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**Implementation of Concluding Observations on
Australia's Compliance with the *International
Covenant on Economic, Social and Cultural Rights***

Submission to the Department of Foreign Affairs and Trade

28 May 2010



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

The Centre gratefully acknowledges the support of **Mallesons Stephen Jaques** in the research and preparation of this submission.

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1. Background

1.1 Australia's Periodic Review under ICESCR

1. The Human Rights Law Resource Centre (**HRLRC**), together with the National Association of Community Legal Centres and Kingsford Legal Centre, coordinated the submission of a major NGO Report to the United Nations Committee on Economic, Social and Cultural Rights (**Committee**) in respect of Australia's compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.¹ The NGO Report was submitted in April 2008 and endorsed by more than 100 NGOs from a range of sectors of Australian civil society.
2. An Addendum to the NGO Report was submitted in May 2009, which updated the Committee on major human rights developments in Australia between April 2008 and April 2009.² The HRLRC also submitted an Executive Summary that was prepared as the primary working document for the Committee members and the Secretariat.³
3. Together, these reports provide a comprehensive and constructive analysis of the state of economic, social and cultural rights (**ESC rights**) in Australia and make a range of targeted recommendations to address disadvantage and poverty. The Reports document a number of areas in which Australia is falling short of its obligations under the ICESCR.
4. In May 2009, the Committee reviewed Australia and adopted its Concluding Observations in respect of Australia's compliance with the ICESCR. The Committee's Concluding Observations noted a number of positive developments, raised a number of concerns, and included 24 recommendations to promote Australia's compliance with the obligations and standards enshrined in the ICESCR.

1.2 About This Submission

5. The Australian Government is seeking input on the implementation of the Committee's recommendations. Given its involvement in preparing the NGO Report, together with its extensive human rights, legal and policy practice, the HRLRC considers itself well placed to provide informed comment on this question, and thanks the Department of Foreign Affairs and Trade for inviting contributions from civil society.

¹ *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Committee on Economic, Social and Cultural Rights* (April 2008) available at www.hrlrc.org.au/our-work/law-reform/ngo-reports/.

² *Freedom, Respect, Equality, Dignity: Action – Addendum to NGO Submission to the Committee on Economic, Social and Cultural Rights* (April 2009) (April 2008) available at www.hrlrc.org.au/our-work/law-reform/ngo-reports/.

³ *Executive Summary of NGO Reports* (April 2009) (April 2008) available at www.hrlrc.org.au/our-work/law-reform/ngo-reports/.

6. This submission addresses many, but not all, of the recommendations contained in the Committee's Concluding Observations, noting significant developments since May 2009 as well as providing concrete recommendations for implementation of the Committee's observations. This submission is intended to be read in conjunction with the NGO Report, Addendum and Executive Summary.

2. Implementation of Concluding Observations

7. The HRLRC supports each of the recommendations contained in the Committee's Concluding Observations. The HRLRC urges the Australian Government to consider each recommendation made by the Committee and to take the necessary steps to ensure that each recommendation is implemented in full.
8. The major NGO Report to the Committee discussed each issue referred to in the Concluding Observations in detail, including identification of issues and concrete proposals for reform. The HRLRC reiterates these proposals and asks the Australian Government to have regard to them in formulating its response to the Concluding Observations.

Recommendation 1:

The Australian Government should take all necessary steps to ensure that each of the recommendations made by the Committee is implemented in full.

3. Positive Developments since the Adoption of the Concluding Observations

9. The HRLRC commends the Australian Government on its stated commitment to human rights and continued engagement with international human rights bodies. Since the adoption of the Committee's Concluding Observations in May 2009, the Australian Government has taken some positive steps to ensure the protection and promotion of the rights guaranteed under the ICESCR.
10. In particular, the HRLRC praises the Australian Government's efforts in relation to:
- (a) the announcement of a taxpayer funded paid parental leave scheme;
 - (b) the commitment in Australia's Human Rights Framework to funding human rights education and establishing parliamentary mechanisms for protecting human rights, including rights recognized under the ICESCR;

- (c) the apology to those Australians who suffered abuse as children in institutional care; and
 - (d) its support for the establishment of the National Congress of Australia's First Peoples.
11. The HRLRC urges the Government to continue to consider further legislative and policy reform with a human rights approach in mind, and with particular reference to the recommendations made by the Committee.

