Sir Nigel Rodley

Visit to Australia

Briefing Paper on Key Human Rights Issues for Discussion with NGOs

February 2007

1. Introduction

1.1 In preparation for the next round of reports by Australia under the *International Covenant on Civil and Political Rights* (***ICCPR***) and the *International Covenant on Economic, Social and Cultural Rights* (***ICESCR***) (together, the ***Covenants***), a group of Australian human rights non-governmental organisations has developed a strategy which aims to:

(a) use the reporting process to document the state of human rights in Australia; and

(b) contribute to the development of effective protection of human rights standards in Australia.

1.2 Part of this strategy, adopted at the end of 2006, is to take opportunities to brief members of the Human Rights Committee (***HRC***), the Committee on Economic, Social and Cultural Rights, other United Nations human rights treaty body members and major international non-governmental organisations on the absence of effective protections in Australia, and to expose the human faces behind major human rights violations.

1.3 We welcome the opportunity provided by the visit to Australia of Sir Nigel Rodley, Vice-Chair of the HRC and provide these notes on some of the key human rights issues that we propose to raise in discussion with him. 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) the Australian Government's policy and practice in relation to asylum-seekers;

(d) counter-terrorism laws and measures;

(e) the situation of Australian citizen, David Hicks, who is currently detained in Guantanamo Bay, Cuba;

(f) mental health law, policy and practice; and

(g) the Australian Government's policy on the death penalty being applied in other countries.

2. Entrenchment of Basic 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]

(d) acquisition of property on just terms;[4] and

(e) some rights that can be implied, such as freedom of political expression.[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.

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1 Australian Constitution, s 116.

2 Australian Constitution, s 117.

3 Australian Constitution, s 80.

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 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

2.5 The state government of Victoria and the local administration of the Australian Capital Territory have recently 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.

2.6 In 2000, the HRC expressed its concern that 'there remain lacunae in the protection of Covenant rights in the Australian legal system.'[6] 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.[7]

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. The absence of enforceable human rights protection mechanisms is most keenly felt by this group of Australians, with governments at all levels routinely passing off responsibility among each other.

Health Issues Facing Indigenous Australians

3.2 In our view, 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.

3.3 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.[8] 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

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

7 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].

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

Discrimination Against Women (***CEDAW***) noted its concern about the lower life expectancy among Indigenous women;[9]

(b) life expectancy for Indigenous Australians is between 8 and 15 years less than that of Indigenous populations in Canada, the United States (***US***) and New Zealand;[10]

(c) median age at death for Indigenous Australians is currently about 53 years, which is 25 years less than that for non-Indigenous Australians.[11] 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;[12]

(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;[13]

(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;[14]

(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;[15] and

(h) the number of Indigenous Australians diagnosed with AIDS has more than doubled in the past four years.[16]

3.4 The crux of the problem is the fact 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.

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

10 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.

11 Australian Institute of Health and Welfare, above n 8.

12 Ibid.

13 Ibid.

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

15 Australian Institute of Health and Welfare, above n 8.

16 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.

Political Representation and Self Determination

3.5 The Australian Government has moved away from recognising self-determination as the basis of its Indigenous policy, effectively limiting Indigenous peoples' right to make their own choices and participate in a meaningful sense in the democratic process. Indigenous Australians have been 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 Aboriginal affairs and their main international representation. ATSIC was replaced with an advisory group that is appointed by the government and has only a limited role in monitoring government policy.

3.6 The HRC, CEDAW and the Committee on Economic, Social and Cultural Rights have each expressed their concern that sufficient action has not been taken in relation to Australia's Indigenous peoples exercising meaningful control over their affairs.[17]

Administration of Justice

3.7 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.

3.8 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).[18] Over the last six years, the rate of Indigenous imprisonment in Australia has risen by 23%.[19] 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.[20]

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17 See *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000), *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) and *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000). 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]).

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

19 Ibid.

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

3.9 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.[21]

3.10 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.[22] 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:

3.11 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.[23] It has been suggested that in some Indigenous communities up to 90% of families are affected by violence.[24]

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

3.12 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.[25] 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.

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21 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].

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

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

24 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.

25 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.

The 'Stolen Generations'

3.13 According to a HREOC report released in 1997 (***Report***),[26] 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.

3.14 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.

3.15 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.

Adequate Housing for Indigenous Australians

3.16 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.

3.17 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.

[26] 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).

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.[27] 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.[28]

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.[29]

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.[30] 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 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.

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27 *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).

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

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

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

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.[31]

Case Study: A v Australia UN Doc CCPR/C/59/D/560/1993 (30 April 1997)

Mr A, a Cambodian asylum seeker, arrived in Australia in 1989. He was held in mandatory immigration detention for over four years and this formed the basis of his complaint.

