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Briefing Paper on Key Human Rights Issues in Australia

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1. Introduction

- 1.1 This briefing paper provides an overview of some of the most significant human rights issues currently facing Australia. The briefing paper is not intended to provide a comprehensive overview of all relevant human rights issues, which will be covered by alternate reports currently being prepared by a coalition of Australian human rights non-governmental organisations in regards to Australia's compliance with the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (together, the **Covenants**). At this stage we understand that these alternate reports, together with the Australian Government report, will be considered by the relevant committees in 2009.
- 1.2 These notes focus on the following human rights issues:
- (a) the lack of entrenchment of basic human rights in Australia's domestic laws;
 - (b) the human rights of Indigenous Australians;
 - (c) Australian law, policy and practice in relation to asylum-seekers;
 - (d) counter-terrorism laws and measures;
 - (e) discrimination against and vilification of Australia's Muslim and Arab population;
 - (f) mental health law, policy and practice;
 - (g) the protection of prisoners' human rights, including particularly the right to health;
 - (h) Australia's policy on the death penalty being applied in other countries; and
 - (i) homelessness and poverty.

2. Legislative Entrenchment of Human Rights

- 2.1 Australia remains the only developed nation without a constitutional or legislative Bill of Rights. The Australian Constitution provides very limited protection for rights, including:
- (a) prohibition against the Commonwealth giving preference to a particular religion over others;¹
 - (b) freedom from discrimination on the basis of state residence;²
 - (c) trial by jury;³

¹ Australian Constitution, s 116.

² Australian Constitution, s 117.

³ Australian Constitution, s 80.

- (d) acquisition of property on just terms;⁴ and
 - (e) some rights that can be implied, such as freedom of political expression and the right to vote.⁵
- 2.2 While the Constitution guarantees these few important freedoms, it has had a limited impact in relation to the protection of the human rights of individuals. The High Court of Australia, which is the court that applies constitutional law, has interpreted these rights narrowly.
- 2.3 Aside from the few guarantees found in the Constitution, the Australian Parliament has failed to provide clear and effective protection of many of the individual rights contained in the Covenants. Federal governments have legislated for limited incorporation of the Covenants into Australian domestic law by appending them to the legislation establishing the Australian Human Rights and Equal Opportunity Commission (**HREOC**). While HREOC is an independent human rights institution in accord with the Paris Principles, its authority is limited to enquiry into complaints, it cannot make enforceable determinations and there is no requirement on the executive government to even respond to its recommendations.
- 2.4 While there are a number of other pieces of legislation that protect certain human rights, state and federal laws only protect a limited number of rights. For example, the *Racial Discrimination Act 1975* (Cth) is based on the UN *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Sex Discrimination Act 1984* (Cth) is based on the UN *International Convention on the Elimination of All Forms of Discrimination Against Women*, however these acts fail to cover some significant provisions of those conventions.
- 2.5 In 2007, the Australian Labor Party (**ALP**), now in Government, committed to reviewing Australia's national human rights legislation and noted that the ALP 'supports the introduction into Australian domestic law of the rights that are recognized and protected in the international treaties' but stressed that any proposal for legislative change will 'not be based on the United States Bill of Rights'.⁶ Specifically, the ALP confirmed that 'Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of Australia and taken into account in administrative decision making'.⁷
- 2.6 Following the ALP's election to federal government, this position has been supported by Attorney-General Robert McClelland committing the Government to a public review of Australia's human rights legislation. This review is to involve a public inquiry about how best to recognise and protect human rights and a consultation process to decide which democratic,

⁴ Australian Constitution, s 51(xxxi).

⁵ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; and *Roach v Australian Electoral Commission & Anor* [2007] HCA 43.

⁶ ALP National Platform and Constitution 2007, pp 9, 206-207; see also <http://www.humanrightsact.com.au>. The National Platform and Constitution of 2007 outlines the Labor Party's long term commitments and principles.

⁷ *Ibid*, 206-07.

industrial and community rights recognised in international treaties and conventions ratified by Australia should be protected.

- 2.7 At a state level, the state government of Victoria and the local administration of the Australian Capital Territory have introduced limited legislative protection of human rights within their jurisdictions incorporating many, but not all, of the ICCPR rights. However, neither act provides for an independent right to take legal action to remedy a breach. In 2007, both the Tasmanian and Western Australian state governments consulted on whether to implement similar legislation to that enacted in Victoria and the Australian Capital Territory. These processes have now been stalled pending the outcome of the federal consultation process.
- 2.8 In 2000, the HRC expressed its concern that ‘there remain lacunae in the protection of Covenant rights in the Australian legal system.’⁸ Australian courts are unable to review cases before them by including consideration of the rights listed in the ICCPR. More recently, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has urged the Australian Government to enact federal legislation implementing the ICCPR and mechanisms for the protection of rights and freedoms.⁹

3. The Human Rights of Indigenous Australians

- 3.1 A significant gap exists between Indigenous and non-Indigenous Australians relating to, among other things, standards of living and health, political participation, the right to self-determination, the administration of justice, land rights, access to adequate housing and education. This gap was recently recognised by the Prime Minister in his official apology to the Stolen Generations.
- 3.2 On 13 February 2008, Prime Minister Kevin Rudd opened Parliament with an official and bipartisan apology to Australia’s Indigenous people for the laws and policies that inflicted on them great pain and suffering, in particular the policy of removal of Aboriginal and Torres Strait Islander children from their families, communities and country.
- 3.3 Prime Minister Rudd expressed hope that the apology would enable Australia to look to a future:

where we harness the determination of all Australians, Indigenous and non-Indigenous, to close the gap that lies between us in life expectancy, educational achievement and economic opportunity. A future where we embrace the possibility of

⁸ Concluding Observations of the Human Rights Committee: Australia, UN Doc A/55/40 (2000).

⁹ 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].

new solutions to enduring problems where old approaches have failed. A future based on mutual respect, mutual resolve and mutual responsibility. A future where all Australians, whatever their origins, are truly equal partners, with equal opportunities and with an equal stake in shaping the next chapter in the history of this great country, Australia.