4. Legal Framework and National Human Rights Act (Paragraphs 10 to 11)

The Committee affirms the principle of interdependency and indivisibility of human rights and calls on the State party to include economic, social and cultural rights when considering the submissions received. (Paragraph 10).

Bearing in mind the provisions of article 28 of the Covenant, the Committee reiterates that the principal responsibility for its implementation lies with the State party's Federal government and recommends that it: (a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; (b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; (c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights. (Paragraph 11).

4.1 National Charter or Human Rights Act

12. In April 2010, the Australian Government launched 'Australia's Human Rights Framework' (the **Framework**), which was the Government's response to the report of the National Human Rights Consultation Committee (the **Consultation Committee**). Although the Framework contains a number of positive developments for the protection of human rights in Australia, it is disappointing that the Australian Government chose not to provide for the comprehensive protection of human rights in Australia by adopting a national Human Rights Act.⁴ Instead, the Government will review the Human Rights Framework in 2014, at which time the question of a Human Rights Act may be considered. Deferral of the consideration of a Human Rights Act until 2014 is effectively the denial of human rights in Australia.
13. The Consultation Committee found that the rights to health, housing and education are among the rights that matter most to Australians.⁵ The Consultation Committee also recommended

⁴ *National Human Rights Consultation Report* (2009) Chapter 1. Robert McClelland, Attorney-General (Cth), 'Address to the National Press Club of Australia — Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Melbourne, 21 April 2010).

⁵ *National Human Rights Consultation Report* (2009) at 344.

that ESC rights be provided protection in a national Human Rights Act, albeit a protection more limited than that provided to civil and political rights.⁶

14. In order to properly protect ESC rights in a comprehensive way, Australia must enact a Human Rights Act that includes the protection of ESC rights. The Australian Government must ensure that the 2014 review of the Framework (and any review conducted sooner) considers incorporating a national Human Rights Act into Australian law. Such an instrument should recognise and protect ESC rights in a comprehensive, enforceable and justiciable way.

4.2 The Human Rights Framework

(a) Joint Parliamentary Committee on Human Rights

15. The HRLRC welcomes the Government's announcement that it will introduce legislation to establish a Parliamentary Joint Committee on Human Rights to scrutinise Commonwealth Bills and delegated legislation for compliance with 'Australia's international human rights obligations under the seven core UN human rights treaties to which Australia is a party'.⁷
16. The UK Joint Committee on Human Rights operates effectively and provides a good framework for the proposed Joint Parliamentary Committee.⁸ The proposed Joint Parliamentary Committee should have the following features and functions in order to be most effective:
 - (a) It should be given a broad and permissive mandate that enables it to consider proposed legislation, exposure drafts and regulations, the recommendations and views of UN human rights bodies (including both treaty bodies and the various mechanisms of the Human Rights Council), and to conduct thematic inquiries. The broad mandate of the UK Joint Committee on Human Rights is one of its key strengths.
 - (b) The Committee should 'screen' all Bills that come before parliament, but, as with the UK Committee, focus its inquiries and reports on those Bills which raise prima facie human rights concerns (including those Bills or types of laws which have been identified as doing so by UN human rights bodies, the Australian Human Rights Commission and human rights NGOs). This will ensure that the work of the Committee is targeted.

⁶ *National Human Rights Consultation Report* (2009), Recommendations 22 and 30.

⁷ Australian Government, *Australia's Human Rights Framework* (April 2010) at 3; see also at 8.

⁸ For further information on parliamentary committees HRLRC submission *Parliamentary Committees and the Promotion and Protection of Human Rights*, Submission to the Senate Scrutiny of Bills Committee: Inquiry into the Future Direction and Role of the Committee available at www.hrlrc.org.au/files/Senate-Scrutiny-of-Bills-Committee-Inquiry-HRLRC-Submission-March-2010.pdf.

