, women have accrued less superannuation than men. This is because they tend to spend less time in the workforce and are more likely to have casual jobs when caring for children. As discussed in relation to Article 6, women also tend to work in professions with lower rates of pay.³⁷²

³⁶⁶ N P Bellido et al, 'The Measurement and Analysis of Poverty and Inequality: An Application to Spanish Conurbations' (1998) 66 *International Statistical Review* 1, 115–16.

³⁶⁷ Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not A Hand Out: Renewing the Fight Against Poverty* (2004) 123–4.

³⁶⁸ Peter Saunders 'Disability, Poverty and Living Standards: Reviewing Australian Evidence and Policies' (Discussion Paper No 145, Social Policy Research Centre, University of New South Wales, December 2005) 5.

³⁶⁹ See Centrelink, 'About Payments' (2008) available at <http://myaccount.centrelink.gov.au/wps/portal/payments>.

³⁷⁰ Kevin Rudd and Jenny Macklin, 'Federal Labor's Affordable Child Care Plan — A 50 per cent Child Care Tax Rebate Paid Quarterly' (Press Release, 22 October 2007).

³⁷¹ Kevin Rudd and Jenny Macklin, 'Federal Labor's Plan For High Quality Child Care — Giving Parents Peace Of Mind' (Press Release, 23 October 2007).

³⁷² See Office for Women, Department of Family and Community Services, 'Chapter 5: Economic Resources' (2004) available at <http://ofw.facsia.gov.au/publications/wia/chapter5.html>.

M.14 Children and Young People

371. Young people receiving social security payments are at higher risk of poverty due to the lower rate of payments to which they are entitled. Those at risk include children whose parents are unemployed, students and those who are unemployed.
372. The basic rate of Youth Allowance, which is for people between the ages of 16 and 20 looking for work, is \$355.40 per fortnight, compared with \$429.80 for the Newstart Allowance payable to adults looking for work.³⁷³
373. The Australia Fair Report notes that the general inadequacy of welfare payments is of particular concern for the 800,000 children living in households where both parents are unemployed. It also notes that 412,000 children are living in poverty in Australia today,³⁷⁴ which raises serious concerns in relation to the realisation of the right to an adequate standard of living for many children and young people in Australia.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 11)

- Please provide to the Committee further information on what steps the Australian Government has taken or will take towards the development of a National Housing Strategy, particularly to address the growing housing affordability crisis facing many low and middle income households.
- Please provide data regarding the number of homeless shelter beds per homeless person.
- Please provide the Committee with detailed information regarding the steps that have been taken or are intended to ensure that all homeless people are able to access crisis accommodation as of right.
- Please provide information regarding the average monthly housing expenditure by median poor household as a proportion of its monthly income.
- Please explain what exceptional circumstances, if any, justify the reduction in the availability of adequate, affordable, accessible and safe housing in Australia over the last decade.
- Please provide details of the proportion of people with inadequate intake of dietary energy.
- Please provide details of the proportion of household expenditure on food.
- Please provide data regarding the variability of prices of staple foods.
- Please provide details as to the nutritional status of Indigenous people, homeless people, sole-parent families, children, unemployed people, low-income earners, older people, people with disabilities, rural people, refugees and asylum seekers, and their ability to access adequate, affordable and appropriate food and water.

³⁷³ See Centrelink, 'About Payments' (2008) available at <http://myaccount.centrelink.gov.au/wps/portal/payments>.

³⁷⁴ Australian Council of Social Service, *Australia Fair: Update on Those Missing Out* (2007) 3.

- Please provide details as to the steps and measures being taken to ensure that all Australians are free from food insecurity and have adequate access to appropriate, nutritious and affordable food.
- Please provide details as to the steps and measures being taken to ensure that all Australians have adequate access to affordable drinkable water and sanitation services.
- Please indicate whether all Indigenous communities have adequate access to affordable drinkable water and sanitation services.
- Please provide to the Committee further information on what steps are taken to assist recently arrived migrants find work.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 11)

THAT Australia develop and implement a comprehensive anti-poverty and social inclusion strategy, which includes a commitment to resources and poverty reduction targets or benchmarks.

THAT Australia amend the *Supported Accommodation Assistance Act 1994* (Cth) to enshrine a right of access to crisis accommodation for homeless people and THAT there be a 40 per cent increase in funding to the Supported Accommodation Assistance Program to meet demand.

THAT federal, state, territory and local governments commit to increase funding, access and availability to various forms of supported housing and accommodation, particularly housing which meets the needs of people with disability, people experiencing mental illness, people with drug or alcohol disorders, and people with complex and multiple needs.

THAT Australia ensure that Indigenous peoples are consulted with to realise the culturally specific housing needs of Indigenous Australians.

THAT Australia develop a National Housing and Taxation Plan that includes strategies to align the supply of affordable housing with demand. The availability of affordable housing, including public housing, should be progressively increased through both direct expenditure, and fiscal and taxation policy reforms.

THAT Australia fully implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the Report on the Special Rapporteur's Mission to Australia.

THAT Australia take all necessary steps and measures, including through the development of a comprehensive anti-poverty and social inclusion strategy, to ensure that all persons are free from food insecurity and have adequate access to appropriate, nutritious and affordable food.

THAT Australia develop and implement a national strategy to ensure that all Australians, including in particular Indigenous Australians, have adequate access to affordable drinkable water and sanitation services.

THAT Youth Allowance is increased to levels above the Henderson Poverty Line so that recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate housing, health care and an adequate standard of living.

Article 12 — Right to Highest Attainable Standard of Physical and Mental Health

Article 12:

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - (a) *The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - (b) *The improvement of all aspects of environmental and industrial hygiene;*
 - (c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) *The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

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N. RIGHT TO HIGHEST ATTAINABLE STANDARD OF HEALTH

374. Provision of public health care in Australia is suffering from chronic underfunding, a decaying public hospital system, rising medical costs, inadequate coverage, and inaccessibility — particularly for disadvantaged and marginalised people. The poor health outcomes of Indigenous Australians remain a critical challenge to the health system in order to lower the discrepancy in mortality and morbidity between Indigenous and non-Indigenous Australians.

375. Article 12 of *ICESCR* protects the right to the highest attainable standard of physical and mental health, including an obligation to create 'conditions which would assure to all medical service and medical attention in the event of sickness'.³⁷⁵ This has been interpreted to include 'provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level'.³⁷⁶

376. According to the UN High Commissioner for Human Rights:

Ill health is both a cause and a consequence of poverty; sick people are more likely to become poor and the poor are more vulnerable to disease and disability. Good health is central to creating and sustaining the capabilities that poor people need to escape from poverty.³⁷⁷

N.1 Public Health

Prevalence and Access

377. Australia generally enjoys a high level of health and life expectancy; however, there are discrepancies among particular population groups. People living in areas of high socio-economic disadvantage³⁷⁸ are more likely to have higher mortality and significantly poorer health, but are less likely to utilise or have access to early intervention measures.³⁷⁹ Indigenous Australians in particular have a significantly lower life expectancy and poorer health than non-Indigenous Australians. Indigenous Australians, together with people in rural and remote areas, people with disability, homeless people, refugees and migrants (and their families)³⁸⁰ and people from non-English speaking backgrounds, all experience particular barriers to accessing health services.

Public Health Funding

378. Australia enjoys relatively high government funding for health services, which has been increasing in recent years; in 2004-5 the total health funding was \$1,436.3 million³⁸¹ which represented about 30 per cent of total government expenditure.³⁸² Nevertheless, resource use could be more efficient if coordination between the federal and state governments were improved.³⁸³

³⁷⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 12.2 (d).

³⁷⁶ CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12)*, UN Doc E/C.12/2000/4 (11 August 2000) [17].

³⁷⁷ UN Office of the High Commissioner for Refugees, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 22.

³⁷⁸ As classified by SEIFA (Socio-Economic Indexes for Areas): quartiles relate to the population in each area who lived in census collectors' districts that were among the 25 per cent least disadvantaged, and the 25 per cent most disadvantaged, Australian Institute of Health and Welfare population database (2005).

³⁷⁹ Australian Institute of Health and Welfare, *Australia's Health 2006*, 232–5.

³⁸⁰ See also paragraphs 248 and 356 above in the context of the right to an adequate standard of living.

³⁸¹ Australian Institute of Health and Welfare, *National Public Health Expenditure Report 2004–05* (2007) x.

³⁸² Pavletich Properties Limited, *3rd Annual Demographia International Housing Affordability Survey, 2007: Ratings for Major Urban Markets* (2007) 25 available at <http://www.demographia.com/dhi2007.pdf>.

³⁸³ Organisation for Economic Co-operation and Development, *Economic Surveys — Australia 2006* (2006) 15.

379. Medicare, Australia's universal public health system, is intended to ensure that there is no out-of-pocket expense for patients if their doctor offers bulk-billing³⁸⁴ through the Medicare rebate. Additionally, the Pharmaceutical Benefits Scheme subsidises approximately 80 per cent of prescription drugs dispensed in Australia.³⁸⁵
380. However, there is a shortfall of doctors in rural and regional areas and it is frequently more difficult to find a doctor who bulk bills in these areas. In 2006, the Committee on the Elimination of Discrimination against Women recommended that Australia take necessary action to ensure that bulk billing for health services is available in rural areas.³⁸⁶
381. The proportion of Australians with private health insurance has been increasing since 1997 due to a number of government initiatives. Most significant of these is the 30 per cent government rebate on private health insurance, which accounts for \$2 billion of government health expenditure per annum.³⁸⁷ As this rebate is not means-tested, it largely benefits high-income households — many of whom would have purchased private health insurance without the rebate.³⁸⁸ Private health insurance, and the government's rebate for those who are able to invest in such schemes, increases the gap in health services that are available and accessible between rich and poor Australians. The private health insurance rebate does not appear to have increased the proportion of funds available to the health system.³⁸⁹

Surgery Waiting Lists

382. The median waiting time for elective surgery in 2004-2005 was 29 days. At that time, 4.8 per cent of patients waited more than 365 days to be admitted to hospital.³⁹⁰
383. The private health sector accounts for 55.8 per cent of all surgical episodes.³⁹¹ Government funding, which supports the private health sector through the private health insurance rebate, would be better directed to ensuring medically necessary care is available through hospitals as a whole rather than supporting the private health system.

³⁸⁴ Productivity Commission, *Report on Government Services 2007* (2007) 10.20. Bulk billing is a government-subsidised method of payment where the doctor or other health professional bills the government directly for the service. The government covers 85 per cent of the cost of the service.

³⁸⁵ Ibid 10.3.

³⁸⁶ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) [27].

³⁸⁷ Jongsay Yong et al, *The Income Distributive Implications of Recent Private Health Insurance Policies in Australia* (2006).

³⁸⁸ Ibid 14.

³⁸⁹ Professor John Deeble, National Centre for Epidemiology and Population Health, *The Private Health Insurance Rebate: Report to State and Territory Health Ministers* (2003) 1.

³⁹⁰ Australian Institute of Health and Welfare, *Australian Hospital Statistics 2004–05*, (2006)

³⁹¹ B Nichol, 'Hospitals Then and Now: Changes Since the Start of Medicare' (2007) 31 *Australian Health Review* 31, s 7.

Lack of Dental Services

384. Dental care is not covered by Medicare. The Australian Council of Social Service estimates that costs of dental services have risen by 45-50 per cent since 1999, leaving at least 500,000 people on waiting lists for public dental care.³⁹² An estimated 40 per cent of Australians are unable to access dental care when they need it.³⁹³

N.2 Indigenous Health

385. The state of Indigenous health in Australia results from and represents serious human rights breaches. Indigenous Australians do not have an equal opportunity to be as healthy as non-Indigenous Australians. Many Indigenous Australians do not have the benefit of equal access to primary health care and many Indigenous communities lack basic needs, such as adequate housing, safe drinking water, electricity and effective sewerage systems.