Health Issues Facing Indigenous Australians

- 3.4 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.
- 3.5 The seriousness of the situation is reflected in the following statistics:
- (a) life expectancy for Indigenous Australian males born in 1999-2001 is expected to be 56.3 years, almost 21 years less than the 77.0 years expected for all Australian males, and for Indigenous Australian females life expectancy is 62.8 years, almost 20 years less than the expectation of 82.4 years for all Australian females.¹⁰ 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 All Forms of Discrimination Against Women (**CEDAW**) noted its concern about the lower life expectancy among Indigenous women;¹¹
 - (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;¹²
 - (c) median age at death for Indigenous Australians is currently about 53 years, which is 25 years less than that for non-Indigenous Australians.¹³ This is considerably lower than the median age at death for Indigenous peoples in other Western countries;
 - (d) in 1999-2003, the infant mortality rate for Indigenous infants was 3 times that of non-Indigenous infants;¹⁴

¹⁰ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003* (2003).

¹¹ *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006), [30].

¹² Aboriginal and Torres Strait Islander Social Justice Commissioner, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2003) <www.humanrights.gov.au/social_justice/statistics/index.html> at 6 February 2007.

¹³ Australian Institute of Health and Welfare, above n 10.

¹⁴ *Ibid.*

- (e) Indigenous Australians are 8 times more likely to die from diabetes, 3 times more likely to die from circulatory disease, 4 times more likely to die from chronic kidney disease and have one of the highest rates of rheumatic heart disease in the world;¹⁵
- (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;¹⁶
- (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;¹⁷ and
- (h) the number of Indigenous Australians diagnosed with AIDS has more than doubled in the past four years.¹⁸

Political Representation and Self Determination

- 3.6 Indigenous Australians were further disenfranchised by the abolition in 2004 of the Aboriginal and Torres Strait Islander Commission (**ATSIC**), which consisted of elected Indigenous representatives, was the main policy-making body in domestic Aboriginal affairs and also represented the interests of Aboriginal Australians internationally. ATSIC was replaced in late 2004 with a 'National Indigenous Advisory Council' that was appointed by the 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.¹⁹
- 3.7 In its previous Concluding Observations, the CESCR encouraged Australia to pursue efforts in the process of reconciliation with Australia's Indigenous peoples and its efforts to improve the disadvantaged situation they are in.²⁰ In addition to the CESCR, the Human Rights Committee and the Committee on the Elimination of All Forms of Discrimination against Women have each expressed their concern that insufficient action has been taken in relation to Australia's Indigenous peoples exercising meaningful control over their affairs.²¹

¹⁵ Ibid.

¹⁶ Australian Bureau of Statistics, *National Health Survey: Aboriginal and Torres Strait Islander results, Australia 2001* (2002).

¹⁷ Australian Institute of Health and Welfare, above n 10.

¹⁸ US Centers for Disease Control and Prevention, *Australia: AIDS Rates Rising in Indigenous Communities* (2005) <http://www.thebody.com/cdc/news_updates_archive/2005/aug26_05/aborigines_hiv.html> at 6 February 2007.

¹⁹ Michelle Grattan, 'Labor Disbands Aboriginal Body', *The Age* (Melbourne), 16 January 2008.

²⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, UN Doc E/C.12/1/Add.50 (2000).

²¹ See Concluding Observations of the Human Rights Committee: Australia, UN Doc A/55/40 (2000), [9]; Concluding Comments of the Committee on the Elimination of all Forms of Discrimination against Women: Australia, UN Doc CEDAW/C/AUL/CO/5 (2006), [17]. CEDAW recommended that Australia consider the adoption of quotas and targets to increase the number of Indigenous women in political and public life (at [17]).

- 3.8 In September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples.²² Although non-binding, the adoption of the declaration is seen as an affirmation of Indigenous people's rights at a time when Indigenous peoples face daily threats to their well-being and survival. Australia was one of only four countries (along with the United States, Canada and New Zealand) to oppose the Declaration.
- 3.9 The recently elected Australian Government may revise its position on signing the Declaration. The Australian Labor Party stated in 2007 that their basic objectives include promoting the 'First Nations' status of Indigenous Australians and respecting 'the right of Indigenous Australians to meaningful self determination arising from their First Nations status'.²³ This commits the new Government to ensuring that all policies and programs increase independence and self reliance in Indigenous communities.²⁴
- 3.10 Signature and ratification of the Declaration would progress the process of reconciliation with Indigenous Australians and efforts to improve to the disadvantaged situation they are in.

Intervention into Northern Territory Aboriginal Communities

- 3.11 In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Aboriginal communities, entitled *Little Children are Sacred*.²⁵ 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.²⁶ The report made 97 recommendations, which were intended to offer advice to the NT Government on how it can best 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 empowerment of the Aboriginal communities.
- 3.12 In response, the then Federal Government announced a 'national emergency intervention' into Aboriginal communities in the Northern Territory and passed a legislative package²⁷ (**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 land, quarantining of social security payments, the banning of

²² United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/61/L.67 (2007).

²³ National Platform and Constitution 2007, 212.

²⁴ National Platform and Constitution 2007, 212.

²⁵ P Anderson and R Wild (co-chairs), *Little Children Are Sacred: Report of the Northern Territory Board of Inquiry in the Protection of Aboriginal Children from Sexual Abuse*, Northern Territory Government (2007).

²⁶ *Ibid*, 5.

²⁷ *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).

alcohol and the deployment of military and police. There was very little relationship between the recommendations to the NT Government contained in the *Little Children are Sacred* report and the then Federal Government's 'national emergency legislation'.

- 3.13 The Northern Territory Intervention legislation was passed without adequate consultation with Indigenous representatives and affected communities, despite the former Australian Government's statement in the Common Core Document that it is committed to consulting and involving Indigenous peoples on policies and programs which impact on them.²⁸ Of particular concern is the haste with which the Northern Territory Intervention legislation was prepared, and enacted. The Northern Territory Intervention failed to ensure 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.
- 3.14 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 article 2 of the ICESCR. HREOC has described the measures as 'punitive and racist'.²⁹
- 3.15 In addition to the discriminatory nature of the legislation, there are a number of other human rights concerns with the Northern Territory Intervention:
- (a) the compulsory acquisition and taking control of specified Aboriginal 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;
 - (b) the response includes an income management regime, which includes measures such as quarantining 50% 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;
 - (c) customary law or cultural practices cannot be taken into consideration in the context of bail applications and conditions in determining criminal sentences. This raises concerns in relation to the right of self determination, as well as Indigenous cultural rights;
 - (d) powers of the Federal 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. This raises concerns in relation to the right of self determination; and

²⁸ Australia's Common Core Document June 2006 at para 181.

²⁹ Russell Skelton, 'Rights Watchdog Proposes Overhaul of Howard's Emergency Intervention', *The Age* (Melbourne), 12 February 2008 at <http://www.theage.com.au/news/national/pressure-to-overhaul-intervention/2008/02/11/1202578694335.html>.