- (c) In assessing and reporting on the human rights compatibility of legislation, the Committee should consider Statements of Compatibility (together with other extrinsic materials), but should conduct its own independent analysis to ensure effective scrutiny of Bills.
- (d) The Committee must have the power to call for submissions and convene public hearings.
- (e) The Committee must be given sufficient time to ensure that its inquiries and reports can actually inform parliamentary debate and dialogue in a meaningful way.
- (f) It is critical that the Committee have an adequately resourced secretariat with the requisite human rights law experience and expertise.
- (g) The Committee should have a role in giving effect to the Framework's commitment to a 'review of legislation, policies and practices for compliance with the seven core UN human rights treaties'. In order to do this, it would need the power to conduct own motion inquiries.

(b) Review of Legislation, Policies and Practice

17. The HRLRC also welcomes the Australian Government's promise to review existing legislation, policies and practice for compliance with human rights standards, particularly given that the Government will take into account '[v]iews expressed by UN human rights bodies' in determining which areas to review.⁹ In accordance with this statement, the HRLRC urges the Government to review as a matter of priority the following legislation referred to by Committee as in need of reform:

- (a) Australia's anti-discrimination legislation (discussed on page 10 below);
- (b) Australia's Northern Territory Emergency Response legislation (discussed on page 11 below);
- (c) the exemption of the *Disability Discrimination Act 1992* from the *Migration Act 1958* (Cth) (discussed on page 14 below);
- (d) the detention and review provisions of the *Migration Act 1958* (Cth) (discussed on page 18 below); and
- (e) the provisions of the *Building and Construction Industry Improvement Act 2005* that limit freedom of association.

18. Further, the Government should ensure that the review of legislation, policies and practice, while prioritising certain areas of concern, proceed in a comprehensive, systematised way.

⁹ Australian Government, *Australia's Human Rights Framework* (April 2010) at 9.

(c) Statements of Compatibility

19. The HRLRC congratulates the Australian Government on its commitment to introducing legislation requiring a Statement of Compatibility to accompany all new bills and delegated legislation subject to disallowance. Statements of Compatibility will provide a statement of the compatibility of the proposed law with the rights contained in all seven core UN human rights treaties to which Australia is party, including the ICESCR.¹⁰
20. In order for Statements of Compatibility to be most effective, they should have the following features:
- (a) They must be reasoned and include discussion and rigorous analysis of the human rights issues raised by a Bill. However, they should also not be too long or technical as this will detract from their utility in informing a parliamentary dialogue about rights.
 - (b) Keeping Statements of Compatibility succinct but adequately reasoned will be a particular challenge given that the compatibility analysis is to take account of the seven core human rights treaties to which Australia is party. The best way to achieve this may be to limit the discussion to those rights which are actually limited by the Bill or a provision thereof, rather than to include a discussion of all those rights which are merely engaged by the proposed legislation (as is the case in Victoria under the *Charter of Human Rights and Responsibilities Act 2006*).
 - (c) Statements of Compatibility should consider and, where appropriate, justify limitations in a rigorous but consistent manner. This will be a challenge because the seven core human rights treaties do not include a general limitations clause unlike, say, s 7 of the *Victorian Charter of Human Rights and Responsibilities* or s 1 of the *Canadian Charter of Rights and Freedoms*. The best way to achieve this would be for the legislation to specify that Statements should (a) consider whether and how a Bill limits human rights and (b) where human rights are limited, specify whether and how such limitations are 'reasonable limits under law which can be demonstrably justified in a free and democratic society'. This formulation is very similar to that contained in s 1 of the Canadian Charter and does not specify the five various factors which are contained in s 7(2) of the Victorian Charter. The reason for excluding these factors is twofold. First, the analysis under s 7(2) can become lengthy and formulaic. Second, the s 7(2) analysis is arguably more cumbersome and less rigorous than has been adopted in respect of s 1 of the Canadian Charter, pursuant to which any limitations should:
 - (i) be for a 'pressing and substantial' purpose;
 - (ii) be proportionate and rationally connected to the purpose; and

¹⁰ Australian Government, *Australia's Human Rights Framework* (April 2010) at 8.