386. The crisis in Indigenous health in Australia is reflected in the following statistics:

- (a) Life expectancy for:
 - (i) Indigenous Australian males is 56.3 years, almost 21 years less than the 77.0 years expected for all Australian males; and
 - (ii) Indigenous Australian females is 62.8 years, almost 20 years less than the expectation of 82.4 years for all Australian females.³⁹⁴

These statistics are attributed to poor health at all levels and age groups within the Indigenous population. In 2006, the Committee on the Elimination of Discrimination against Women noted its concern about the lower life expectancy among Indigenous women.³⁹⁵

- (b) Life expectancy for Indigenous Australians is between 8 and 15 years less than that of Indigenous populations in Canada, the United States and New Zealand.³⁹⁶
- (c) The median age at death for Indigenous Australians is currently about 53 years, which is 25 years less than that for non-Indigenous Australians.³⁹⁷ This is considerably lower than the median age at death for Indigenous peoples in other Western countries.

³⁹² Australian Council of Social Service, *A Fair Go for All Australians: International Comparisons, 2007: 10 Essentials* (2007) 26.

³⁹³ Australian Council of Social Service, *Fair Dental Care for Low Income Earners* (2006) 11.

³⁹⁴ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003* (2003).

³⁹⁵ *Concluding Observations of the Committee on the Elimination of all Forms of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) [30].

³⁹⁶ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (August 2006) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

³⁹⁷ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003* (2003).

- (d) In 1999–2003, the infant mortality rate for Indigenous infants was three times that of non-Indigenous infants.³⁹⁸
 - (e) Indigenous Australians are eight times more likely to die from diabetes, three times more likely to die from circulatory disease, four times more likely to die from chronic kidney disease and have one of the highest rates of rheumatic heart disease in the world.³⁹⁹
 - (f) One in ten Indigenous children in Australia under the age of 15 report having hearing problems, about three times the rate of non-Indigenous children.⁴⁰⁰
 - (g) In 1999–2003, two of the three leading causes of death for Indigenous peoples in Queensland, South Australia, Western Australia and the Northern Territory were chronic diseases of the circulatory system and cancer.⁴⁰¹
 - (h) The number of Indigenous Australians diagnosed with AIDS has more than doubled in the past four years.⁴⁰²
387. The Committee on the Elimination of Racial Discrimination has previously recommended that Australia intensify its efforts to eradicate the disparities faced by Indigenous peoples in relation to, among other areas, health.⁴⁰³ The Committee also recommended that decisive steps be taken to ensure that a sufficient number of health professionals provide services to Indigenous people. The crux of the problem is that Indigenous health services are severely under-funded by Australian governments and have been for decades. Further, policies are not based on clear goals to meet the requisite human rights standards and there are no individual or group remedies for these failures.
388. Recently, the new Australian Prime Minister, Kevin Rudd, committed
- within a decade to halve the appalling gap in infant mortality rates between Indigenous and non-Indigenous children and, within a generation, to close the equally appalling 17-year life gap between Indigenous and non-Indigenous in overall life expectancy.⁴⁰⁴

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Australian Bureau of Statistics, *National Health Survey: Aboriginal and Torres Strait Islander Results, Australia 2001* (2002).

⁴⁰¹ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003* (2003).

⁴⁰² US Centers for Disease Control and Prevention, *Australia: AIDS Rates Rising in Indigenous Communities* (26 August 2005) available at <http://www.thebody.com/content/art25660.html>.

⁴⁰³ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005) [19].

⁴⁰⁴ Commonwealth of Australia, *Apology to Australia's Indigenous Peoples*, House of Representatives, 13 February 2008 (Kevin Rudd, Prime Minister).

Indigenous Women

389. Indigenous women continue to experience much higher levels of ill-health, disease and death than non-Indigenous women.⁴⁰⁵ For example, the prevalence of low-birth weight babies (which, at 13 per cent for Indigenous mothers, is twice the rate of 6 per cent which appears in the general population) did not improve between 1991 and 2005.⁴⁰⁶ Communicable and chronic diseases are diagnosed at much higher rates than for non-Indigenous women, and health risk factors⁴⁰⁷ and mental health problems are also apparent on a much greater scale among Indigenous women than in the broader community.⁴⁰⁸
390. Indigenous women are more likely to have an unhealthy standard of living, and to suffer from intersecting social issues, including larger families and overcrowded housing, less access to water and utilities, less access to medical and other services, and to experience more stressors such as eviction, job loss, violence and death of family members.⁴⁰⁹

N.3 Mental Health Services

391. Funding for mental health services and research must be increased to match the level of actual need. In Australia, mental illness causes 13 per cent of the burden of disease in the health system but receives only 7 per cent of funding. Only 4 per cent of health research funding in Australia is directed to mental health related research.⁴¹⁰ People with mental illness are significantly over-represented in key measures of disadvantage such as homelessness, unemployment, poverty, substance abuse, and incarceration rates.
392. According to a major Senate Committee inquiry into mental health in 2006, more emphasis is needed on prevention and early intervention:

There are too many people ending up in acute care, and not enough is being done to manage their illness in the community. There are particular groups, and people with particular illnesses, who are receiving inadequate care.⁴¹¹

The Senate Committee recommended that there be ‘a substantial overall increase in funding for mental health services over time, to more closely reflect the disease burden and to satisfy the very significant unmet need’.

⁴⁰⁵ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (August 2006) chapter 4 available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

⁴⁰⁶ Ibid chapter 4(a).

⁴⁰⁷ Health risk factors include smoking and obesity: ibid chapter 4(f).

⁴⁰⁸ For a simple analysis of the comparative health statistics, see Australian Bureau of Statistics, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05* (2007) available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4722.0.55.001>.

⁴⁰⁹ Ibid.

⁴¹⁰ See Mental Health Council of Australia, *Time for Service* (2007).

⁴¹¹ Senate Select Committee on Mental Health, *A National Approach to Mental Health: From Crisis to Community* (2006) [17.1].

393. People with a mental illness are overrepresented in all types of custody, including the criminal justice system and the immigration detention system. While a lack of statistical information prevents exact prevalence rates of intellectual disability and mental illness in the prison population being determined, estimates show that it is greater than the prevalence of mental illness in the general population. Additional concerns include:
- (a) procedures for detecting and treating mental illness in the criminal justice system were found to be inadequate in each and every Australian jurisdiction;⁴¹²
 - (b) women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners;⁴¹³
 - (c) mentally ill people detained by the criminal justice system are frequently denied treatment;⁴¹⁴
 - (d) in some cases, the response of the system to mental illness was not treatment but brutality or an increase in harshness or length of detention;⁴¹⁵ and
 - (e) children with mental illnesses and/or intellectual deficiencies are over-represented in the juvenile justice system.⁴¹⁶
394. The right of people with mental illness to live, work and participate in the community to the full extent of their capabilities is still being compromised by a lack of available community based services and care options. It is a central principle of the international human rights framework that all people have the right, and should have the opportunity without discrimination, to participate in public affairs and, in particular, in decision-making processes that affect them.
395. Access to best quality, least aversive treatments, and the full range of pharmacological and non-pharmacological treatments and supports must be prioritised. All levels of government must commit to addressing the high levels of homelessness, poverty, unemployment and substance abuse among Australians with mental illness.

N.4 Asylum Seekers

396. Long-term detention, by its nature, is widely recognised as having a seriously debilitating effect on the mental health of detainees. For example, according to the Royal Australian College of General Practitioners, while many refugees are in good health, some specific health problems facing refugees include: psychological disorders such as post traumatic stress disorder, anxiety, depression and psychosomatic disorders; poor oral health; delayed growth of children; or under recognised and under managed hypertension, diabetes and

⁴¹² Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

⁴¹³ See Sisters Inside, *Submission* (2004); Federation of Community Legal Centres (Vic) and Victorian Council of Social Service, *Request for a Systematic Review of Discrimination against Women in Victorian Prisons* (2005) available at <http://www.sistersinside.com.au/media/VICComplaint.pdf>.

⁴¹⁴ Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

⁴¹⁵ Ibid.

⁴¹⁶ UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [73].

chronic pain.⁴¹⁷ Indeed, aside from detention, the stresses of migration and settlement generally experienced by migrants may affect mental well-being.⁴¹⁸

397. For refugees and humanitarian visa holders, these mental health issues may actually be compounded by experiences of immigration detention and uncertainty over their future in Australia. A recent Human Rights and Equal Opportunity Commission report demonstrates that mental health of detainees deteriorates significantly during immigration detention, and numerous instances of self-harming behaviour has been documented, including among children.⁴¹⁹ Detainees must receive an adequate standard of psychiatric care given the compounded risks of distress and increased vulnerability to mental illness in detention.⁴²⁰ In 2008, the Human Rights and Equal Opportunity Commission renewed its call to repeal Australia's mandatory detention laws in order to

get people out of detention faster in order to reduce the risk of causing long-term mental health damage. There is a range of alternatives to holding people in detention centres, including the issuing of bridging visas or residence determinations more readily so that people can live in the community.⁴²¹

398. Over half of the asylum seekers in one study experienced major stress related to either the fear of being sent home or of being unable to return home in an emergency.⁴²² Separation from family, unemployment, a lack of access to health and welfare services, and bureaucratic difficulties were other factors cited.⁴²³

399. In addition to general concerns about mandatory immigration detention, the Human Rights and Equal Opportunity Commission has also labelled the conditions of suicide and self-harm observation rooms in Villawood Immigration Detention Centre, where individuals requiring mental health treatment are effectively placed in solitary confinement, as a 'disgrace'.⁴²⁴

⁴¹⁷ Royal Australian College of General Practitioners, *Refugee and Asylum Seeker Resources: Health Care For Refugees And Asylum Seekers* (2002) available at <http://www.racgp.org.au/refugeehealth>.

⁴¹⁸ Mental Health Council of Australia, *The National Action Plan for Promotion, Prevention and Early Intervention for Mental Health, 2000* (2003).

⁴¹⁹ Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

⁴²⁰ Ibid 260.

⁴²¹ See generally, Human Rights and Equal Opportunity Commission, *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities 2007* (2008).

⁴²² Derek Silove and Zachary Steel, *The Mental Health and Well-Being of On-Shore Asylum Seekers in Australia*, (1998) 34.

⁴²³ Robert Schweitzer, Lisa Buckley and Donata Rossi, 'The Psychological Treatment of Refugees and Asylum Seekers: What Does the Literature Tell Us?' (2002) 21 *Mots Pluriels* 1.

⁴²⁴ Human Rights and Equal Opportunity Commission, 'Immigration Detention Centres: Improvements, But Still More Work to Do' (Media Release, 9 January 2008) available at http://www.hreoc.gov.au/about/media/media_releases/2008/1_08.html.

N.5 Women with Disability

400. Australia became a signatory to the UN *Convention on the Rights of Persons with Disabilities* on 30 March 2007. Lack of access to health services for women with disability in Australia, particularly due to the lack of special equipment and other infrastructure, was noted as an area requiring immediate attention by the Committee on the Elimination of Discrimination against Women in 2006.⁴²⁵
401. The issue of the forced sterilisation of children, particularly girls, with disability also raises serious concerns in relation to Article 12 of the *ICESCR*, as discussed in further detail under Article 10: Forced Sterilisation of Children with Disability.

N.6 Homeless People

402. Poor health has been demonstrated to be a contributor to and consequence of homelessness.⁴²⁶ While homelessness exacerbates and complicates the treatment of many health problems, some health problems are consequences of homelessness.⁴²⁷
403. At a recent Homelessness Consumer Forum in Melbourne, 51 per cent of people surveyed reported that they became homeless as a result of mental health problems and a lack of access to health care, 62 per cent stated that their mental health had worsened as a result of their experience of homelessness, and 78 per cent of people indicated that they had ongoing physical or mental health issues.⁴²⁸ These findings are echoed in other parts of the country. For example, a NSW-based report found that:
- (a) 75 per cent of people experiencing homelessness in inner Sydney have a mental health issue, compared to 20 per cent in the general population;
 - (b) 23 per cent of men and 46 per cent of women who are homeless have schizophrenia, compared to a general population prevalence between 5 and 10 per cent; and
 - (c) 33 per cent have depression compared to 6 per cent of the Australia community.⁴²⁹
404. Identified barriers to adequate health care for people experiencing homelessness include, among others, financial barriers, lack of transportation to medical facilities, competing needs where basic subsistence needs in relation to food, accommodation and income take precedence over health care, and lack of health insurance.⁴³⁰

⁴²⁵ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006).