- (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.
- 3.16 The incoming Labor government promised to proceed with the intervention, reviewing its progress after 12 months. Labor indicated it would change some aspects of the intervention program, including the Aboriginal work-for-the-dole scheme and reinstating the permit system that regulates non-indigenous access to Aboriginal communities.³⁰
- 3.17 The Northern Territory Intervention is interfering in nearly every area of life for every Aboriginal person in the NT, and is being made at a time when there is no representative body for Indigenous people in Australia.

Administration of Justice

- 3.18 Many Indigenous Australians confront serious human rights issues in the justice system, including in relation to 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 may be necessary for a fair hearing.
- 3.19 Indigenous peoples in Australia are among the most highly incarcerated peoples in the world. Despite Indigenous Australians representing approximately 2% of the Australian population, around 22% of the prison population is Indigenous (based on 2005 figures).³¹ Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23%.³² The incarceration rate for Indigenous Australians is more than 16 times higher than for non-Indigenous Australians and in 2003, Indigenous women were incarcerated at a rate 19.3 times that of non-Indigenous women.³³
- 3.20 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 and Indigenous Australians continue to be disproportionately affected by that legislation. Young Indigenous people, who are a small fraction of the youth population of Western Australia, comprise three quarters of mandatory sentencing cases.³⁴

³⁰ Patricia Karvelas, 'Rudd urged to save NT intervention' *The Australian* 15 January 2008 <http://www.theaustralian.news.com.au/story/0,25197,23053300-601,00.html>.

³¹ Australian Bureau of Statistics, *Prisoners in Australia 2005* (2005), 5.

³² *Ibid.*

³³ Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (2004).

³⁴ 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].

- 3.21 The deaths of Indigenous Australians in custody also continues to be of serious concern, despite the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* over 15 years ago.³⁵ In 2003, 75% of deaths in custody were of Indigenous Australians detained for no more than public order offences. The striking over-representation of Indigenous Australians in prison, as well as the percentage of Indigenous deaths in custody and the lack of fair treatment under the criminal justice system, all raises serious concerns in relation to articles 6 (right to life), 7 (freedom from cruel treatment or punishment), 9 (freedom from arbitrary detention), 10 (humane treatment in detention) and 14 (right to a fair hearing) of the ICCPR.

Other Issues Facing Indigenous Australians

Domestic and Family Violence against Indigenous Women:

- 3.22 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 ten times more likely to be killed as a result of domestic violence than non-Indigenous women.³⁶ It has been suggested that in some Indigenous communities up to 90% of families are affected by violence.³⁷

Rights and Access to Traditional Lands and Preservation of Indigenous Culture:

- 3.23 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.³⁸ Furthermore, in many cases, the participation or informed consent of Indigenous Australians was not sought before decisions relating to their rights to land were adopted, contrary to articles 25 and 27 of the ICCPR.

The 'Stolen Generations'

- 3.24 According to a HREOC report released in 1997 (**Report**),³⁹ at least 100,000 children were removed forcibly or under duress from their families by various government agencies and church missions between approximately 1910 and 1970, which constituted somewhere between 10-30% of all Aboriginal children during that period.

³⁵ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

³⁶ A Ferrante et al., *Measuring the Extent of Domestic Violence* (1996), 10.

³⁷ 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.

³⁸ The Australian Government made amendments in 1998 and 2006, and is likely to make further amendments in 2007, that wind back some of the protections previously afforded to Indigenous peoples.

³⁹ 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).

- 3.25 Some of the key findings of the Report were that many Indigenous children:
- (a) were placed in institutions, church missions, adopted or fostered;
 - (b) received little education and were expected to perform low grade domestic and farming work, and that many never received wages for their labour;
 - (c) suffered, or were at risk of suffering, physical and sexual abuse; and
 - (d) welfare officials failed in their duty to protect Indigenous wards from abuse.
- 3.26 The Report made 54 recommendations aimed towards restoring justice and dignity to the Stolen Generations and to rectify the present effects of family separation. However, many of those recommendations have not been implemented by the Australian Government and its response to the Report was inadequate.
- 3.27 As referred to above in paragraph 3.2, the new Rudd Government has issued a formal apology to the Stolen Generations and in doing so noted the Report, its findings and recommendations. This indicates promise that the current Government will review its position on the Report's recommendations.

Adequate Housing for Indigenous Australians

- 3.28 Indigenous communities in both urban and rural areas are facing 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'. Unaffordability of housing, lack of appropriate support services, significant levels of poverty and underlying discrimination are all factors that contribute to the situation faced by Indigenous Australians.
- 3.29 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.

4. Immigration Detention – Asylum-Seeker Policy and Practice

- 4.1 Since 1992, asylum seekers who arrive in Australia without a visa – both adults and children – have been subject to mandatory detention. In all but a few rare cases, their detention ends only when they are recognised as refugees and granted a protection visa or when they are removed from the country. Australia's mandatory detention of asylum seekers raises issues in relation to articles 7, 9 and 10 of the ICCPR.
- 4.2 In 2002, the HRC considered that the mandatory detention under the *Migration Act 1958* (Cth) (***Migration Act***) of 'unlawful non-citizens', including asylum-seekers, raises questions of

compliance with article 9(1) of the ICCPR.⁴⁰ The HRC urged Australia to reconsider its policy of mandatory detention of ‘unlawful non-citizens’ with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The HRC also expressed its concerns at Australia’s policy of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.⁴¹

- 4.3 In 2006, CEDAW raised concerns about the disproportionately adverse gender-specific dimensions and impact of Australian laws and policy on refugees and asylum-seekers. It was particularly concerned that people on temporary protection visas are being denied the right to family reunion for up to five years, which may impose particular hardships on women. CEDAW also raised concerns that women who are in the country on their partners’ protection visa face legal and procedural impediments in lodging a separate application for a protection visa in the event of domestic violence.⁴²
- 4.4 Recent decisions of the High Court of Australia have confirmed that it is constitutional and lawful under the *Migration Act* to keep a person in detention indefinitely, even where there is no real likelihood of that person being removed from Australia in the reasonably foreseeable future.⁴³ As a result, asylum-seekers can be detained indefinitely and have no right to challenge the administrative decision to detain them. In other words, their indefinite detention is the result of an unreviewable administrative decision. As discussed above, such potential contraventions of the ICCPR cannot be remedied at a domestic level due to the absence of legislative or constitutionally-protected rights and obligations.
- 4.5 In 2005, in response to community concern given voice by Parliamentary backbench members of the Government, the then Federal Government established some goals for processing of asylum claims within certain periods, and asked the Commonwealth Ombudsman to report on cases of long term detention over two years. While significant reforms within the context of a harsh and flawed system, they fall way short of a process for assessing asylum-seeker claims consistent with the Covenants.
- 4.6 Australia’s ‘Pacific Solution’, whereby asylum seekers are kept and processed off-shore, with limited access to lawyers and the protections of the Australian legal system, is not consistent with the ICCPR or the comments made by the HRC in 2000.⁴⁴ One of the first acts of the Labor Government has been to abolish the so called Pacific Solution, closing detention

⁴⁰ *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000). See also, for example, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

⁴¹ *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

⁴² *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006), [22].