The HRC concluded that Mr A's indefinite and prolonged detention was arbitrary and a violation of article 9(1) of the ICCPR. The Committee also determined that Australia had violated Mr A's right to have his detention reviewed by a court: a violation of article 9(4).

In coming to its conclusions, the Committee noted that detention authorised by law can still be arbitrary if it is inappropriate, unjust, unnecessary or disproportionate to the end sought – even if entry into Australia was unauthorised. Significantly, the Committee observed that review of the lawfulness of detention must include consideration of the human rights listed in the ICCPR, which is something that Australian courts cannot do.

In December 1997, the Australian Government formally rejected the Committee's findings and refused to compensate Mr A.

These policies continue.

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 HREOC[32] 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.[33]

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

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

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

5. Counter-Terrorism Laws and Measures

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 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 the 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.

6. Detention of David Hicks

6.1 David Hicks is an Australian citizen who has been detained in Guantanamo Bay, Cuba since 2002 after allegedly having served with the Taliban and al-Qaeda in Afghanistan. He has been detained without charge for more than five years as an 'unlawful combatant'. Accordingly, it is claimed that he is outside the normal protections of US law and the provisions of the Geneva Convention.

6.2 Hicks has not been lawfully charged for any crimes and remains in detention without conviction. The US administration has not alleged that Hicks engaged in any actual acts of terrorism or that he killed any US or Coalition soldier while engaged in fighting. His trial before a US military commission was due to begin in November 2005, however proceedings were cancelled following the US Supreme Court ruling in *Hamdan v Rumsfeld* that the military commissions were illegal under US law and the Geneva Conventions.[34]

6.3 Whatever form they take, it is clear that the US military commissions will provide fewer civil rights than in regular trials in the US or Australia. For example, hearsay and coerced testimony, if it would have 'probative value to a reasonable person', and evidence kept secret from the defendant and his lawyer (if any), can be used to convict defendants.[35] Further, the concept of a military commission is a system based on charges brought by a military authority, prosecuted by a military authority, judged by military officers and sentenced by military officers.

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

35 United States' White House, *Fact Sheet: The Administration's Legislation to Create Military Commissions* (2006) <http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html> at 6 February 2007.

6.4 Hicks' treatment has been entirely inconsistent with the basic principle of innocence until proven guilty. The Australian Government has been complicit in denying him this fundamental right. He has been denied the most basic legal right of habeas corpus. Hicks has had no right of reply to any allegations and has no legal jurisdiction in which to mount a defence. Hicks' unlawful and arbitrary detention raises serious concerns in relation to articles 9 and 14 of the ICCPR.

6.5 In addition to the unlawfulness of Hicks' detention, there have also been many allegations of his serious mistreatment 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.[36]

6.6 Such treatment clearly raises serious issues in relation to articles 7 and 10 of the ICCPR.

6.7 The Australian Government has consistently accepted U.S. assurances that Hicks has been treated in accordance with international law. However, this is in contrast with the UN Commission on Human Rights report of February 2006, which criticises the US for its human rights policies and positions.[37]

6.8 Hicks' ongoing confinement at Guantanamo Bay raises 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.

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***)[38] 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.

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36 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.

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

38 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).

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.[39] 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, 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;[40]

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

40 Human Rights and Equal Opportunity Commission, above n 38.

(b) Sisters Inside (Qld), Beyond Bars (NSW) and the Federation of Community Legal Centres (Vic) report evidence that women labelled with an intellectual, psychiatric or learning disability are more likely to be classified as maximum-security prisoners.[41] They also raise particular concerns about access to conditional and community release and the practice of strip-searching and the disproportionate impact of these practices particularly on women with mental illness;

(c) mentally ill people detained by the criminal justice system were found to be frequently denied treatment;[42]

(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;[43] and

(e) children with mental illnesses and/or intellectual deficiencies are over-represented in the juvenile justice system.[44]

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.

41 See www.sistersinside.com.au/media/adcqsubmission.pdf, www.sistersinside.com.au/media/NSWADCreport.pdf and www.sistersinside.com.au/media/VICComplaint.pdf.

42 Human Rights and Equal Opportunity Commission, above n 38.

43 Ibid.

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

8. Australia's Policy on the Death Penalty

8.1 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.[45] 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 the Australian Government 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.

8.2 Of particular concern is the Australian Government'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 were made by the Indonesian National Police and 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.

8.3 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'. The Australian Prime Minister said 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'.[46]

8.4 In addition to the Bali Nine, the Australian Government 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, the Australian Prime Minister stated that '[w]hat other countries do with the death penalty is other countries' business.'[47]

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45 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].

46 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.

47 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.

8.5 And regarding Ali Amrozi bin Haji Nurhasyim, the Indonesian who was convicted for his part in the 2002 Bali bombings, the Prime Minster said:

> We're dealing here with the citizen of another country who has murdered 88 of our 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.[48]

[48] 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.