⁴²⁶ Adrienne Lucy, 'South Eastern Sydney Area Health Service Homelessness Health Strategic Plan 2004–09' (2004) 17(8) *Parity* 6.

⁴²⁷ Institute of Medicine (US), *Homelessness, Health and Human Needs* (1998) 39.

⁴²⁸ Statistics derived from questionnaires undertaken at the Melbourne Consumer Forum, Melbourne Town Hall, August 2006.

⁴²⁹ T Hodder, M Teeson and N Buhrich, 'Down and Out in Sydney — Prevalence of Mental Disorders in Sydney' in St Vincent de Paul (ACT/NSW), *A Long Road to Recovery* (2001).

⁴³⁰ L Gelberg et al, *Health, Homelessness and Poverty: A Study of Clinic Users* (1996) 2325–30; National Mental Health Working Group, *Homelessness and Mental Illness: Bridging the Gap — Discussion Paper* (2003) 5; Margaret Eberle et al, *Homelessness: Causes and Effects — A Review of the Literature* (2001) 16–17.

405. Improving health outcomes for homeless people requires specifically targeted health care services, delivered together with programs to address underlying causes of homelessness.⁴³¹

Case Study

'I couldn't afford a dentist. I was homeless and ended up in emergency accommodation, where I found free dental care because of my circumstances. But all the dentist did was pull teeth out that could have been retained and repaired and I'm still waiting for replacements.'

One man reported that he was turned away from many hospitals when he presented with a broken sternum on the ground that the injury was not sufficiently severe or 'life threatening'.⁴³²

N.7 Prisoners

406. A 'snapshot' of prisoners in Victoria indicates that approximately half of all prisoners in custody have two or more characteristics of serious disadvantage. Characteristics of severe disadvantage include being of Aboriginal or Torres Strait Islander descent, being unemployed, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being homeless.⁴³³
407. Prisoners as a group are characterised by social and psychological disadvantage. They face major health issues, including high rates of injecting drug use and high rates of sexually transmitted diseases.⁴³⁴ The European Court of Human Rights has consistently held that a failure to provide adequate facilities so as to ensure that prisoners are not subject to degrading conditions, including particularly the failure to provide adequate health care to mentally ill prisoners, is a breach of the right to the highest attainable standard of health.⁴³⁵
408. It is estimated that approximately 5,000 out of the total Australian prison population of 25,000 suffer serious mental illness.⁴³⁶ This represents a rate between three and five times higher than in the general Australian community.⁴³⁷ There is both a causal and consequential link between imprisonment and mental illness. People with mental illness are more likely to be incarcerated, particularly having regard to the lack of support provided by the poorly resourced community mental health sector, and people in prison are more likely to develop

⁴³¹ Paula Braveman and Sofia Gruskin, 'Poverty, Equity, Human Rights and Health' (2003) 81(7) *Bulletin of the World Health Organization* 539, 540.

⁴³² Case study based on PILCH Homeless Persons' Legal Clinic consultations, 2005.

⁴³³ Department of Premier and Cabinet, State of Victoria, *Growing Victoria Together Progress Report* (2005–06) Appendix B — Service Delivery, 358.

⁴³⁴ Australian Institute of Health and Welfare, *Australia's Health 2006* (2006) 249.

⁴³⁵ See especially, *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii v Moldova* [2007] ECHR 8721/05. It may also amount to a violation of the prohibition against torture.

⁴³⁶ J P R Ogloff et al, Australian Institute of Criminology, *The Identification of Mental Disorders in the Criminal Justice System* (2007).

⁴³⁷ *Ibid.*

mental health problems.⁴³⁸ Procedures for detecting and treating mental illness in the criminal justice system have been found to be inadequate in each and every Australian jurisdiction.⁴³⁹ Children with mental illnesses and/or intellectual deficiencies are also over-represented in the juvenile justice system.⁴⁴⁰

409. There is significant evidence that mental health care in Australian prisons is manifestly inadequate and may amount to a level of neglect that constitutes degrading treatment or punishment. The conditions under which seriously mentally ill people are kept is not conducive to well being and recovery and is rudimentary at best. Rarely are proper provisions made⁴⁴¹ and mentally ill people detained are frequently denied treatment.⁴⁴² In some cases, the response of the system to mental illness was not treatment but brutality or an increase in harshness or length of detention.⁴⁴³
410. The use of solitary confinement (or ‘segregation’) as a management tool for people incarcerated in Australian prisons is widespread. It may cause or significantly exacerbate symptoms of mental illness, such as paranoia.⁴⁴⁴ Anecdotal evidence suggests inmates may be locked up for 22 or 23 hours a day in their cells, provided with incorrect, or inappropriate medications, and with limited access to mental health professionals.⁴⁴⁵
411. It is very common for mentally ill prisoners displaying acute and disturbing psychiatric symptoms to be placed in a ‘management and observation cell’ (or ‘Muirhead cell’) as a management strategy rather than for health reasons.⁴⁴⁶

⁴³⁸ Ibid.

⁴³⁹ Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

⁴⁴⁰ UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [73].

⁴⁴¹ Forensicare, *Submission to Senate Select Committee on Mental Health* (2005) 4, 5, 19 and 20 available at http://www.aph.gov.au/SEnate/committee/mentalhealth_cte/submissions/sub306.pdf.

⁴⁴² Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

⁴⁴³ Ibid.

⁴⁴⁴ NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (2006) available at [http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

⁴⁴⁵ Elizabeth Wynhausen, ‘Jailed in Body and Mind’, *The Australian* (Sydney), 28 August 2006.

⁴⁴⁶ Forensicare, *Submission to Senate Select Committee on Mental Health* (May 2005) 21 available at http://www.aph.gov.au/SEnate/committee/mentalhealth_cte/submissions/sub306.pdf; Commonwealth of Australia, *Official Committee Hansard*, Senate Select Committee on Mental Health, 6 July 2005, 48–9.

Case Study

Scott Simpson was found dead in a solitary confinement prison cell. At the time of his death, he was awaiting admission into a prison hospital facility for treatment for mental illness, having been found not guilty of a criminal offence on the grounds of mental incapacity.

Despite having been diagnosed as suffering from a serious case of paranoid schizophrenia, he had no traces of anti-psychotic medication in his system. For the final 26 months of his life (except for two short periods), he had been kept in solitary confinement.⁴⁴⁷

Women in Prison

412. Women in prison present with significant health needs. Recent research conducted in New South Wales, Queensland and Western Australia indicates that more than half of the women inmates had been diagnosed with a mental health condition and that between 30 per cent and 40 per cent had attempted suicide at some time.⁴⁴⁸ Women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners.⁴⁴⁹ Substance abuse and rates of infectious disease are also reported to be high.

Indigenous Women Prisoners

413. Indigenous women prisoners are the fastest growing prison population.⁴⁵⁰ In the decade to 2005, the Indigenous women prisoner population has increased by 420 per cent.⁴⁵¹ More than half of women in jail have been diagnosed with a mental illness and over 89 per cent of women prisoners are survivors of sexual assault.⁴⁵² Women in prison are not able to access adequate care and services, and prison staff are unable to ensure proper treatment for women with mental health issues.⁴⁵³

⁴⁴⁷ NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (2006) available at [http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

⁴⁴⁸ Australian Bureau of Statistics, *Australian Social Trends, 2004: Crime and Justice: Women in Prison* (2004) available at <http://www.abs.gov.au/Ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/781c132ae9185bedca256e9e002975fc!OpenDocument>.

⁴⁴⁹ See Sisters Inside, *Submission* (2004); Federation of Community Legal Centres (Vic) and Victorian Council of Social Service, *Request for a Systematic Review of Discrimination against Women in Victorian Prisons* (2005) available at <http://www.sistersinside.com.au/media/VICComplaint.pdf>.

⁴⁵⁰ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2006) chapter 9(b) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

⁴⁵¹ This compares with an increase over the same decade of 110 per cent in the male Indigenous prison population, and of 45 per cent in the general male prison population. In March 2004, the incarceration rates of indigenous women nationally were 20.8 times that of non-Indigenous women: *ibid*.

⁴⁵² Women's Report Card Project, Women's Rights Action Network Australia, *Our Rights, Our Voices: The National Community Report on Women's Human Rights in Australia* (2004) 25 available at <http://www.wrana.org.au/WRC%20Project/Final%20National%20report.pdf>.

⁴⁵³ *Ibid*.

N.8 Access to IVF

414. The availability of access to reproductive technology has been the subject of ongoing community debate, with infertility affecting approximately 15 per cent of Australian couples of reproductive age. Currently, different states and territories have different regimes operating in relation to access to reproductive technologies.
415. Access to fertility treatments via clinics is a matter regulated at a state and territory level, rather than at a federal level. This means that access to fertility treatments varies across Australia. Currently, in South Australia, Victoria and the Northern Territory, women in same-sex relationships and single women are excluded from undergoing assisted reproductive treatment procedures at clinics.⁴⁵⁴ In 2000, this exclusion from service in Victoria was successfully challenged in the High Court of Australia on the basis that it was inconsistent with the federal *Sex Discrimination Act 1984* (Cth).⁴⁵⁵
416. In response to this case, the Australian Government at the time introduced proposed amendments to the *Sex Discrimination Act 1984* (Cth) to permit states and territories to discriminate against women in same-sex relationships and single women and exclude them from fertility treatment at clinics. Despite various attempts by the former Australian Government, the proposed amendments were not passed.
417. At a more general level, failure to prohibit discrimination against women who are single or in same-sex relationships in respect of access to fertility treatments raises concerns not only in relation to the right to health, but also in relation to the right to family and equitable access to technology.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLE 12)

- Please provide details of the proportion of public expenditure on primary health care.
- Please provide further information to the Committee regarding whether the shift in funding from the public health system to private health insurance rebates has resulted in an increase in the gap in health services available to rich and poor Australians.
- Please provide further information on the Australian Government's plan to ensure that access to health care is better matched to community health need, with particular emphasis on the needs of low income and disadvantaged groups.
- Please provide details of plans for ensuring primary health care services and health infrastructure for Indigenous peoples that will bridge the gap in health standards by 2018.
- Please provide details of the proportion of public expenditure on mental health care.

⁴⁵⁴ See *Reproductive Technology Act 1988* (SA) s 13(4); *Infertility Treatment Act 1995* (Vic) ss 3, 8(3); *Anti-Discrimination Act 1992* (NT) s 4(8).

⁴⁵⁵ *McBain v State of Victoria* (2000) 99 FCR 116.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 12)

THAT Australia take steps, including budgetary steps, to increase the availability of dental care services to low and middle-income families.

THAT Australia take immediate steps to ensure that Indigenous Australians have an equal opportunity to be as healthy as non-Indigenous Australians, including by ensuring that Indigenous Australians have equal access to primary health care and that the basic health needs of Indigenous communities are met through the provision of adequate housing, safe drinking water, electricity and effective sewerage systems.

THAT Australia commit to adequate resourcing of mental health support and treatment services and research initiatives so that funding levels are in line with actual level of need.

THAT Australia abolish the practice of immigration detention.

THAT Australia provide the same rights and entitlements to all asylum seekers, regardless of their mode of entry.

THAT Australia prohibit the sterilisation of girls under the age of 18 years, unless the sterilisation is performed as a life saving measure or medical emergency.

THAT Australia deliver specifically targeted health care services to improve health outcomes for homeless people, including programs to address underlying causes of homelessness, including in the areas of housing, income support, primary health care, training and employment, protection from discrimination, rehabilitation and reintegration.

THAT Australia take appropriate measures to reduce the over-representation of people with a mental illness in the prison system, and to ensure that all prisoners receive adequate and appropriate mental health treatment as needed while in prison.