⁴³ See *Minister for Immigration & Multicultural & Indigenous Affairs v Al Khafaji [2004] HCA 38* and *Al-Kateb v Godwin [2004] HCA 37*.

⁴⁴ *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

facilities in Nauru and Papua New Guinea. However, off-shore processing facilities in 'excised Australian territories' such as Christmas Island remain operational.

- 4.7 The mandatory, indeterminate and effectively unreviewable detention of children raises ongoing concerns in relation to the Convention on the Rights of the Child (**CROC**). While a short period of detention may be permitted for the purpose of conducting preliminary health, identity and security checks, Australia's detention system requires detention well beyond those permitted purposes. An inquiry by HREOC⁴⁵ found that, as at the end of 2003, the majority of children in immigration detention had been held for more than two years. The inquiry concluded that many basic rights outlined in the CROC were denied to children living in immigration detention. The UN Committee on the Rights of the Child recommended that Australia implement the recommendations of the inquiry.⁴⁶

5. Counter-Terrorism Laws and Measures

Counter-Terrorism Laws

- 5.1 Prior to 2002, there were no specific counter-terrorism laws in Australia. Since 'September 11', both Federal and State governments have progressively introduced counter-terrorism legislation seeking to facilitate investigation and prosecution of conduct that might be connected with, or give rise to, terrorism. The *Criminal Code Act 1995* (Cth) contains a broad statutory definition of a 'terrorist act', which, at its margins, could be interpreted to embrace industrial action and political protest.
- 5.2 Without being exhaustive, Australia's counter-terrorism legislation provides for the following measures:
- (a) a series of offences, all of which are punishable with up to life imprisonment, including engaging in a 'terrorist act', providing or receiving training for a terrorist act, possessing things connected with a terrorist act, collecting documents likely to facilitate a terrorist act, acts in preparation for a terrorist act;
 - (b) the proscription of 'terrorist organisations' and criminalisation of a broad range of interactions, such as associating with an organisation deemed by the Government to be a terrorist organisation;
 - (c) strengthening of border surveillance and the surveillance of movement of people;
 - (d) the Australian Federal Police (**AFP**) can seek from a court control orders for periods of 12 months on people who are considered to pose a terrorist risk to the community or who *may* have trained with a terrorist organisation. Control orders can impose

⁴⁵ Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, (2004).

⁴⁶ UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [64].

conditions including compelling individuals to wear tracking devices, and restricting their travel and association, and communication via telephone and Internet;

- (e) laws that enable the Australian Security and Intelligence Organisation (**ASIO**) to detain people who are not suspected of having committed, or being likely to commit, terrorism offences, but who may have information related to an anti-terrorism investigation. People may be detained by ASIO for up to seven days without charge and during this time may be interrogated for up to 24 hours; and
- (f) the retrospective operation of certain laws resulting in conduct that would not have been subject to this regime now being covered.

5.3 Australia's counter-terrorism laws also compromise some of the long-standing protections in the Australian legal system:

- (a) *presumption of innocence*: many laws overturn basic aspects of the presumption of innocence which requires that:
 - (i) individuals are presumed innocent until proven guilty in a court of law upon adequate proof; and
 - (ii) individuals presumed innocent are free from coercive powers;
- (b) *freedom from detention and arbitrary deprivation of liberty*: the extended stop, question and search powers granted to the AFP can be exercised where 'there are reasonable grounds that a person might have just committed, might be committing, or might be about to commit a terrorism offence'. Allowing coercive powers to be used when there is only a possibility of an offence being committed considerably lowers the threshold for the use of such powers;
- (c) *freedom of political and religious association and belief*: grounds for inferring that an individual may commit a 'terrorism' offence on the basis of his or her political or religious beliefs has implications for the freedoms of political and religious association and belief. Further, powers to ban 'terrorist organisations' under the Criminal Code that 'advocate terrorism' poses the danger that many organisations that publicly support independence movements or articulate unpopular political opinions will be vulnerable to proscription;
- (d) *right to privacy*: many provisions enable once-private information to be gathered by police and security organisations. The 'notice to produce' regime has the potential to result in serious incursions into the privacy of individuals;
- (e) *right to non-discrimination*: there is a real danger that the powers conferred by these laws would be exercised in a discriminatory fashion due to the increased discretion to target individuals and organisations because of their political or religious views. All persons charged so far with a 'terrorism' offence are Muslim and that all groups, except for one, that have been proscribed as 'terrorist organisations' under the Criminal Code are organisations that espouse a connection to Islam. Such laws

clearly have the potential to be enforced in a discriminatory way against racial and religious minorities who provide easy targets for random police searches and investigations;

- (f) *freedom of speech*: laws against sedition appear to be an unreasonable constraint on freedom of speech; and
- (g) *retrospective operation of laws*: these laws are a serious departure from the normal rule that a law should not be given retrospective operation.

5.4 Counter-terrorism measures must be consistent with international human rights law. However, in adopting the above laws, the Australian Government has looked to US and United Kingdom legislative measures on counter-terrorism as justification for its laws, but failed to acknowledge the human rights protections that operate within those countries. Indeed, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed his concern in relation to a number of areas in which the rights and freedoms of those in Australia have been, or may be, limited in the pursuit of countering terrorism.

5.5 The Special Rapporteur's recommendations included that Australia:

- (a) carefully reconsider its definition of the term 'terrorist act', as the current definition in the *Criminal Code* goes beyond the characterisation set out in Security Council Resolution 1566 (2004) of conduct to be suppressed in the fight against international terrorism. In addition, the definition of 'advocacy' of terrorism is overly broad and insufficiently precise;
- (b) avoid the speed with which counter-terrorism legislation is being passed in order to secure the broadest possible political and popular support for such legislation and that undue limits are not placed on the rights and freedoms of individuals;
- (c) ensure a clear demarcation between intelligence gathering and criminal investigations; and
- (d) ensure that border security measures are not used to undertake racial profiling.