(iii) impair the right as little as possible: see *R v Oakes* [1986] 1 SCR 103.

(d) Finally, given the extensive international and comparative human rights learnings on which Australia can draw, the HRLRC considers that it would be useful for the legislation to specify that, in considering the scope and content of the seven core human rights treaties, 'proper consideration should be given to international human rights law and the judgments of domestic, foreign and international human rights courts, bodies and tribunals'. Section 32(2) of the Victorian Charter contains a similar formulation.

21. To have the greatest impact and accessibility, Statements of Compatibility should be tabled with the Second Reading Speech of a Bill and also included in Hansard.

Recommendation 2:

The Australian Government should work towards enacting a comprehensive national *Human Rights Act* that recognises and protects ESC rights, including providing effective and enforceable remedies for breach of those rights.

Recommendation 3:

In its review of existing legislation for compliance with human rights, the HRLRC urges the Government to review as a matter of urgency the legislation flagged for review in the Committee's Concluding Observations, namely:

- anti-discrimination legislation;
- the Northern Territory Intervention legislation;
- the exemption of the *Disability Discrimination Act* from the *Migration Act*;
- the detention and review provisions of the *Migration Act*; and,
- the provisions in the *Building and Construction Industry Improvement Act 2005* that limit freedom of association.

Recommendation 4:

The legislation creating the Parliamentary Joint Committee should ensure that Committee is given a broad and permissive mandate that enables it to consider proposed legislation, exposure drafts and regulations, the recommendations and views of UN human rights bodies (including both treaty bodies and the various mechanisms of the Human Rights Council), and to conduct thematic inquiries on its own motion.

Recommendation 5:

The Australian Government should require that Statements of Compatibility be reasoned and include discussion and rigorous analysis of the human rights issues raised by a Bill. The best way to achieve this would be for the legislation to specify that Statements should (a) consider whether and how a Bill limits human rights and (b) where human rights are limited, specify whether and how such limitations are 'reasonable limits under law which can be demonstrably justified in a free and democratic society'.

5. Official Development Assistance (Paragraph 12)

The Committee recommends that the State Party increase its official development assistance to 0.7 percent of its GDP, as reaffirmed at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held in Doha on 29 November - 2 December 2008.

22. The HRLRC strongly supports the Committee's recommendation that Australia increase its international development assistance to 0.7 per cent of its gross domestic product (**GDP**).
23. Since the release of the Committee's Concluding Observations, the Australian Government has outlined its budget for 2010-2011. The HRLRC welcomes the Australian Government's announcement that it will increase its foreign aid budget from \$3.8 billion in the 2008-2009 financial year to \$4.3 billion in the 2010-2011 financial year and its commitment to boost official development assistance from 0.3 percent of gross national income (**GNI**) in the 2009-2010 financial year to 0.5 per cent of GNI by 2015-16.¹¹
24. The HRLRC also welcomes the fact that a portion of this funding has been allocated to assist developing nations adapt to climate change. However, the HRLRC believes that the amount earmarked to assist developing nations in this manner needs to be drastically increased in order to provide real assistance to affected nations and meet the levels Australia agreed to under the Copenhagen Accord.
25. Despite improvements in this area, Australia's official development assistance will remain below 0.7 per cent of GDP - the benchmark agreed upon by the UN General Assembly in 1970.¹² This raises questions about Australia's compliance with Article 2 of the ICESCR, which obliges Australia to take steps to achieve the full realisation of ESC rights through international economic assistance. Furthermore, the HRLRC is concerned that funds earmarked for climate change adaptation assistance are to be drawn from Australia's overseas development assistance allocation. The HRLRC urges the government to create a separate fund for climate change adaptation assistance so that these funds are drawn out of official development assistance.
26. Finally, the HRLRC notes the recent recommendation of the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade following its inquiry into *Human Rights in the Asia-Pacific*, that AusAID 'adopt a human rights-based approach to the planning and

¹¹ *Australia's International Development Assistance Program* available at www.budget.gov.au/2010-11/content/ministerial_statements/ausaid/html/index_ausaid.htm.