THAT Australia ensure that solitary confinement is not used as a substitute for adequate mental health treatment and care and that all necessary steps be taken to minimise the deleterious impacts of incarceration on mental health.

THAT Australia take steps to ensure equitable access to reproductive technologies for all women, regardless of marital status or sexual orientation, or geographic location.

Articles 13 & 14 — Right to Education

Article 13:

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*
2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*
 - (a) *Primary education shall be compulsory and available free to all;*
 - (b) *Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*
 - (c) *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*
 - (d) *Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*
 - (e) *The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*
3. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*
4. *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

Article 14:

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

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O. RIGHT TO EDUCATION

418. Article 13 (1) of the *ICESCR* recognises the right of everyone to education. Education should enable the effective participation of all in society and strengthen respect for human rights and fundamental freedoms. Article 13 requires States Parties to provide free compulsory primary education, free and accessible secondary education and higher education which is equally accessible on the basis of capacity.
419. Education in Australia is reaching crisis point at all levels — from early childhood education through to tertiary education. Australian research has linked education to better life outcomes, including higher rates of employment, higher wages, lower reliance on welfare, better health, and lower levels of violence, suicide and depression.⁴⁵⁶ While school attendance is compulsory in all jurisdictions to the age of 15 or 16 years,⁴⁵⁷ many children face issues regarding equal access to schools or are excluded from the education system altogether. In particular, children with disability, children from low income backgrounds and Indigenous children have lower levels of access to education from preschool to tertiary levels.

⁴⁵⁶ Australian Council of Social Service, *A Fair Go for All Australians: International Comparisons, 2007: 10 Essentials* (2007) 18 available at http://www.australiafair.org.au/upload/site/pdf/publications/3078_Australia%20Fair%20Report.pdf.

⁴⁵⁷ School attendance is compulsory for all children between the ages of 6 and 15 years in the Australian Capital Territory, New South Wales and the Northern Territory, and between the ages of 6 and 16 years in all other states.

420. In its Concluding Observations in 2005, the UN Committee on the Rights of Child made the following recommendations in relation to Australia:

61. The Committee recommends that the State Party:
 - (a) Take all necessary measures to ensure that articles 28 and 29 [right to education] of the Convention are fully implemented, in particular with regard to children belonging to the most vulnerable groups (i.e. indigenous children, homeless children, children living in remote areas, children with disabilities, etc.);
 - (b) Continue to take appropriate measures to combat the phenomenon of bullying in schools, including by carrying out periodic surveys among students, staff and parents to learn more about the peer relations being fostered by the school;
 - (c) Ensure that public education policy and school curricula reflect in all their aspects the principle of full participation and equality, include children with disabilities in the mainstream school system to the extent possible and provide them with the necessary assistance.⁴⁵⁸

O.1 Early Childhood Education

421. High quality early childhood education can have a significant impact on future educational outcomes and general wellbeing in later life. Australia does not have universal access to pre-school education and access to quality pre-school education remains problematic for many families, particularly those with a low income. Australia spends just 0.1 per cent of GDP on early childhood pre-school education, compared with the Organisation for Economic Co-operation and Development average of 0.5 per cent.⁴⁵⁹

422. In 2005, the Australian Council of Social Service estimated that 83.4 per cent of Australian children attended state and territory funded and/or provided pre-school services in the year before school, for an average of 11 hours per week.⁴⁶⁰ While a high percentage of Australian children attend pre-school education, there is no guaranteed access to pre-school education. As a result, children from non-English speaking backgrounds, low income families, Indigenous children or those with additional needs are less likely to attend early childhood education.⁴⁶¹

⁴⁵⁸ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [61].

⁴⁵⁹ Organisation for Economic Co-operation and Development, *Education at a Glance* (2006) 207

⁴⁶⁰ Australian Council of Social Service, *Fair Start: 10 Point Plan for Early Childhood Education and Care* (2006) 8.

⁴⁶¹ Kathy Walker, *For All Our Children: National Preschool Education Inquiry Report* (2004) 11.

O.2 Primary and Secondary School Education

423. In 2005, secondary school completion rates were 67 per cent, a figure which had not improved in the last decade.⁴⁶² Female students are more likely to complete secondary schooling than male students, and students from low socio-economic backgrounds are less likely to complete secondary school than students from high-income backgrounds.⁴⁶³
424. In comparison to other Organisation for Economic Co-operation and Development countries, Australia has an overall lower investment in education, spending 5.8 per cent of GDP. This places Australia's investment in education behind 17 other Organisation for Economic Co-operation and Development countries.⁴⁶⁴
425. The resource gap between private and public schools continues to grow. There has been an increase in the proportion of funding that non-government schools receive from the Australian Government, with state and territory governments left to provide the bulk of funding for government schools. In 2004-05, the Australian Government spent on average \$4,515 per student in non-government schools, compared to \$1,051 per student in government schools. In the same year, state and territory governments averaged \$1,636 per student in non-government schools, and \$9,778 per student in government schools.⁴⁶⁵
426. In addition, while public education at primary and secondary levels in Australia is 'free', there are a number of fees and charges that can be imposed. Students may be excluded from core education activities and school resources, such as access to computers or participation in excursions, because the school has not received payment of fees or charges. The reliance by government schools on fees and charges is another indication of fundamental problems in the resourcing of education in Australia, which impedes the opportunity of many Australians to realise the rights contained in Articles 13 and 14.

⁴⁶² Australian Bureau of Statistics, *Australian Social Trends* (2006) available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/9FA90AEC587590EDCA2571B00014B9B3?opendocument>.

⁴⁶³ Productivity Commission, *Report on Government Services 2007* (2007) 3.63.

⁴⁶⁴ Organisation for Economic Co-operation and Development, *Education at a Glance* (2006) 207.

⁴⁶⁵ Productivity Commission, *Report on Government Services 2007* (2007) B.6.

Bullying and Violence in Schools

427. In 1997, a national survey of more than 38,000 children (aged between 7 and 17 years) established that approximately one child in six was bullied by peers each week in Australian schools.⁴⁶⁶ In 2003, the Ministerial Council on Education, Employment, Training and Youth Affairs developed the National Safe Schools Framework.⁴⁶⁷ While the Framework has resulted in some measures being developed at both federal and state and territory levels to deal with this issue, the occurrence of bullying and violence in schools remains prevalent. In 2005, Kids Helpline reported 4,370 calls from children seeking assistance for bullying experiences.⁴⁶⁸
428. Australia's response to concerns raised by the Committee on the Rights of the Child about corporal punishment and the root causes of child abuse and violence⁴⁶⁹ has been inadequate. Bullying and violence has a serious effect on school retention and further education. Students who are bullied tend to leave school earlier, and many victims of bullying or violence at school report that bullying affected their plans for further education.⁴⁷⁰

Exclusion from Education

429. Students who are suspended or expelled from schools may be 'blacklisted' and unable to find a school willing to accept them. There is a lack of investment and support by all levels of government in models of alternative education, meaning that there are limited opportunities for participation in education for many young people with behavioural issues.
430. In 1996, the Parliamentary House of Representatives Standing Committee on Employment, Education and Training reported that truancy and exclusion required 'urgent remedial action' and recommended the collection of national data on the incidence of truancy, formal and informal exclusion and expulsion.⁴⁷¹ In 2004, research by the Australian Council of Educational Research attempted an analysis of the limited available data and estimated that rates of exclusions were increasing.⁴⁷² However, there remains no national statistical data collection on suspensions and exclusions.

⁴⁶⁶ Ken Rigby, 'What Children Tell Us about Bullying in Schools' (1997) 22(2) *Children Australia* 28.

⁴⁶⁷ See Ministerial Council on Education, Employment, Training and Youth Affairs, *National Safe Schools Framework* (2003) available at http://www.dest.gov.au/sectors/school_education/publications_resources/profiles/national_safe_schools_framework.htm.

⁴⁶⁸ See Kids Helpline, *Newsletter: October 2005* (2005).

⁴⁶⁹ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) [35], [36], [42]–[44].

⁴⁷⁰ See VicHealth, *Victorian Attitudes Towards Bullying* (2001) available at <http://www.togetherwedobetter.vic.gov.au/resources/research.asp>.

⁴⁷¹ Standing Committee on Employment, Education and Training, Commonwealth House of Representatives, *Truancy and Exclusion from School* (1996).

⁴⁷² Graeme Withers, *Disenchantment, Disengagement, Disappearance* (unpublished paper for 2004 Learning Choices Expo, Dusseldorp Skills Forum, 2004).

Case Study

Nadia is 16. She started at a new high school where she found herself in trouble. She was harassed and threatened by an older girl and her relationship with the school deteriorated when her mother became involved. She was accused of stealing and suspended for arguing about it. During the school holidays, the school left a message for her mother that she 'wasn't welcome' at the school any more and that she should find another school.

She tried to enrol in her previous school, but found that there was a new principal who wouldn't take her because they didn't want trouble. She is scared and depressed and wants to finish school, but doesn't know where she will find a school to take her.⁴⁷³

O.3 Higher Education

431. Access to higher education is becoming increasingly difficult for many Australians due to declines in government funding, the increasing privatisation of Australian universities and a 'user pays' approach to access to higher education.
432. Vocational and Educational Training and Adult and Community Education are more common educational options for Australians experiencing disadvantage, such as Indigenous people, people who speak English as a second language, people living in remote or regional areas and people with disability.⁴⁷⁴ However, Vocational and Educational Training had an 18 per cent decrease in funding in the 1990s.⁴⁷⁵
433. Investment by governments in university education continues to decline in Australia. Free higher education in universities was abolished in 1988 and replaced with a government-subsidised fee scheme. Students can elect to pay up-front for a discounted rate, or defer payment under the Higher Education Contribution Scheme. As Higher Education Contribution Scheme repayments are taken out of wages once income reaches a particular level, paying a tertiary education debt is particularly burdensome for women or people from non-English speaking background who are disproportionately represented in part-time or casual labour, or who interrupt their paid employment to have children. It is estimated that 93 per cent of men will have paid their Higher Education Contribution Scheme debt by the age of 65, in comparison to 77 per cent of women.⁴⁷⁶

⁴⁷³ Case study provided by National Children and Youth Law Centre.

⁴⁷⁴ Productivity Commission, *Report on Government Services 2007* (2007) [4.12]–[4.14].

⁴⁷⁵ Peter Kell (ed), *TAFE Futures — An Inquiry into the Future of Technical and Further Education in Australia* (2006) 13.

⁴⁷⁶ Martin Watts, 'Gender Segregation in Higher Educational Attainment in Australia 1978–94' (1997) 34 *Higher Education* 45, 56.

434. The Australian Labor Party calculated that the debt burden for university students has increased from \$4.5 billion in 1996-7 to nearly \$13 billion in 2007.⁴⁷⁷ The cost and debt burden act as a deterrent to further education and, as a result, students from disadvantaged and low income backgrounds are less likely to attend university. In 2003, 15 per cent of students from low income families went to university. These families believed the education costs and the costs of living while studying were too high.⁴⁷⁸

435. In addition, many young people from rural and regional communities are unable to attend higher education due to lack of income support, relocation costs and their obligations to their families in difficult economic circumstances.

436. The current Australian Government has very recently announced a major review of higher education in Australia. The Education Minister stated that:

Every Australian is now feeling the consequences of the Howard government's neglect of higher education, in things like a shortage of Australian trained doctors and nurses, a shortage of early childhood educators and school teachers, especially in crucial areas like maths and sciences, and a shortage of qualified engineers and logistical workers for our booming resources and construction sectors.⁴⁷⁹

437. The Australian Government's review of higher education will examine, among other things, ways in which to widen access to universities, improve student support programs and ensure the highest possible standards of education. These issues are essential to ensuring the access to tertiary education for as many Australians as possible.