David Hicks

5.6 David Hicks is an Australian citizen who was detained in Guantanamo Bay, Cuba from 2002 to 2007 after allegedly having served with the Taliban and al-Qaeda in Afghanistan. He was detained without charge for more than five years as an 'unlawful combatant' and it was claimed that he was outside the normal protections of US law and the Geneva Conventions.

5.7 Hicks trial before a US military commission, due to begin in November 2005, was cancelled following the US Supreme Court ruling in *Hamdan v Rumsfeld* that the military commissions were illegal under US law and the Geneva Conventions.⁴⁷

⁴⁷ *Hamdan v Rumsfeld*, 548 U.S. (2006).

- 5.8 Hicks' treatment while detained in Guantanamo Bay was inconsistent with the basic principle of innocence until proven guilty. The then Australian Government was complicit in denying him this fundamental right. He was also denied the most basic legal right of habeas corpus. Hicks had no right of reply to any allegations and no legal jurisdiction in which to mount a defence. His unlawful and arbitrary detention raised serious concerns in relation to articles 9 and 14 of the ICCPR.
- 5.9 In addition to the unlawfulness of Hicks' detention, there were many allegations of his serious mistreatment while in custody. Allegations of his treatment and conditions include:
- (a) extended periods of time in solitary confinement;
 - (b) that he has been beaten while blindfolded and handcuffed;
 - (c) sensory-deprivation torture for a period of eight months;
 - (d) medication forced upon him against his will; and
 - (e) sleep deprivation as a matter of policy.⁴⁸
- 5.10 Such treatment clearly raises serious issues in relation to articles 7 and 10 of the ICCPR.
- 5.11 In contrast to the UN Commission on Human Rights report of February 2006, which criticised the US for its human rights policies and positions,⁴⁹ the Australian Government consistently accepted US assurances that Hicks was being treated in accordance with international law.
- 5.12 Hicks' confinement at Guantanamo Bay raised serious concerns about the Australian Government's protective duty to Hicks, as an Australian citizen in custody overseas, and its failure to request that Hicks' incarceration by the US comply with the Geneva Convention, the ICCPR and the Universal Declaration of Human Rights.

Plea bargain

- 5.13 On 26 March 2007, Hicks agreed to plead guilty to providing material support to terrorism under the *US Military Commissions Act 2006* (US). Under the plea bargain, Hicks agreed to withdraw allegations he had been abused at the hands US personnel, his time in detention could not be subtracted from any sentence and he could not to speak to the media for the following year nor take legal action against the United States.

Control Order

- 5.14 Under the plea bargain, Hicks returned to Australia in May 2007 and was released on 29 December 2007. The terms of his release included the imposition of a control order, an order

⁴⁸ In 2002, Hicks submitted a report to the International Committee of the Red Cross outlining abuses by United States officials that he suffered in Guantanamo. Information accessed on Amnesty International website at <<http://news.amnesty.org/pages/torture-case-eng>> at 6 February 2007.

⁴⁹ UN Commission on Human Rights, *Situation of detainees at Guantanamo Bay*, UN Doc E/CN.4/2006/120 (2006).

that imposes obligations, prohibitions or restrictions on a person's movements or activities⁵⁰ with the aim to protect the public from a terrorist act.⁵¹

- 5.15 The conditions of Hicks' control order included a curfew, reporting to the Police three times a week and submitting to electronic fingerprint testing. These terms have since been slightly relaxed.⁵² Hicks' control order is the second of such orders to be imposed on an Australian citizen. In 2006, Jack Thomas was also ordered to comply with a control order.

Mamdouh Habib

Extraordinary Rendition and a Failure to Investigate

- 5.16 In October 2001, Mamdouh Habib, a dual Australian-Egyptian citizen, was detained in Pakistan, where he alleges that he was tortured and ill-treated. When Mr Habib complained to Australian law enforcement and intelligence officers in Pakistan about this abuse, they decided not to investigate the complaints.
- 5.17 Mr Habib was extraordinarily rendered by US officials to Egypt, where he was tortured for six months.⁵³ According to Mr Habib, he was routinely beaten. He was handcuffed and taken to a small room which was slowly filled with water until it was just under his chin. He was subjected to electric shocks to all parts of his body, including his genitals. He was told that his family had been murdered. He was told that he would be attacked by dogs trained to rape people. Australia has not officially accepted that Mr Habib was held in Egypt.
- 5.18 On the basis of 'confessions' obtained under torture in Egypt, Mr Habib was then rendered to Guantanamo Bay, where he was allegedly abused again. When Mr Habib was interviewed by Australian officials at Guantanamo Bay, he complained about his torture and mistreatment. Australia referred the allegations to the United States for investigation. Mr Habib was released without charge from Guantanamo Bay in 2005.
- 5.19 Mr Habib alleges that Australian officials were present when he was rendered from Pakistan and, on at least one occasion, when he was being interrogated by Egyptian security officers.
- 5.20 The Australian Government has failed to:
- (a) investigate or indict any individual for complicity in the torture of Mr Habib;

⁵⁰ See Division 104 of the *Criminal Code 1995* (Cth).

⁵¹ Robert Cornall AO, *Criminal Law A Century on Control Orders – Sword or Shield*, Paper presented to the Legal Convention – Secretary's paper on Control Orders, 21 March 2007. See http://www.ag.gov.au/www/agd/agd.nsf/Page/AbouttheDepartment_Speeches_2007_LegalConvention-SecretaryspaperonControlOrders-21March2007.

⁵² On 19 February 2008, the Federal Magistrates Court amended the order to allow Hicks to report twice weekly, live outside South Australia and have his overnight curfew reduced by two hours.

⁵³ Phil Mercer, 'Fresh Guantanamo Torture Claims', *BBC News* (United Kingdom), 13 February 2005. See also: *NSWCCL Shadow Report*, [213]-[231].

- (b) refer Mr Habib's serious allegations to the appropriate mechanism for investigating such extraordinary allegations, such as a Royal Commission⁵⁴
- (c) acknowledge that Mr Habib was tortured;
- (d) apologise to Mr Habib or compensate him for his ill-treatment; and
- (e) condemn the practice of extraordinary rendition.