¹² *International Development Strategy for the Second United Nations Development Decade*, UN General Assembly Resolution 2626 (XXV), 24 October 1970, [43].

implementation of development projects'.¹³ This recommendation was underpinned by evidence that development and human rights are interdependent and mutually reinforcing,¹⁴ and that a human rights-based approach can enhance program effectiveness and efficiency.¹⁵ The prioritisation of human rights as a key aim and instrument of Australia's aid and development program would be consistent with the Government's commitment to strengthen the effectiveness of Australia's aid program. It would also constitute a concrete advancement of the Australian Government's April 2010 commitment to 'improve the protection and promotion of human rights within our region and around the world'¹⁶ and, in the context of Australia's UN Security Council candidacy for 2013-14, to act as a 'principled advocate of human rights for all'.¹⁷

Recommendation 6:

The Australian Government should increase its official development assistance and create a separate fund for climate change adaptation assistance.

Recommendation 7:

The Australian Government should commit to a human rights-based approach to the planning and implementation of aid and development and should commit to the promotion and protection of human rights as a key priority and instrument of Australia's aid and development program.

6. Australian Human Rights Commission (Paragraph 13)

The Committee notes with concern that the Australian Human Rights Commission has limited competency as regard the Covenant rights and lacks adequate human and financial resources, which affects its capacity to fulfil its role and functions.

The Committee recommends that the State party strengthen the mandate of the Australian Human Rights Commission in order to cover all the Covenant rights and ensure that adequate human and financial resources are allocated to this institution, in line with the Paris Principles.

27. The Australian Government is to be commended for undertaking to provide \$6.6 million over four years to the Australian Human Rights Commission (**AHRC**) as a part of the Framework (discussed above). However, this funding is limited to developing the AHRC's education

¹³ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Human Rights in the Asia-Pacific: Challenges and Opportunities* (2010) [Recommendation 2] (Joint Committee Report).

¹⁴ Joint Committee Report, 130.

¹⁵ See, eg, Marta Foresti, David Booth and Tammie O'Neill (Overseas Development Institute), *Aid Effectiveness and Human Rights: Strengthening the Implementation of the Paris Declaration* (2006).

¹⁶ Australian Government, *Australia's Human Rights Framework* (April 2010) 2, 7.

program and does not strengthen its mandate or ability to fulfil its role and functions with respect to ESC rights.

28. Currently the AHRC does not have the mandate and capacity to monitor Australia's compliance with ESC rights or any jurisdiction to conciliate complaints about violations of ESC rights. The National Human Rights Consultation recommended that the AHRC be able to hear complaints about breach of ESC rights, but that recommendation has not been adopted in the Framework.¹⁸ Consequently, the AHRC does not have a mandate to protect and promote ESC rights, except insofar as civil and political rights are also involved.

Recommendation 8:

The HRLRC urges the Australian Government provide the AHRC's with the mandate and capacity to monitor Australia's compliance with ESC rights and also to conciliate complaints about breaches of those rights.

7. Anti-Discrimination Legislation (Paragraph 14)

The Committee recommends that the State party enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds.

29. The Government's recently announced commitment to 'harmonise and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly' (the 'Consolidation Project') is an opportunity to adopt a robust and comprehensive legal framework which promotes real equality and addresses all grounds of discrimination.¹⁹
30. The Government should release an exposure draft for a single, comprehensive Equality Act, the features of which include:
- (a) a legal right to substantive equality;
 - (b) comprehensive coverage through a non-exhaustive list of protected attributes;
 - (c) the recognition of compounded or intersectional discrimination;
 - (d) replacement of the 'comparator' test with the 'detriment' test;
 - (e) reversing the onus of proof in discrimination cases;

¹⁷ See Department of Foreign Affairs and Trade, *Australia: United Nations Security Council Candidate 2013-14*.

¹⁸ *National Human Rights Consultation Report* (2009), Recommendation 22.