O.4 Indigenous Education

438. Indigenous children have lower levels of access to education, from pre-school through to tertiary levels. In 2005, the retention rate for Indigenous students is 86 per cent to year 10, and 40 per cent to completion of secondary school.⁴⁸⁰ This figure is worse for females, with only 20 per cent of Indigenous women having completed secondary school compared with 45 per cent of non-Indigenous women. While the gap between Indigenous and non-Indigenous students is decreasing, Indigenous students are still only half as likely as non-Indigenous students to complete secondary school.⁴⁸¹ The number of adult Indigenous women who did not attend school at all is more than double that of non-Indigenous women.⁴⁸²

439. The lack of appropriate alternative options has particular impact on Indigenous children. In particular, a lack of culturally-appropriate education, Indigenous language schools and human rights education seriously affects the education system's ability to attract and retain

⁴⁷⁷ Australian Labor Party, *The Australian Economy Needs an Education Revolution* (2007) 21.

⁴⁷⁸ For details see Australian Council of Social Service, *Barriers to University Participation* (2003).

⁴⁷⁹ ABC, 'Govt Announces Higher Education Review', *PM Program* (13 March 2008) available at <http://www.abc.net.au/pm/content/2008/s2188994.htm>.

⁴⁸⁰ Dennis Trewin and Richard Madden, Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005* (2005) 18.

⁴⁸¹ *Ibid.*

⁴⁸² Australian Bureau of Statistics, *2006 Census of Population and Housing* (2007).

Indigenous students.⁴⁸³ If schools are culturally inappropriate or otherwise inaccessible, Indigenous students will not attend.⁴⁸⁴ Students who speak Indigenous languages at home but attend schools that teach only in English are more likely to fail or drop out than those taught by a bilingual or trilingual teacher.⁴⁸⁵ Further Indigenous community consultation and input into schools and curriculum is essential.

440. Despite recognition in the Common Core Document that significant investment is still required to improve education for Indigenous people,⁴⁸⁶ under-spending on Indigenous education continues to be a serious problem. As part of the Northern Territory Intervention (see [Article 1: Intervention into Northern Territory Indigenous Communities](#)), the Australian Government enforces school attendance by withholding welfare payments from Indigenous parents (mostly mothers) whose children do not attend school.⁴⁸⁷ However, it is estimated that if the participation rate of Indigenous school students in the Northern Territory was 100 per cent, at least another 660 teachers would be needed.⁴⁸⁸ The punitive approach to attendance has not yet been accompanied by adequate funding of schools and communities.
441. Recently, the current Australian Government has committed to have every Indigenous four-year-old in a remote Indigenous community enrolled in and attending a proper early childhood education centre or opportunity, and engaged in proper preliteracy and prenumeracy programs over the next five years.⁴⁸⁹

O.5 Children with Disability

442. Most Australian children with disability who are enrolled in school attend mainstream schools (86.3 per cent).⁴⁹⁰ However, peak bodies of people with disability in Australia, and advocacy and support organisations of families and carers, have voiced concerns about the accessibility of educational institutions, the curricula and the levels of support and resources available to students with disability.⁴⁹¹

⁴⁸³ See discussion in M Kronemann, Australian Education Union, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007).

⁴⁸⁴ Ibid 20.

⁴⁸⁵ Ibid.

⁴⁸⁶ Common Core Document, above n 3, [575]–[579].

⁴⁸⁷ This now applies to all Indigenous communities in the Northern Territory (*Social Security Act 2007* (Cth) sch 1) and may be expanded to many other Indigenous communities.

⁴⁸⁸ M Kronemann, Australian Education Union, *Education is the Key: An Education Future for Indigenous Communities in the Northern Territory* (2007) 33. This estimate was based on all Indigenous persons aged 3 to 17 years attending schools, with a teacher ratio of 1:10 for bilingual schools.

⁴⁸⁹ Commonwealth of Australia, *Apology to Australia's Indigenous Peoples*, House of Representatives, 13 February 2008 (Kevin Rudd, Prime Minister).

⁴⁹⁰ P Foreman (ed), *Integration and Inclusion in Action* (2nd ed, 2001).

⁴⁹¹ National Children's and Youth Law Centre and Defence for Children International (Australia), *The Non Government Report on the Implementation of the United Nations Convention on the Rights of the Child in Australia* (2005) 53.

443. Some of these concerns are reflected in the following statistics:
- (a) 84 per cent of all children with disability attending ordinary classes in mainstream schools were not provided with any education support arrangements;⁴⁹²
 - (b) only 32 per cent of young people aged between 15 and 24 years with a disability completed the final year of secondary school compared with 53 per cent of young people without a disability;⁴⁹³
 - (c) over half (57 per cent) of all young people with a disability aged between 20 and 24 years did not have a post-school qualification compared with 43 per cent of their same-age peers without a disability.
444. Educational opportunities in turn affect the realisation of other *ICESCR* rights, such as employment opportunities and outcomes. According to the Organisation for Economic Co-operation and Development, more than half (58 per cent) of Australia's adults with disability were unemployed in the late 1990s.⁴⁹⁴ Women with disability are particularly disadvantaged in this regard, with lower employment rates than similarly disabled males. If they are employed, they earn less than similarly disabled males.⁴⁹⁵ In addition, women with disability are less likely than their male counterparts to receive a senior secondary and/or tertiary education.
445. In Victoria, despite figures that show that the number of students with disability in schools has increased every year,⁴⁹⁶ the Victorian Government has tightened its funding criteria to reduce the eligibility of students with language disorders for individual funding. As a result, the number of supported students has declined from 6,760 to 208 students between 2005 and 2007. This is despite research presented to the Victorian Government from Speech Pathology Australia linking lack of access to education for students with language disorders to higher risks of long-term negative outcomes such as psychiatric illness, unemployment and over representation in the criminal justice system.⁴⁹⁷
446. There is also an exceptionally large number of claims lodged in relation to discrimination in education under the *Disability Discrimination Act 1992* (Cth). The Disability Discrimination Legal Service in Victoria reports that complaints in relation to people with disability and their access to education have continued unabated over the last 10 years.

⁴⁹² Australian Institute of Health and Welfare, *Children with Disabilities in Australia* (2004) 73.

⁴⁹³ Australian Institute of Health and Welfare, *Australia's Young People: Their Health and Well-Being 2003* (2004).

⁴⁹⁴ Organisation for Economic Co-operation and Development, *Transforming Disability into Ability. Policies to Promote Work and Income Security for Disabled People* (2003).

⁴⁹⁵ Women with Disabilities Australia, *Submission to the National Competition Policy Review of the Disability Discrimination Act 1992* (2003).

⁴⁹⁶ Ministerial Working Group Program for Students with Disabilities, Victoria, *Report of the Ministerial Working Group Program for Students with Disabilities* (2005).

⁴⁹⁷ Speech Pathology Australia, 'Students with Severe Language Disorder in Government Schools' (Briefing Paper, 2006).

447. Some of the difficulties facing young people with disability and their access to education include:
- (a) the trend towards mainstream schools persuading parents to move their children to Special Schools;
 - (b) high levels of bullying of children with disability in mainstream schools and an inability of many schools to tackle this problem effectively;
 - (c) the fact that transport to Special Schools can require young children with multiple disability to sit on buses for 3 to 4 hours per day; and
 - (d) the unwillingness of most Special Schools to provide academic curricula, even to children who have no intellectual disability.
448. These concerns indicate many of the impediments faced by children with disability in realising their right to education.

Case Study 1

Luke is an 8 year old mildly autistic child who attends a specialist school for intellectually disabled and autistic students. The school provides transport to students attending the school, however the bus trip for Luke takes between 1.5 and 2 hours each way to travel only 9 kilometres.

During the bus journey, all of the children, including Luke, are restrained in their seats by the use of seat belt locks, regardless of whether a child has any behavioural problems. In Luke's case, he can be incontinent from time to time which often results in him wetting himself and being forced to stay in his seat for the remainder of the journey because there is no one on the bus to attend to him. Given his autism, Luke is unable to communicate to the bus driver to express his discomfort.

In addition to the conditions and length of the bus journey, this significant period of time spent on the bus per day — sometimes up to 4 hours — has broader implications for the opportunity for children with disability to enjoy their family, rest and leisure time and to ensure the full growth and development of their personality and opportunities.⁴⁹⁸

Case Study 2

Students with a visual impairment are increasingly reliant on texts in electronic form. However, in Australia, it is difficult for blind people to access a wide range of electronic texts and no scheme exists to enable such access.⁴⁹⁹ At the same time, sighted people are using electronic text and other digital media at an ever-increasing rate. As a consequence, visually impaired students in Australia face significant disadvantage when compared with the level of access to electronic versions of all published material for sighted people, which has implications for their educational opportunities.

⁴⁹⁸ Case study provided by the Disability Discrimination Legal Service, Victoria.

⁴⁹⁹ See Suzor, Harpur and Thampapillai, 'Digital Copyright and Disability Discrimination: From Braille Books to Bookshare' (2008) Media and Arts Law Review.

PROPOSED QUESTIONS FOR LIST OF ISSUES (ARTICLES 13 AND 14)

- Please provide to the Committee any further information on what plans the Australian Government has to develop an integrated early childhood education and care program across Australia.
- Please provide details of the share of public expenditure on primary education and secondary education (disaggregated according to public and private schools).
- Please provide information regarding the proportion of Indigenous children attending secondary education and details of the adequacy and effectiveness of supports for Indigenous children to participate fully in and complete secondary education.
- Please provide information regarding the proportion of children with disabilities attending secondary education and details of the adequacy and effectiveness of supports for children with disabilities to participate fully in and complete secondary education.

**PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS
(ARTICLES 12 AND 13)**

THAT Australia invest progressively using the maximum available resources in public education and reduce the funding inequity between public government schools and private schools.

THAT Australia implement and adequately resource programs to address the issues of bullying, truancy and exclusion from schools, particularly in respect of Indigenous children.

THAT Australia take appropriate steps and measures, including budgetary measures, to ensure that tertiary education is equally available to all persons on the basis of merit and capacity and that special measures be implemented to ensure equality of opportunity and access for students with disability, Indigenous students, low income students, and students from rural and remote areas.

THAT, as a matter of urgency, Australia take immediate steps to address the serious disadvantage in accessing all levels of education experienced by Indigenous Australians.

THAT Australia implement and adequately resource programs to enable children with disabilities to participate fully in and complete secondary education.

Article 15 — Cultural and Scientific Progress Rights

Article 15:

1. *The States Parties to the present Covenant recognize the right of everyone:*
 - (a) *To take part in cultural life;*
 - (b) *To enjoy the benefits of scientific progress and its applications;*
 - (c) *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
3. *The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*
4. *The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.*

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P. CULTURAL RIGHTS

449. Article 15 recognises the right of everyone to take part in cultural life and enjoy the benefits of scientific progress and its applications. It also recognises the right for authors to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

P.1 Native Title

450. In its previous Concluding Observations, the CESCR recommended that necessary steps be taken to restore and protect the titles and interests of Indigenous Australians in their native lands, including by considering amending anew the *Native Title Act 1993* (Cth).⁵⁰⁰ Despite concerns expressed by the CESCR, access to and control over traditional lands continues to be a major human rights issue for Indigenous Australians. Despite significant developments in the recognition of Indigenous land rights in the early 1990s, legislation now provides for onerously high standards of proof to obtain recognition of their relationship with their traditional lands. The Committee on the Elimination of Racial Discrimination has also expressed concerns in relation to this high standard of proof.⁵⁰¹
451. In particular, the Northern Territory Intervention (discussed in detail under [Article 1: Intervention into Northern Territory Indigenous Communities](#)) grants the Australian Government five-year leases over Indigenous townships, without the permission of the land-owners. The Indigenous land-owners are not given the opportunity to negotiate the terms of the leases, which confer exclusive possession on the Australian Government and do not guarantee a right of residence for the affected peoples. The Australian Government may undertake any building and demolition work, and is not required to pay rent to the land owners. It was the former Australian Government's position that the compulsory leases 'will allow the Government to improve conditions in communities without having to go through long approval processes'.⁵⁰²
452. The compulsory acquisition of Indigenous townships vests all decision-making power in the Australian Government and thus deprives the traditional owners the right to make decisions about the use of the land. This is contrary to the right of self-determination, which would require that Indigenous peoples be involved in any decision-making process which affect their land. The different needs and cultures of Indigenous groups also require that decisions relating to each society be made separately and specifically.