Jack Thomas

Admission of Confessional Evidence Obtained under Duress

- 5.21 Officers of the Australian Federal Police and ASIO have been involved in obtaining confessional evidence as the result of a long period of ill-treatment in detention and without the presence of a lawyer.
- 5.22 In the case of Jack Thomas,⁵⁵ confessional evidence obtained by the AFP and ASIO in Pakistan during a period of six months detention was used for charges to be brought against him on his return to Australia. During the six months of detention, Mr Thomas was held for extended periods in solitary confinement, including being detained in 'dog-kennel' like conditions and deprived of food and water for up to three days. He was hooded, shackled, manacled, and threatened with electrocution and execution. On one occasion he was strangled with the cord of his hood so that he could not breathe. He was threatened with lashings and the rape of his wife. He was told that his testicles were going to be crushed and was urged to cooperate fully with Pakistani and US interrogators who told him, 'We're outside the law. No one will hear you scream.' Mr Thomas was convicted of terrorist-related offences on the basis of his confessional evidence, although the evidence was subsequently excluded and the conviction quashed by an appellate court. Mr Thomas was, however, immediately made subject to a control order following his successful appeal on the basis of 'very limited evidence'.⁵⁶

⁵⁴ See Australia's Second Report to CAT (1999) UN Doc CAT/C/25/Add.11, [13].

⁵⁵ *R v Thomas* [2006] VSCA 165 (18 August 2006).

⁵⁶ Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), [38].

6. Discrimination and Vilification against Australian Muslim and Arab Communities

- 6.1 Following the events of 11 September 2001, Australia's Muslim and Arab Australian population have reported increased anti-Muslim and anti-Arab prejudice yet Australian state and federal legislation fails to adequately protect against such prejudice.
- 6.2 In 2003, based on reports from Muslim and Arab community organisations of increasing anti-Muslim and anti-Arab prejudice, HREOC launched the Ismaḡ project. Ismaḡ means 'listen' in Arabic. The findings of the Ismaḡ report, released in 2004, are disturbing. In his foreword to the report, Dr William Jonas, former Acting Race Commissioner of HREOC, describes Arab and Muslim Australians being 'abused, threatened, spat on, assailed with eggs, bottles, cans and rocks, punched and even bitten'. This situation has worsened since the London Bombings in 2005 and the Cronulla Riots in 2005/2006. Women in Islamic dress, including the hijab, niqab, chador and burqa, reported being particularly at risk. People identifiable as Arab or Muslim experienced discrimination and vilification in employment, at school and university, in shopping centres, on public transport and on the street. Participants in the Ismaḡ project reported 'a substantial increase in fear, a growing sense of alienation from the wider community and an increasing distrust of authority'.
- 6.3 While federal and state discrimination law generally protects people who have been treated badly because they are Arab, the situation for people who experience discrimination or vilification because they are Muslim is not so certain. It is also unlikely that people who are treated badly because they are Muslim are able to get an effective remedy under federal discrimination laws and state discrimination laws have varying coverage.
- 6.4 All states and territories, except New South Wales and South Australia, make it unlawful to discriminate against someone on the grounds of religion. New South Wales law does cover people who have been discriminated against or vilified on the basis of their 'ethno-religious origin', it is unlikely that this extends to people who have been treated badly solely on the basis of their religion. This gap is particularly problematic given that approximately half of Australia's Muslim population lives in New South Wales. Only Victoria, Queensland and Tasmania state laws make it unlawful to vilify someone because of their religion.
- 6.5 Accordingly, there is no recourse for those who experience discrimination on the grounds of their religion in New South Wales or South Australia nor for those who are vilified on the grounds of their religion in Perth, Sydney, Adelaide, Darwin or Canberra.
- 6.6 It is a basic human right to live a life free from discrimination. The Ismaḡ report outlined a number of areas that require work, such as improving legal protection, promoting public awareness through education, addressing stereotypes and misinformation in public debate, ensuring community safety through law enforcement, empowering communities and fostering public support and solidarity with Arab and Muslim Australians. The report also made 10

recommendations for action. The first one calls for the introduction of a federal law making discrimination and vilification on the grounds of religion or belief unlawful.

7. Mental Health Law, Policy and Practice

- 7.1 People with mental illness in Australia experience discrimination within society, and even within the health care system, causing significant social disadvantage. In 1993, the National Inquiry into the Human Rights of People with Mental Illness (*Burdekin Report*)⁵⁷ sought to assess how well the human rights of the mentally ill in Australia were being honoured. The findings uncovered overt human rights abuses within mental health institutions, as well as covert neglect in the wider community.
- 7.2 The Burdekin Report's major conclusions were that:
- (a) people affected by mental illness suffered from widespread systemic discrimination and were consistently denied the rights and services to which they are entitled; and
 - (b) health services and other services which would enable people with a mental illness to live effectively in the community were found to be seriously under funded or in some areas just not available at all;
- 7.3 The Burdekin Report led to the introduction by the Australian Government of its National Mental Health Strategy. However, despite significant advances in legislation and policy, the reality for people in Australia with a mental illness continues to be a denial of fundamental human rights in practice. Mental health systems throughout Australia continue to be vastly under-resourced, suffer from split responsibility between national, state and territory governments, and the absence of a clear legislative framework balancing the right to treatment and civil rights.
- 7.4 Many people are denied proper access to treatment because insufficient resources are allocated to mental health services. In addition to a lack of resources, people with a mental illness are often denied access to services because they do not meet diagnostic criteria or due to the stigma surrounding mental health.
- 7.5 Within mental health services, there are many reports of abuses, such as hostile environments, mental health staff ignoring or dismissing consumers' personal feelings, physical abuse and forced treatment.⁵⁸ Treatments provided for mental illness often have serious, debilitating and stigmatising side effects. In addition, seclusion or restraint are used inappropriately and without proper regard to the person and often expressions of distress,

⁵⁷ 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).

⁵⁸ Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006), [3.18].

depression or other mental health issues are responded to punitively. In some cases, voluntary patients are often coerced into treatment by the threat of being made involuntary patients, or are deceived, tricked or bullied into taking potent psychotropic drugs with harmful side effects.

7.6 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;⁵⁹
- (b) mentally ill people detained by the criminal justice system were found to be frequently denied treatment;⁶⁰
- (c) 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;⁶¹ and
- (d) children with mental illnesses and/or intellectual deficiencies are over-represented in the juvenile justice system.⁶²

7.7 The symptoms and behaviour of people with mental illness, once they are in custody, are frequently misunderstood by untrained custodial officers to the extent that human rights abuses are a common occurrence. A failure to notify the family or carer of a person with a mental illness of their detention has resulted in the inappropriate detention of consumers. Where consent to talk to family or primary carers is refused by acutely ill consumers, custodial services rely on the ability of a vulnerable consumer to represent their own histories accurately and advocate for their own needs. This is compounded where the person is from a culturally diverse background or doesn't speak English well.