¹⁹ *Australia's Human Rights Framework* (April 2010), available at www.ag.gov.au/humanrightsframework

- (f) mechanisms to identify, target and address systemic discrimination;
 - (g) provision for representative and individual complaints;
 - (h) provision for temporary special measures to promote equal opportunity; and
 - (i) the removal of permanent exceptions that do not meet human rights standards of reasonableness and proportionality.
31. For further discussion and recommendations of the steps that the Government should take to ensure that Australia's antidiscrimination laws meet the standards articulated in ICESCR, please refer to the HRLRC's policy paper, *'Advance Australia Fair': An Agenda to Promote Equality and Address Discrimination in Australia*.²⁰

Recommendation 9:

The HRLRC recommends that the Government enact a single, comprehensive *Equality Act* which promotes a rights-based model of substantive equality.

8. The Northern Territory Intervention (Paragraph 15)

The Committee recommends that the State party (a) address the human rights violations identified in the 2007 Little Children are sacred report bearing in mind the recommendations of the 2008 report of the Northern Territory Intervention Response Review board in this regard; (b) conduct formal consultations with the indigenous peoples concerned regarding the operation and impact of the Northern Territory Intervention; (c) establish a national indigenous representative body with adequate resources; (d) ratify ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

32. Despite amendments proposed in various federal government bills in 2009,²¹ the HRLRC remains concerned that the Northern Territory Intervention measures (**Intervention Measures**) will continue to have serious and pervasive effects on Indigenous communities and that they will jeopardise Australia's compliance with its obligations under ICESCR and other human rights instruments. The HRLRC strongly recommends that the Australian Government adopt a human rights-based approach with respect to all Intervention measures.

8.1 Reinstatement of the RDA

33. The HRLRC remains concerned about:

²⁰ See www.hrlrc.org.au/files/Policy-Paper-Equality-and-Human-Rights1.pdf

²¹ See the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Welfare Reform Bill)* and the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009*.

- (a) the excessive amount of time it is going to take for the Australian Government to fulfil its commitment to reinstating the RDA, as it is currently scheduled to come back into force on 31 December 2010;²²
 - (b) the fact that reinstatement of the RDA will not necessarily be effective in addressing the remaining discriminatory aspects of the Northern Territory Intervention.
34. While the racially discriminatory aspects of the Intervention continue, Aboriginal communities in the Northern Territory continue to be subjected to a range of draconian measures and policies.

Recommendation 10:

The HRLRC strongly recommends that the RDA be reinstated in relation to the Northern Territory Intervention and that this reinstatement take effect immediately and without conditions.

8.2 Income Management

35. The Intervention measures currently include the compulsory quarantining of between 50 and 100 per cent of welfare payments for people living in 'prescribed areas' (**Income Management Regime**). Welfare recipients in the prescribed areas are predominantly Indigenous. Quarantined money can only be spent on 'priority needs' including food, clothing, household items and utilities, childcare and development, education and training, and cannot be spent on alcohol, tobacco and gambling. Compulsory income management is consequently a substantial impingement on welfare recipient's human rights including the right to social security and right to an adequate standard of living. The HRLRC is deeply concerned that the income management regime continues to be met with widespread resentment and anger from a substantial section of the Indigenous community and that the available evidence does not clearly demonstrate income management to be an effective strategy.
36. The HRLRC is concerned that, despite the recommendation of the Northern Territory Intervention Review Board that a voluntary model of income management should replace compulsory income quarantining, the Government is retaining and expanding compulsory income management. Compulsory income management is to be applied across the Northern Territory from 1 July 2010, and potentially across the whole of Australia at a later date.²³
37. The HRLRC is concerned that, by definition, the expanded application of income management measures will continue to disproportionately adversely affect Indigenous communities. The

²² This is nearly three and a half years since the introduction of the Northern Territory Intervention and two years since the current Government announced its intention to reinstate the RDA.

income management regime also cannot be properly classified as a 'special measure' exempting the operation of the RDA. The HRLRC submits that if income management is to be retained, the Government Bills must be amended to ensure that the scheme is voluntary. Voluntary income management would ensure that the application of the scheme is assessed on a case by case basis and only applied to individuals and families based on need and their consent. Such an approach would have the advantages of ensuring that the scheme is:

- (a) consistent with the RDA, because it could be properly justified as being reasonable; and
- (b) likely to be far more effective in addressing Aboriginal disadvantage, because providing people with a choice to have their income quarantined promotes the right of Aboriginal people to self-determination by allowing them to effectively participate in their own lives.