⁵⁰⁰ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000) [11]

⁵⁰¹ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005) [17].

⁵⁰² Department of Families, Community Services and Indigenous Affairs, *Factsheet Number 25: Why is the Australian Government Acquiring Leases Over Townships?* (2007) available at http://www.facs.gov.au/nter/docs/factsheet_25.htm.

Case Study 1

Pursuant to powers granted in the Northern Territory Intervention, the Australian Government took over culturally sensitive areas of the Warlpiri nation, including a men's ceremonial area and a cemetery.⁵⁰³

Case Study 2

In November 2007, a government contractor involved in the Northern Territory Intervention built a pit toilet on a culturally important site at Numbulwar, 600 kilometres south-east of Darwin.⁵⁰⁴

P.2 Legal Recognition of Indigenous Cultural Laws

453. Australian laws governing the admissibility of Indigenous evidence and, in particular, Indigenous oral testimony in native title litigation, fail to recognise the rights of Indigenous Australians to take part in and to achieve the full realisation of Indigenous cultural life. Under Australian law, written evidence is favoured over the oral testimony of Indigenous witnesses, as oral records constitute 'hearsay' and are inadmissible under common law and the *Evidence Act 1995* (Cth).⁵⁰⁵ Indigenous societies, however, do not relegate information passed on via oral traditions to a second-class form of knowledge; what is valued in Indigenous society is the fact of transmission, its source, and to whom it has been passed.
454. This is compounded by the fact that written records demonstrating a genealogical connection to ancestors living at, or prior to, European settlement cannot be proven by official records since such records are non-existent. This means that Indigenous peoples face great disadvantage in the current legal system.⁵⁰⁶ The restrictive approach to Indigenous evidence imposes a critical barrier to native title. The loss of native title rights impedes the realisation of many economic, social and cultural rights for many Indigenous Australians.

P.3 Protection of Indigenous Cultural and Intellectual Property

455. Indigenous cultural and intellectual property rights are not adequately protected by Australian laws such as the *Copyright Act 1968* (Cth) or the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth). In June 2007, a Senate Environment, Communications, Information Technology and the Arts Committee completed an inquiry into Australia's Indigenous visual arts and craft sector and identified the following issues:

⁵⁰³ Lindsay Murdoch, 'Stop Interfering: Angry Elders Take a Stand against Changes', *Sydney Morning Herald* (25 October 2007) available at <http://www.smh.com.au/news/national/stop-interfering-angry-elders-take-a-stand-against-changes/2007/10/24/1192941153373.html>.

⁵⁰⁴ ABC, 'Claims Pit Toilet Built on NT Cultural Site', *ABC News*, 12 November 2007 available at <http://abc.net.au/news/stories/2007/11/12/2088464.htm>.

⁵⁰⁵ See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 and *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

⁵⁰⁶ *Ward (on behalf of the Miriuwung and Gajerrong People) v State of Western Australia* (1998) 159 ALR 483.

- (a) Indigenous cultural and intellectual property rights are communally, rather than individually owned;
- (b) transmission of Indigenous cultural and intellectual property rights, if permitted, is based upon a series of cultural qualifications, rather than being rights that are freely transferable; and
- (c) Indigenous customary law emphasises preservation and maintenance of culture, rather than economic rights.⁵⁰⁷

456. The Senate Committee noted that Indigenous artists were in a weak economic bargaining position and faced disadvantage such as poverty or medical conditions.⁵⁰⁸ The Senate Committee made several recommendations directed towards improving the material position of Indigenous artists, including recommending that: ‘recognising the complexity of the issues in this area, the Commonwealth introduce appropriate legislation to provide for the protection of Indigenous cultural and intellectual property rights.’⁵⁰⁹ The Senate Committee also recommended that, as a matter of priority, the Australian Government introduce revised legislation on Indigenous communal moral rights.⁵¹⁰ Currently, Australian copyright law only protects the moral rights of individual authors.

457. To date, the recommendations of the Senate Committee have not been adopted.

Q. ACCESS TO SCIENTIFIC PROGRESS AND ITS APPLICATIONS

458. The issue of access to reproductive technology has been the subject of ongoing debate, with infertility affecting approximately 15 per cent of Australian couples of reproductive age.⁵¹¹ Currently, different states and territories have different regimes operating in relation to access to reproductive technologies.

459. The problem has not been so much availability of technology, but rather access to it. The release of the revised National Health and Medical Research Council Ethical guidelines on the use of assisted reproductive technology in clinical practice and research in September 2004 has not changed Australia’s restrictive stance. Certain groups of women continue to be denied access to certain reproductive technologies such as artificial insemination and in vitro fertilisation, particularly lesbians, single heterosexual women, and financially disadvantaged women.⁵¹² This denial of access to reproductive technology raises concerns in relation to Article 15 of the *ICESCR* and also raises issues in relation to the right to health, as discussed under Article 12: Access to IVF.

⁵⁰⁷ Senate Environment, Communications, Information Technology and the Environment Committee, *Indigenous Art: Securing the Future — Inquiry into Australia’s Indigenous Visual Arts and Crafts Sector* (2007) [11.8].

⁵⁰⁸ *Ibid* [8.15].

⁵⁰⁹ *Ibid* Recommendation 25.

⁵¹⁰ *Ibid* Recommendation 24.

⁵¹¹ A Waters, J Dean and A Sullivan, *Assisted Reproductive Technology in Australia and New Zealand* (2006).

⁵¹² On 14 December 2007, the Victorian Government announced plans to introduce legislation to allow single women and lesbians access to IVF technology: see ‘Lesbian Women to Get Access to IVF’, *The Age* (Melbourne) 15 December 2007 available at <http://news.theage.com.au/lesbian-women-to-get-access-to-ivf/20071214-1h3j.html>.

PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS (ARTICLE 15)

THAT Australia ensure, through legislation, that the moral and material rights of Indigenous authors are protected.

THAT Australia ensure that the cultural impact of the Northern Territory Intervention is consistent with Australia's obligations under Article 15 of the *ICESCR*.

THAT Australia amend evidentiary laws governing the admissibility of Indigenous testimony so as to allow for the recognition and respect of Indigenous oral testimony in native title claims.

THAT Australia take steps to ensure equitable access to reproductive technologies for all women, regardless of marital status or sexual orientation, or geographic location.

Appendix 1 — Proposed Questions for List of Issues

Article 1 — Right of Self-Determination

- Please provide information on the steps that the Australian Government is taking to promote the right of Indigenous Australians of self-determination.
- Please provide details of any policies and measures being developed by the Australian Government to establish a representative Indigenous body to ensure that Indigenous persons are able to meaningfully participate in and contribute to relevant policy and decision-making processes.
- Please provide information on the steps that the Australian Government is taking to improve consultation with affected communities and to support the development of better Indigenous governance structures, particularly in light of the abolition of the Aboriginal and Torres Strait Islander Commission and particularly in relation to the Northern Territory Intervention.
- Does the Australian Government propose to implement the remaining recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report that are not already implemented? In particular, what measures are being taken to provide an effective remedy to the Stolen Generations through reparations?
- Please provide information on the steps the Australian Government is taking to implement the recommendations of the Human Rights and Equal Opportunity Commission to ensure that the Northern Territory Intervention is compatible with domestic and international human rights standards.

Article 2 — Treaty Entrenchment and Non-Discrimination

- Please provide information as to how the *ICESCR* is incorporated into Australian domestic law, including its enforceability and justiciability before domestic courts and tribunals.
- Please indicate whether the proposed national consultation regarding a federal charter of rights will consider whether economic, social and cultural rights should be enshrined in Australian law.
- Please explain Australia's current position in relation to negotiation and adoption of an Optional Protocol to the *ICESCR* and how this position is compatible with the principle that victims should be entitled to an 'effective remedy' for human rights violations.
- Please also explain how Australia's position is compatible with the notion that all human rights — civil, political, economic, social and cultural — are universal, inalienable, interdependent and mutually reinforcing.
- Please explain why Australia does not support an inquiry procedure for gross and systematic violations of economic, social and cultural rights.

- The current Australian Government’s commitment to increasing foreign aid from 0.3 per cent to 0.5 per cent of Gross National Income is welcome. Please explain why, however, the commitment remains short of the 0.7 per cent required by the Millennium Development Goals.
- Please provide information as to the steps being taken to develop a national action plan on human rights education and to ensure that ‘human rights’ are a formal component of the curriculum at a primary or secondary level in every Australian state and territory.
- What steps, including legislative measures, is the Australian Government taking to address issues of substantive inequality and systemic discrimination against vulnerable communities and groups, including Indigenous Australians, women, people with disability, people from non-English speaking backgrounds and all religions, homeless people, gay, lesbian, bisexual, transgender and intersex people, children and young people, and older persons?
- Please explain how exemptions to Australian anti-discrimination law which permit discrimination on grounds including race and nationality in the field of employment are compatible with the prohibition against discrimination under the *ICESCR*.
- The current Australian Government has recently recognised that homelessness is a major issue in Australian society. What additional measures, both legislative and educative, have or will the Australian Government introduce to address discrimination based on socio-economic and housing status?

Article 3 — Equal Rights of Men and Women

- What concrete steps, including legislative, budgetary and administrative steps, is Australia taking to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation?
- Please outline the steps and measures that Australia is taking to ensure that women and children who are victims of domestic violence are able to remain in the family home and do not become homeless.
- Please indicate whether the resources allocated to both prevention of violence and assistance for women and children who experience violence, including through the “Women’s Safety Agenda” initiative, are anticipated to meet the demand for services.
- How will the Australian Government support a structure for Indigenous women to have input into deciding on appropriate services and solutions to violence in their own communities?
- Please provide details of policies and programs to protect homeworkers, including by ensuring that they receive the official minimum wage, benefit from adequate social security and enjoy fair working conditions.

Article 6 — Right to Work

- Please provide information as to how the tribunal arm of Fair Work Australia will facilitate the evolution of working conditions given the restrictions on its proposed award-making powers.
- Is the Australian Government committed to having all workers' conditions set by an independent tribunal, regardless of the amount they earn?
- Is the Australian Government committed to giving the independent tribunal sufficiently broad award-making powers to allow for the evolution of working conditions?
- How does the Australian Government envisage this will be possible within their proposed policy of preventing new awards from being made and limiting the allowable subject matters and types of employees that awards may cover?
- Please provide information as to whether the Welfare to Work changes to social security legislation introduced by the former Australian Government have resulted in a decrease in income for some marginalised and vulnerable groups.
- Please provide details of the rate of underemployment in Australia, including disaggregated data according to gender, race and age.
- Please provide disaggregated data according to gender, race and age regarding the proportion of working poor (that is, people working but earning less than poverty-line income) in the labour force.
- How will the Australian Government ensure social inclusion issues — particularly education and training, child care and health — are incorporated into any 'mutual obligation' policies it intends to maintain in its regulation of Welfare to Work and Work for the Dole?
- Please provide details of any special programs or measures designed to address the significant barriers to workforce participation faced by many Indigenous people, asylum seekers and migrants.
- What steps has/will the Australian Government take to introduce work rights for asylum seekers in the community?
- How does the Australian Government intend to allow such work rights to continue pending the finalisation of any applications before the Minister for Immigration under section 417 of the *Migration Act 1958* (Cth)?
- Please provide details of any national strategy to combat the trafficking of women and children and to address exploitation resulting from sexual servitude.
- What steps is Australia taking to ensure that adequate compensation is paid to Indigenous Australians for stolen wages?

Article 7 — Right to Just and Favourable Conditions of Work

- Please provide further detail on the steps being taken to address the impact of the former Australian Government's industrial relations policy, Work Choices, including in relation to hours of work, work loads, protection from unfair dismissal, fair wages and conditions, collective bargaining and leave entitlements.
- What steps will the Australian Government take to remedy the unequal conditions of employment enjoyed by women?
- What steps will the Australian Government take to ensure better guarantees of maximum hours of work and reasonable rest and leisure time for Australian workers?
- What steps will the Australian Government take to ensure the progressive realisation of Australian workers' rights under article 7?