7.8 In addition, 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.

⁵⁹ Human Rights and Equal Opportunity Commission, above n 57.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² UN Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73].

8. Australia's Treatment of Prisoners and Prison Conditions

Aboriginal and Torres Strait Islander (ATSI) Australians

- 8.1 The national rate of imprisonment of Indigenous Australians continues to increase. Incarceration rates of Aboriginal and Torres Strait Islander Australians are at least 11 times higher than the rate for non-ATSI Australians. Indigenous children between 10 and 14 years of age are 30 times more likely to be incarcerated than their non-Indigenous peers. Aboriginal and Torres Strait Islander women are almost 20 times more likely to be incarcerated than non-ATSI women.⁶³
- 8.2 In 2006, the Human Rights Committee found that the treatment of an Aboriginal juvenile in a NSW prison amounted to inhumane treatment. Mr Brough was placed in isolation in an *adult* prison, exposed to artificial light for long periods and had his blanket and some of his clothes removed.⁶⁴

Supermaximum Prisons

- 8.3 'Supermaximum prisons' are once again being constructed in Australia. They are being used to house remand inmates and terrorist suspects, as well as convicted inmates. Some inmates are mentally ill.
- 8.4 The largest supermax is the High Risk Management Unit (HRMU) in NSW. During induction, inmates are kept in isolation for approximately two weeks and have all their personal items removed. All inmates are subjected to a strict regime of privileges and sanctions. Each cell measures 2x3 metres and, while some inmates are allowed 'outside of their cells' into a small cage for a maximum of 8 hours a day, some inmates are not allowed 'outside' at all. Inmates may only interact with one other prisoner at a time. Access to education, rehabilitation and health services is limited. Inmates cannot challenge their placement in the supermax. Terrorist suspects are prohibited from seeing the Official Visitor. When inmates are transported to and from the unit they are shackled and dressed in orange jumpsuits.
- 8.5 Victoria has recently opened a supermax prison (Melaleuca High Security Unit). Queensland and Western Australia are also considering building similar facilities.
- 8.6 Unconvicted remand prisoners, particularly persons accused of 'terrorist'-related offences, are routinely held in these facilities. In a recent Victorian case in which a terrorist accused sought bail on the grounds that the conditions were so oppressive as to constitute 'exceptional circumstances', a Supreme Court judge stated that the 'conditions in Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which

⁶³ See generally, Australian Bureau of Statistics, *Prisoners in Australia 2006* (2006) which reveals that prison numbers across Australia increased by 42% between 1996 and 2006 and that Indigenous people constitute 24% of the prison population compared with approximately 2% of the general population (the highest proportion since 1996).

⁶⁴ *Brough v Australia*, UN Doc CCPR/C/86/D/1184/2003 (2006). See also *NSWCCL Shadow Report*, [168]-[171].

the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.⁶⁵

Treatment of Inmates with Mental Illnesses

- 8.7 The number of forensic patients and mentally ill inmates in Australian prisons is increasing, without a proportionate increase in health resources. Recent research indicates that of a total Australian prison population of around 25,000 people, approximately 5000 inmates suffer serious mental illness.⁶⁶ There is substantial evidence from across Australia that access to adequate mental health care in prisons is manifestly inadequate, that the mentally ill in prison are often 'managed' by segregation, and that such confinement – often for very long periods – can seriously exacerbate mental illness and cause significant psychological harm.⁶⁷
- 8.8 In 2006, the NSW Deputy State Coroner was highly critical of the prison conditions that led to the suicide of a forensic patient, Scott Simpson. Her Honour recommended, in line with international human rights law, that inmates suffering from mental illness should be held in solitary confinement only as a last resort, and for a limited period.⁶⁸ The Australian Human Rights Commission and Equal Opportunity Commission concluded that Mr Simpson's treatment amounted to inhuman and degrading treatment and punishment, Mr Simpson, a paranoid schizophrenic, murdered his remand cellmate during a psychotic episode. Contrary to medical advice, Mr Simpson was subsequently kept in isolation in the HRMU supermax prison. Shortly after being found not guilty of his cellmate's murder on the grounds of mental illness, Mr Simpson committed suicide. He was never housed in a mental health facility due to the lack of beds for forensic patients in NSW prisons.
- 8.9 Similar criticism has been made of conditions in the prisons of Western Australia. In Victoria, the Ombudsman recently described some prisons as 'not fit for human habitation'.

⁶⁵ *Raad v DPP* [2007] VSC 330 (6 September 2007).

⁶⁶ J P R Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

⁶⁷ See, eg, Forensicare (Victorian Institute of Forensic Mental Health), *Submission to Senate Select Committee on Mental Health* (May 2005) 4, 5, 19 and 20. See also, *NSWCCL Addendum Report*, [A20]-[A21].

⁶⁸ NSW Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson* (17 July 2006). See also *NSWCCL Addendum Report*, [A26]-[A34].

9. Australia's Policy on the Death Penalty

- 9.1 By becoming a party to the Second Optional Protocol to the ICCPR, Australia has committed itself not to expose a person to the real risk of the application of the death penalty.⁶⁹ The last use of the death penalty in Australia was in Victoria in 1967 and it was officially abolished in 1985. However, over the last few years Australia has weakened its stance in relation to the application of the death penalty to individuals, including Australian citizens, in other countries and indicated that it is inappropriate to intervene in the affairs of a foreign country.
- 9.2 Of particular concern was Australia's involvement in the case of the nine Australian citizens (known as the 'Bali Nine') who were arrested in Bali, Indonesia for alleged involvement in heroin trafficking. The arrests resulted from intelligence provided by members of the AFP. Presently, six members of the 'Bali Nine' face execution as a result of their respective convictions for drug trafficking offences. The death sentence may therefore be applied as a direct result of the actions of the AFP.
- 9.3 This case represents an example of the failure of the Australian Government to protect the fundamental human rights of Australian citizens by exposing them to a real risk of the death penalty being applied. In addition, the Australian Government has condoned the application of the death penalty in Indonesia to members of the 'Bali Nine'. Former Australian Prime Minister Howard said at the time that the '[Bali Nine] should be dealt with in accordance with Indonesian law. ...and if [the death penalty] is what the law of Indonesia provides, well, that is how things should proceed. There won't be any protest from Australia'.⁷⁰
- 9.4 In addition to the Bali Nine, the Australia has also made public statements to the effect that they would not intervene in the death penalty being applied to other individuals. For example, regarding Saddam Hussein, Former Australian Prime Minister Howard stated that '[w]hat other countries do with the death penalty is other countries' business'.⁷¹
- 9.5 And regarding Ali Amrozi bin Haji Nurhasyim, the Indonesian who was convicted for his part in the 2002 Bali bombings, the Prime Minister said:

We're dealing here with the citizen of another country who has murdered 88 of our

⁶⁹ In *Judge v. Canada*, the HRC decided that Canada had breached its obligations under article 6(1) of the ICCPR by deporting Mr Judge 'without ensuring that the death penalty would not be carried out'. The HRC stated: For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence will not be carried out. See Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003) at [10/4].