Recommendation 11:

The HRLRC recommends that the Government Bills be amended to remove the compulsory nature of the income management scheme, and that the scheme be replaced with voluntary income management.

8.3 Consultations

38. Whilst the Northern Territory Intervention 'Redesign Consultations' potentially represent a positive development in the Australian Government's approach to the Intervention measures, serious concerns have been raised about the content and form of the consultation process. The consultations have been criticised for:

- (a) the lack of Aboriginal input into the format;
- (b) lack of notice to communities;
- (c) the absence of interpreters at meetings;
- (d) the retrospective nature of consultations (i.e. post Intervention and after the policy decision to continue compulsory income quarantining); and
- (e) the inadequacy of the explanations provided about Intervention measures and complex legal concepts.²⁴

²³ Australian Government FaHCSIA, 'Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response', (Policy statement, November 2009) at 5.

²⁴ Nicholson, Behrendt, Vivian, Watson and Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (November 2009).

39. HRLRC is concerned that these substantive and procedural flaws mean that the Australian Government has still failed to meaningfully engage with indigenous communities on the issues raised by the Intervention measures.

Recommendation 12:

The HRLRC recommends that the Government consult widely with Aboriginal communities about the Intervention Measures.

8.4 A National Indigenous Representative Body

40. HRLRC welcomes the announcement in May 2010 that the National Congress of Australia's First Peoples, a new national indigenous representative body, is ready to commence operating. The National Congress has emerged from an extensive consultation process driven by Aboriginal and Torres Strait Island peoples. It is hoped that the National Congress will function as a credible representative voice to facilitate meaningful Aboriginal engagement with government policies and programs.²⁵

9. Disability Discrimination and the Migration Act (Paragraph 16)

The Committee encourages the State party to strengthen its efforts towards the adoption of concrete measures to enable persons with disabilities to fully enjoy the rights guaranteed by the Covenant. It recommends that the Migration Act 1958 and the Disability Discrimination Act 1992 be amended to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.

41. Section 52 of the *Disability Discrimination Act (DDA)* provides an exemption from the requirements of the DDA to the provisions of the *Migration Act 1958* (Cth) (**Migration Act**) and the *Migration Regulations 1994* (Cth) (**Regulations**), and to those things permitted or required to be done under those instruments. Accordingly, the exemption under the DDA applies to the health requirements for visa applicants in Schedule 4 (Part 1) of the Regulations.
42. The health requirements for visa applicants listed in s 4005(c) Schedule 4 (Part 1) of the Regulations require an applicant to be free from any 'disease or condition' which during the applicant's proposed stay in Australia, is likely to require health care or community services at significant cost to the Australian community or prejudice to the access an Australian citizen or permanent resident would have to health care or community services, regardless of whether those services will actually be used by the visa applicant.

²⁵ HREOC, 'First National Executive is a milestone moment for Indigenous Australians', (Press release, 2 May 2010) available at www.hreoc.gov.au/about/media/media_releases/2010/40_10.html.

43. These requirements discriminate against people with disabilities who make applications for visas to enter and remain in Australia. As outlined in the HRLRC's recent submission to the Joint Standing Committee on Migration's Inquiry into Immigration Treatment of Disability,²⁶ the current migration regime focuses on costs associated with disability in a way that is neither reasonable nor proportionate.
44. Although the costs associated with the grant of a visa to a person with a disability or a member of their family may be an appropriate issue for consideration, the HRLRC notes that this issue cannot be determinative.

Recommendation 13:

The HRLRC considers that the Australian Government should repeal the exemption of the operation of Divisions 1, 2 and 2A of the DAA to the provisions of the Migration Act and the Regulations.

10. Gender Equality (Paragraph 17)

The Committee recommends that the State party continue strengthening its effort to enhance equality between men and women in the work place, in particular those initiatives aimed at implementing the principle of equal pay for work of equal value. The State party should consider implementing the recommendation of the Senate Legal and Constitutional Affairs Committee in relation to amending the Sex Discrimination Act 1984.