Article 8 — Freedom of Association and Right to Strike

- Please explain how the right to strike is protected by Australian law and how restrictions on the right under domestic law are compatible with the *ICESCR*.

Article 9 — Right to Social Security

- Please explain how social security is enshrined as a right under Australian law.
- Please advise whether social security is available to all persons who experience a loss of income beyond their control and who require income support to ensure realisation of their human right to an adequate standard of living.
- What steps is the Australian Government taking to make social security payments accessible to newly arrived migrants, asylum seekers, people unable to provide adequate proof of identity, and marginalised and disadvantaged people unable to satisfy mutual obligation requirements?
- Please provide information as to whether the level of social security payments is adequate to support a dignified life and adequate standard of living.
- Please provide the Committee with further information on any research that has been undertaken to investigate the impact of no payment periods in facilitating return to employment.

Article 10 — Right to Family

- Please provide details of the outcomes of Productivity Commission inquiry the establishment of a paid parental leave scheme.
- Please provide details as to whether there are currently any children being held in both on-shore and off-shore immigration detention.
- Prior to being elected as the current Australian Government in November 2007, the Australian Labor Party committed to removing discrimination on the basis of sexual orientation in Federal laws.⁵¹³ Please provide further information on the Australian Government's plans to implement the recommendations of the Human Rights and Equal Opportunity Commission's *Same-Sex: Same Entitlements* report and also to amend the other laws that the Australian Labor Party has found to discriminate against same-sex couples and their families.
- Please provide further information on whether the Australian Government intends to proceed with the draft Children with Intellectual Disabilities (Regulation of Sterilisation) Bill 2006.

Article 11 — Right to an Adequate Standard of Living

- Please provide to the Committee further information on what steps the Australian Government has taken or will take towards the development of a National Housing Strategy, particularly to address the growing housing affordability crisis facing many low and middle income households.
- Please provide data regarding the number of homeless shelter beds per homeless person.
- Please provide the Committee with detailed information regarding the steps that have been taken or are intended to ensure that all homeless people are able to access crisis accommodation as of right.
- Please provide information regarding the average monthly housing expenditure by median poor household as a proportion of its monthly income.
- Please explain what exceptional circumstances, if any, justify the reduction in the availability of adequate, affordable, accessible and safe housing in Australia over the last decade.
- Please provide details of the proportion of people with inadequate intake of dietary energy.
- Please provide details of the proportion of household expenditure on food.
- Please provide data regarding the variability of prices of staple foods.
- Please provide details as to the nutritional status of Indigenous people, homeless people, sole-parent families, children, unemployed people, low-income earners, older people, people with disabilities, rural people, refugees and asylum seekers, and their ability to access adequate, affordable and appropriate food and water.

⁵¹³ Shadow Attorney-General Joe Ludwig, 'Labor Welcomes Human Rights and Equal Opportunity Report on Same-Sex Entitlements' (Media Statement, 21 June 2007).

- Please provide details as to the steps and measures being taken to ensure that all Australians are free from food insecurity and have adequate access to appropriate, nutritious and affordable food.
- Please provide details as to the steps and measures being taken to ensure that all Australians have adequate access to affordable drinkable water and sanitation services.
- Please indicate whether all Indigenous communities have adequate access to affordable drinkable water and sanitation services.
- Please provide to the Committee further information on what steps are taken to assist recently arrived migrants find work.

Article 12 — Right to Highest Attainable Standard of Physical and Mental Health

- Please provide details of the proportion of public expenditure on primary health care.
- Please provide further information to the Committee regarding whether the shift in funding from the public health system to private health insurance rebates has resulted in an increase in the gap in health services available to rich and poor Australians.
- Please provide further information on the Australian Government's plan to ensure that access to health care is better matched to community health need, with particular emphasis on the needs of low income and disadvantaged groups.
- Please provide details of plans for ensuring primary health care services and health infrastructure for Indigenous peoples that will bridge the gap in health standards by 2018.
- Please provide details of the proportion of public expenditure on mental health care.

Articles 13 & 14 — Right to Education

- Please provide to the Committee any further information on what plans the Australian Government has to develop an integrated early childhood education and care program across Australia.
- Please provide details of the share of public expenditure on primary education and secondary education (disaggregated according to public and private schools).
- Please provide information regarding the proportion of Indigenous children attending secondary education and details of the adequacy and effectiveness of supports for Indigenous children to participate fully in and complete secondary education.
- Please provide information regarding the proportion of children with disabilities attending secondary education and details of the adequacy and effectiveness of supports for children with disabilities to participate fully in and complete secondary education.

Appendix 2 — Proposed Recommendations for Concluding Observations

Article 1 — Right of Self-Determination

THAT the recent formal apology to Indigenous Australians be congratulated.

THAT Australia continue its efforts in the process of reconciliation with Indigenous Australians and its efforts to improve their disadvantaged situation.

THAT the Australian Government provide resources for healing and counselling services for those affected by the Stolen Generations and for reparation options.

THAT all of the recommendations contained in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report be implemented.

THAT, in light of the abolition of the Aboriginal and Torres Strait Islander Commission, the Australian Government establish an Indigenous body that consists of elected Indigenous representatives who can contribute to policy-making in domestic Indigenous affairs.

THAT the Australian Government consider repealing those aspects of the Northern Territory Intervention legislation that are incompatible with domestic and international human rights standards.

Article 2 — Treaty Entrenchment and Non-Discrimination

THAT Australia incorporate the Covenant in its legislation in order to ensure the applicability of the provisions of the Covenant in domestic courts.

THAT Australia incorporate comprehensive protection of all economic, social and cultural rights into domestic law.

THAT Australia support the adoption of an Optional Protocol to *ICESCR* and commit to promptly signing and ratifying this instrument, including the inquiry procedure component.

THAT Australia increase its foreign aid commitment to meet the target set by the Millennium Development Goals.

THAT Australia include education about human rights, including economic, social and cultural rights, in primary and secondary school curricula.

THAT, as requested in the Committee's 2000 Concluding Observations, the Australian Government provide additional and more detailed information including statistical data that is disaggregated according to age, sex and minority groups, particularly with respect to the right to work, just and favourable conditions of work, social security, housing, health and education.

THAT Australia legislate to prohibit discrimination on the grounds of sexual orientation and gender identity and THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Same-Sex: Same Entitlements* report.

THAT Australia legislate to ensure that any exemptions or exceptions permitted under domestic anti-discrimination law are compatible with the prohibition against discrimination under the *ICESCR*.

THAT Australia legislate to address issues of substantive inequality and systemic discrimination against vulnerable communities and groups.

THAT Australia implement the recommendations of the Human Rights and Equal Opportunity Commission's *Isma — Listen* report, to address the issue of discrimination against and vilification of Arab and Muslim Australians.

Article 3 — Equal Rights of Men and Women

THAT Australia take concrete steps, including legislative, budgetary and administrative steps, to address the significant disadvantage of women compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation.

THAT in addition to addressing the underlying causes of domestic violence, Australia increase funding to shelters and support services that are appropriate to women fleeing situations of domestic violence.

THAT Australia ensure that Indigenous women are properly consulted in relation to appropriate services and solutions to address violence in their communities.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

THAT Australia introduce a national Mandatory Code of Practice to protect outworkers and THAT Australia develop policies and programs to protect homeworkers, including by ensuring that they receive the official minimum wage, benefit from adequate social security and enjoy fair working conditions.

Article 6 — Right to Work

THAT special programs and measures be designed to address the significant barriers to workforce participation faced by many Indigenous people, asylum seekers and migrants.

THAT Australia extend work rights to all asylum seekers regardless of how and when they entered Australia.

THAT Australia ensure that recognition is given to qualifications of skilled migrants who are educated overseas and that access to bridging training is promptly available. In addition, that Australia ensure that effective programs are implemented to address negative community and employer perceptions regarding migrant workers.

THAT Australia develop and implement a comprehensive national strategy, including within a workers' rights framework, to combat the trafficking of women and children and to address exploitation resulting from sexual servitude or debt bondage.

THAT Australia implement the recommendations contained in the *Unfinished Business: Indigenous Stolen Wages* report, including the establishment of a national compensation plan.

THAT Australia implement laws to ensure that prisoners are:

- (a) fairly remunerated for their work;
- (b) not penalised through loss of other opportunities or privileges for refusing to undertake paid work;
- (c) provided with opportunities to acquire vocational skills to assist them to find post-release employment; and
- (d) equally protected in relation to workplace injury as other workers.

Article 7 — Right to Just and Favourable Conditions of Work

THAT Australia be congratulated for its commitment to abolish Work Choices and for taking steps to phase out individual statutory agreements and restoring some unfair dismissal rights.

THAT Australia take steps to ensure that the realisation of Australian workers rights under Article 7 continues to evolve. In particular, that Australia take steps to ensure the award-making powers of any future award-making tribunal be sufficiently broad to allow for such evolution.

THAT Australia remove restrictions on unfair dismissal protection and refrain from reducing the time limit in which employees may apply for unfair dismissal remedies.

THAT Australia take steps to prevent further casualisation of the workforce and to promote job security.

THAT Australia take immediate steps to reduce the significant gender wage gap that exists in the Australian workforce.

THAT Australia introduce a compulsory paid maternity leave scheme consistent with the internationally-recognised standard of 14 weeks.

Article 8 — Freedom of Association and Right to Strike

THAT Australia ensure that industrial relations laws and practices reflect the principle that the right to freedom of association and the right to strike encompass both the right to join a trade union and extend to the membership of a union.

Article 9 — Right to Social Security

THAT all necessary legislative and administrative steps be taken to ensure that:

- (a) social security payments are available to all people who experience a loss of income beyond their control or who require income support to ensure realisation of their human right to an adequate standard of living;
- (b) social security payments are increased to levels above the Henderson Poverty Line so that recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate housing, health care and an adequate standard of living; and
- (c) the breach penalty regime under the *Social Security Act 1991* (Cth) be amended so that people are only penalised if they wilfully and intentionally breach their mutual obligations. Penalties should be no longer than 8 weeks duration, no greater than 25 per cent of income and recoverable on compliance or reasonable steps.

THAT the waiting period for all newly arrived residents, including New Zealand citizens, be reduced to six months and that where a person is in financial hardship they have access to the special benefit – regardless of whether there has been a 'substantial change in circumstances beyond a person's control'.

THAT Australia ensure that asylum seekers are not left destitute and that they have access to social security payments, Medicare, higher education funding schemes and other social assistance.

Article 10 — Right to Family

THAT Australia consider implementing a comprehensive national paid parental leave scheme, including compulsory paid maternity leave consistent with the internationally-recognised standard of 14 weeks.

THAT Australia make it a priority to resettle family members of individual refugee and humanitarian permanent residents.

THAT Australia abolish temporary protection visas for refugees and replace them with permanent protection or permanent residency visas.

THAT Australia commit to working with state and territory governments towards a nationally consistent approach to relationship recognition, in particular one that includes both same-sex and, mixed-sex couples on terms of equality, and also other interdependent relationships.

THAT Australia take immediate steps to ensure minimum entitlements such as personal/carer's leave, compassionate leave and parental leave are afforded to all employees regardless of sexual orientation.

THAT Australia legislate to remove discrimination against same-sex couples and their families, including by implementing the recommendations contained in the Human Rights and Equal Opportunity Commission's report on *Same-Sex: Same Entitlements*.

THAT Australia take steps to ensure that families can access housing, health and employment services following the release of a parent from prison.

THAT Australia ensure that all states and territories implement consistent policies addressing the needs of dependent children during the arrest and incarceration of their primary carer, in particular by considering alternative sentencing options such as the suitability of home detention, periodic detention or community-based orders.

THAT Australia legislate comprehensively to ensure that no child may be held in an immigration detention centre.