⁷⁰ ATV Channel 7, 'Interview with John Howard (Part 2)', *Sunday Sunrise*, 16 February 2003 <<http://seven.com.au/sundaysunrise/transcripts/18363>> at 6 February 2007.

⁷¹ AAP, 'Saddam trial 'heroic', says Howard', *The Age* (Melbourne), 6 November 2006 <<http://www.theage.com.au/news/world/saddam-trial-heroic-says-howard/2006/11/06/1162661578964.html>> at 6 February 2007.

own in another country and the law of that other country says the death penalty is appropriate. Now I am prepared to accept that, I will not object to it and I think it is appropriate because I respect the judicial processes of that other country. And if we are to get the total co-operation between Australia and Indonesia in the war against terrorism that could go on for years one of the things we have to do is develop a code of mutual respect and co-operation between the judicial systems of our two countries.⁷²

10. Homelessness and Poverty

Homelessness

- 10.1 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.⁷³
- 10.2 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.⁷⁴ A further 23,000 people across Australia live temporarily in caravan parks.⁷⁵
- 10.3 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.⁷⁶ In many cases of homelessness, these causes are intersectional and inter-related.
- 10.4 The primary government response to homelessness in Australia is through the national Supported Accommodation Assistance Program (**SAAP**). This program is jointly funded by Australian Federal and State governments and administered by the States within a legislated national policy framework.⁷⁷ SAAP 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.
- 10.5 Recent data from the Australian Institute of Health and Welfare, demonstrates that approximately 161,200 people accessed homelessness assistance services provided through SAAP in 2005–06.⁷⁸ However, the demand for homelessness assistance services continues to significantly exceed supply. In 2003–04, 56% of requests for crisis accommodation by

⁷² Radio 3AW, 'Interview with Prime Minister the Hon John Howard MP', *Neil Mitchell*, 8 August 2003 <<http://www.pm.gov.au/news/interviews/Interview414.html>> at 6 February 2007.

- homeless people were unmet, and 63% of requests from homeless families with children were unmet.⁷⁹
- 10.6 SAAP requires an increase in funding of 15% simply to sustain viability of service. In order to meet the demand, funding needs to increase by 40%.⁸⁰ Despite this, the current SAAP agreement (SAAP V) shows an accumulative loss of nearly \$50 million over 5 years.⁸¹
- 10.7 The Government has committed to building more public housing, increase housing affordability and to work with states to extend homeless services. A Green Paper will be tabled in May 2008 in order to frame public consultation and the subsequent drafting of a White Paper on homelessness. The Government has also introduced a new Minister for Social Inclusion whose task is to bring economic and social policy together to reduce disadvantage. We welcome these positive developments. The Minister for Social Inclusion will coordinate with the newly established Social Inclusion Board that will consult with community, welfare advocates, economists and policy specialists to advise Government on effective social investment.
- 10.8 One of Australia's core obligations under ICESCR is to provide sufficient housing services to ensure all homeless people can access crisis accommodation as of right. The New South Wales Ombudsman's report of 2004 found that those groups that find it particularly hard to access SAAP services include people with substance disorders (61%), mental illness (53.7%) and intellectual disabilities (33.3%).⁸² The absence of a guaranteed minimum income and the fact social security payments are generally set at below the Henderson Poverty Line are significant contributors to people either living in or being at risk of poverty and homelessness.

⁷³ CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

⁷⁴ Australian Bureau of Statistics, *Counting the Homeless 2001* (2003) 2.

⁷⁵ *Ibid.*, 6.

⁷⁶ See generally, Australian Bureau of Statistic, *Counting the Homeless 2001* (2003); Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2003–04* (2005); Senate Community Affairs References Committee, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004).

⁷⁷ Second Reading Speech, Supported Accommodation Assistance Bill 1985, House of Representative, 27 March 1985, Hansard 1020.

⁷⁸ Australian Institute of Health and Welfare, *Homeless People in SAAP: National Data Collection Annual Report 2005–06* (2007) 2.

⁷⁹ *Ibid.*

⁸⁰ Australian Labour Party, *New Directions for Affordable Housing. Addressing the decline in housing affordability for Australian families*, June 2007.

⁸¹ *Ibid.*

⁸² NSW Ombudsman, *Assisting Homeless People: The Need to Improve their Access to Accommodation and Support Services* (2004).

Poverty

- 10.9 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*.⁸³ The report listed a number of different estimates of poverty in Australia, which generally ranged between 2 to 3.5 million people.⁸⁴ Recent research conducted by the Australian Council of Social Service also indicates that one in ten Australians live below the 50% of median income poverty line, which translates to about 2 million Australians living in poverty.⁸⁵
- 10.10 The Report recommended, among other things, that a comprehensive anti-poverty strategy be developed at the national level to coordinate action across policy areas such as employment, health, education, income support, community services and housing to reduce poverty. The Report also recommended that the Government establish benchmarks and targets to measure progress against anti-poverty objectives.⁸⁶ To date, the Australian Government has not implemented these recommendations.
- 10.11 In addition, Australia has failed to establish an official poverty line, despite the recommendations of the CESCR in its previous Concluding Observations that it do so.⁸⁷ The Common Core Document states that simplistic income poverty lines tend to obscure the wide range of factors which lead to disadvantage.⁸⁸ This fails to ensure that a credible assessment can be made of the extent of poverty in Australia.

⁸³ Commonwealth of Australia, Senate Community Affairs References Committee, *A Hand Up Not A Hand Out: Renewing the Fight Against Poverty (Report on poverty and financial hardship)*, 11 March 2004.

⁸⁴ *Ibid*, xv-xvi.

⁸⁵ 'Australia Fair: Update on those missing out' (Australian Council of Social Service, 2007) 4.

⁸⁶ Recommendations 94 and 95.

⁸⁷ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, UN Doc E/C.12/1/Add.50 (2000).

⁸⁸ CCD at [483].