THAT Australia commit to a specific timeframe for all Australian state and territory governments to provide a minimum age for paid employment and/or a maximum number of allowable work hours for children subject to compulsory schooling.

THAT Australia ensure all states and territories abolish junior or youth rates of pay replacing them with equal rates of pay for equal work, with payments based on responsibilities and skills required in the job, not age.

THAT Australia ratify ILO Conventions 138 Concerning the Minimum Age for Admission to Employment and 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

THAT Australia adopt legislation to prohibit the sterilisation of children, including children with disability.

Article 11 — Right to an Adequate Standard of Living

THAT Australia develop and implement a comprehensive anti-poverty and social inclusion strategy, which includes a commitment to resources and poverty reduction targets or benchmarks.

THAT Australia amend the *Supported Accommodation Assistance Act 1994* (Cth) to enshrine a right of access to crisis accommodation for homeless people and THAT there be a 40 per cent increase in funding to the Supported Accommodation Assistance Program to meet demand.

THAT federal, state, territory and local governments commit to increase funding, access and availability to various forms of supported housing and accommodation, particularly housing which meets the needs of people with disability, people experiencing mental illness, people with drug or alcohol disorders, and people with complex and multiple needs.

THAT Australia ensure that Indigenous peoples are consulted with to realise the culturally specific housing needs of Indigenous Australians.

THAT Australia develop a National Housing and Taxation Plan that includes strategies to align the supply of affordable housing with demand. The availability of affordable housing, including public housing, should be progressively increased through both direct expenditure, and fiscal and taxation policy reforms.

THAT Australia fully implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the Report on the Special Rapporteur's Mission to Australia.

THAT Australia take all necessary steps and measures, including through the development of a comprehensive anti-poverty and social inclusion strategy, to ensure that all persons are free from food insecurity and have adequate access to appropriate, nutritious and affordable food.

THAT Australia develop and implement a national strategy to ensure that all Australians, including in particular Indigenous Australians, have adequate access to affordable drinkable water and sanitation services.

THAT Youth Allowance is increased to levels above the Henderson Poverty Line so that recipients are able to meet their material needs and participate in society. Payments should be sufficient to ensure that recipients can afford adequate housing, health care and an adequate standard of living.

Article 12 — Right to Highest Attainable Standard of Physical and Mental Health

THAT Australia take steps, including budgetary steps, to increase the availability of dental care services to low and middle-income families.

THAT Australia take immediate steps to ensure that Indigenous Australians have an equal opportunity to be as healthy as non-Indigenous Australians, including by ensuring that Indigenous Australians have equal access to primary health care and that the basic health needs of Indigenous communities are met through the provision of adequate housing, safe drinking water, electricity and effective sewerage systems.

THAT Australia commit to adequate resourcing of mental health support and treatment services and research initiatives so that funding levels are in line with actual level of need.

THAT Australia abolish the practice of immigration detention.

THAT Australia provide the same rights and entitlements to all asylum seekers, regardless of their mode of entry.

THAT Australia prohibit the sterilisation of girls under the age of 18 years, unless the sterilisation is performed as a life saving measure or medical emergency.

THAT Australia deliver specifically targeted health care services to improve health outcomes for homeless people, including programs to address underlying causes of homelessness, including in the areas of housing, income support, primary health care, training and employment, protection from discrimination, rehabilitation and reintegration.

THAT Australia take appropriate measures to reduce the over-representation of people with a mental illness in the prison system, and to ensure that all prisoners receive adequate and appropriate mental health treatment as needed while in prison.

THAT Australia ensure that solitary confinement is not used as a substitute for adequate mental health treatment and care and that all necessary steps be taken to minimise the deleterious impacts of incarceration on mental health.

THAT Australia take steps to ensure equitable access to reproductive technologies for all women, regardless of marital status or sexual orientation, or geographic location.

Articles 13 & 14 — Right to Education

THAT Australia invest progressively using the maximum available resources in public education and reduce the funding inequity between public government schools and private schools.

THAT Australia implement and adequately resource programs to address the issues of bullying, truancy and exclusion from schools, particularly in respect of Indigenous children.

THAT Australia take appropriate steps and measures, including budgetary measures, to ensure that tertiary education is equally available to all persons on the basis of merit and capacity and that special measures be implemented to ensure equality of opportunity and access for students with disability, Indigenous students, low income students, and students from rural and remote areas.

THAT, as a matter of urgency, Australia take immediate steps to address the serious disadvantage in accessing all levels of education experienced by Indigenous Australians.

THAT Australia implement and adequately resource programs to enable children with disabilities to participate fully in and complete secondary education.

Article 15 — Cultural and Scientific Progress Rights

THAT Australia ensure, through legislation, that the moral and material rights of Indigenous authors are protected.

THAT Australia ensure that the cultural impact of the Northern Territory Intervention is consistent with Australia's obligations under Article 15 of the *ICESCR*.

THAT Australia amend evidentiary laws governing the admissibility of Indigenous testimony so as to allow for the recognition and respect of Indigenous oral testimony in native title claims.

THAT Australia take steps to ensure equitable access to reproductive technologies for all women, regardless of marital status or sexual orientation, or geographic location.

Appendix 3 — Recommendations of Treaty Bodies and Special Procedures

The following table addresses the extent to which the Common Core Document deals sufficiently with previous Concluding Observations of the Committee on Economic, Social and Cultural Rights.

An assessment has been made as to whether each recommendation is:

- not addressed at all;
- inadequately addressed; or
- adequately addressed.

Concluding Observation	Common Core Document Reference	Assessment
<p>The Committee strongly recommends that the State Party incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts. The Committee urges the State Party to ensure that no conflicts occur between Commonwealth and state law in this respect. The Committee encourages the State Party to follow the High Court’s position concerning ‘legitimate expectations’ arising from the ratification of the Covenant.</p>	<p>D. General legal framework within which human rights are protected at the national level</p>	<p>Not addressed at all / inadequately addressed.</p> <p>The report is deliberately silent on the incorporation of the Covenant into domestic legislation.</p> <p>Often the other concluding observations are pointed out and then disagreed with or rebutted. In this case, the report does not address this observation at all.</p> <p>The legitimate expectation aspect is dealt with at paragraphs [65]-[66].</p>
<p>The Committee encourages the State Party to pursue its efforts in the process of reconciliation with Australia’s Indigenous peoples and its efforts to improve the disadvantaged situation they are in.</p>	<p>G. Non-discrimination and equality Paragraphs [115]-[151]</p>	<p>Adequately addressed.</p> <p>The report is silent on the issue of an apology to Indigenous Australians, and is also silent on issues relating to the condition of Indigenous Australians in the Northern Territory.</p>
<p>The Committee recommends that the State Party ensure that the legislative provisions concerning job security are strengthened and effectively implemented, especially for the most vulnerable groups, such as fixed term contract workers, temporary workers and casual workers.</p>	<p>T. Right to just and favourable conditions of work Paragraph [437]</p>	<p>Inadequately addressed.</p> <p>The report is silent on measures taken to strengthen job security of the vulnerable.</p>

Concluding Observation	Common Core Document Reference	Assessment
The Committee strongly recommends that the State Party undertake measures to protect home workers and to ensure that they receive the official minimum wage, that they benefit from adequate social security and that they enjoy working conditions in conformity with the legislation.	T. Right to just and favourable conditions of work Paragraphs [429]-[430]	Inadequately addressed. The report relies on changes made for the Victorian jurisdiction only and the general effects of Work Choices. It is silent on issues that are particular to homeworkers and any particular measures to deal with their needs.
The Committee recommends that the State Party consider enacting legislation on paid maternity leave and ratifying ILO Convention No. 103 concerning maternity protection.	R. Right to marry and found a family, protection of the family, mother and children Paragraph [382]	Inadequately addressed. The Australian Government indicates that it does not intend to ratify this ILO Convention.
The Committee recommends that the State Party limit its prohibitions on the right to strike to essential services, in accordance with ILO Convention No. 87, and, in the context of the civil service, to civil servants who exercise functions of State authority.	U. Trade Union Rights Paragraph [452]	Inadequately addressed. The Australian Government indicates that it will not limit the prohibition on strikes to essential services.
The Committee recommends that the State Party ensure that labour in private prisons is voluntarily undertaken and is properly remunerated.	T. Right to just and favourable conditions of work Paragraph [431]-[436]	Inadequately addressed. Deals with the inconsistent approaches adopted by states with this observation and notes that this area needs to be addressed federally. However, it does not deal with this issue in detail.
The Committee requests that the State Party provide detailed information on the work for dole scheme in its Fourth Periodic Report.	V. Right to social security Paragraphs [460]-[464]	Adequately addressed. The report briefly outlines the ‘work for the dole’ scheme.
The Committee calls upon the State Party to ensure that the two-year waiting period for the receipt of social security assistance by new immigrants does not infringe upon their right to an adequate standard of living.	V. Right to social security Paragraphs [465]-[468]	Adequately addressed. It is noted by the report that the two year waiting period is waived only for humanitarian entrants.

Concluding Observation	Common Core Document Reference	Assessment
<p>The Committee strongly urges the State Party to establish an official poverty line, so that a credible assessment can be made of the extent of poverty in Australia. The Committee requests further that the State Party provide information on this issue in its Fourth Periodic Report.</p>	<p>V. Right to social security Paragraphs [483]-[485]</p>	<p>Inadequately addressed. The report stipulates that the application of a poverty line to Australia is not an effective way of measuring the effects of social policy.</p>
<p>The Committee strongly recommends that the State Party, at the federal level, develop a housing strategy in keeping with the Committee’s General Comments No. 4 and 7, including provisions to protect tenants from forced eviction without reasons and from arbitrary rent increases. In addition, the Committee recommends that the State Party ensure that all state and territory governments establish appropriate housing policies in accordance with this strategy.</p>	<p>W. Right to adequate food, clothing and housing Paragraphs [498]-[501]</p>	<p>Inadequately addressed. The report is silent on federal action to address this observation.</p>
<p>The Committee calls upon the State Party to take effective steps to ensure that human rights education is included in primary and secondary school curricula and requests the State Party to inform the Committee of the measures taken in this regard in its Fourth Periodic Report.</p>	<p>E. General framework within which human rights are promoted at the national level Paragraphs [86]-[87]</p>	<p>Inadequately addressed. The report deals with this observation by outlining approaches taken by the Australian Government to education. It does not identify the particular programs in place or the extent to which they are implemented.</p>
<p>The Committee requests the State Party to provide additional, more detailed information, including statistical data which is disaggregated according to age, sex and minority groups, concerning the right to work, just and favourable conditions of work, social security, housing, health and education, in its Fourth Periodic Report.</p>	<p>S. The right to work T: Right to just and favourable conditions of work W. Right to adequate food, clothing and housing X. Right to enjoy the highest standard of physical and mental health Y. The right to education, other cultural rights Statistical Annex</p>	<p>Inadequately addressed. The Report does not provide information in the manner required by the Committee. The Statistical Annex gives extensive detail, however it is not organised as requested.</p>

Freedom Respect Equality Dignity: Action

NGO Submission to the UN Committee on Economic, Social and Cultural Rights

Australia

Australia is not meeting its obligations under the International Covenant on Economic, Social and Cultural Rights, a treaty that Australia ratified in 1975.

Fundamental human rights issues have been at the core of national political and social debate in Australia in the last decade. This report documents areas in which Australia is falling short of its obligations under the International Covenant on Economic, Social and Cultural Rights. It focuses on areas that have been the subject of extensive NGO activity and research in Australia.

Subjects detailed in the report include:

- (a) the lack of recognition and protection of economic, social and cultural rights;
- (b) the current housing crisis and the significant problem of homelessness,
- (c) groups within society that remain vulnerable to discrimination, such as Indigenous peoples, women and children, people with disability, asylum seekers and gay and lesbian couples;
- (d) the regression of workers' rights under Work Choices; and
- (e) the chronic underfunding of both public health care and education in Australia.

The report includes specific recommendations of concrete steps that Australian authorities should take to bring Australia more fully into compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights; an Australia in which all persons can live with freedom, respect, equality and dignity.