10.1 Equality in the Workplace

45. Since the release of the Committee's Concluding Observations, the House Standing Committee on Employment and Workplace Relations has tabled its report on the inquiry into pay equity and associated issues related to increasing female participation in the workforce entitled *Making it Fair*.²⁷ The HRLRC recommends that the Government adopt the recommendations contained in this report.
46. The HRLRC notes that the ASX Corporate Governance Council has announced a proposal to expand the *Corporate Governance Principles and Recommendations* to require each entity

²⁶ *Submission to the Joint Standing Committee on Migration's Inquiry into Immigration Treatment of Disability* (October 2009) available at www.hrlrc.org.au/files/Migration-and-Disability-HRLRC-Submission.pdf.

²⁷ House Standing Committee on Employment and Workplace Relations, *Inquiry into pay equity and associated issues related to increasing female participation in the workforce* (November 2009) available at www.aph.gov.au/house/committee/ewr/payequity/report.htm.

listed on the ASX to adopt and disclose a policy on diversity that includes 'measurable objectives relating to gender'.²⁸

47. The HRLRC welcomes this development, but notes that the Government also has an important role to play in advancing gender equality in the workplace. The Office for Women has released its *Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation* report following a comprehensive consultation process. The review produced a number of solutions for improving employment outcomes for women at both a cultural and operational level.

Recommendation 14:

The HRLRC considers that the Australian Government should respond to and adopt the recommendations in the *Making it Fair* report.

Recommendation 15:

The HRLRC considers that the Australian Government should respond to and adopt the recommendations in the *Review of the Equal Opportunity for Women in the Workplace Act 1999 Consultation* report.

11. Paid Parental Leave (Paragraph 21)

The Committee recommends that the State Party introduce a compulsory paid maternity and paternity leave scheme and consider ratifying ILO Conventions No 103 (1952) concerning Minimum Standards of Social Security and No. 183 (2000) concerning the Revision of Maternity Protection Convention (Revised), 1952.

48. Since the release of the Committee's Concluding Observations, both major parties in Australia have now adopted policies relating to paid parental leave. The HRLRC views this as a positive development. The HRLRC also welcomes the release of a draft bill detailing the Government's paid parental scheme.
49. The Government's paid parental leave scheme, which will operate from 1 January 2011, entitles the primary carer of a newborn child to paid leave for up to 18 weeks at the national minimum wage. However, the HRLRC is concerned that this is actually a lower standard than is provided for under many awards and enterprise agreements. Many awards provide paid parental leave of the usual wage of the employee. Restricting payment to the minimum wage is likely to cause significant financial difficulty for many families.

²⁸ Australian Stock Exchange Press Release, *New ASX Corporate Governance Council Recommendations on Diversity* (7 December 2009) available at http://203.15.147.66/about/pdf/mr_071209_asx_cgc_communique.pdf.

50. Employees will be eligible for paid parental leave under this scheme if they have worked at least 330 hours over the 13 months prior to the expected birth or adoption of the child, with a break of no greater than eight consecutive weeks between two periods of work during that time. The HRLRC is concerned that this may exclude certain persons such as long standing employees who have recently taken an extended period of leave.
51. The HRLRC supports the provisions providing that individuals other than the child's parent (for example grandparents) will, in exceptional circumstances, be able to claim the payment where they have custody of the child. However the HRLRC is concerned that these 'exceptional' circumstances establish a high threshold that will be hard to meet in many circumstances and that this may cause significant hardship where an individual other than the parent has custody of the child.

Recommendation 16:

The HRLRC urges the government to reconsider the provisions of the draft bill to ensure that its paid parental scheme adequately provides for the needs of new parents and remains readily accessible to carers of newborns.

12. Violence Against Women (Paragraph 22)

The Committee recommends that the State party take appropriate measures, including specific legislative measures criminalizing acts of domestic violence. In particular, the State party should consider adopting the Australian Human Rights Commission's proposals related to the development of the new Plan of Action to Reduce Violence against Women and their Children, ensuring that it reflects human rights principles; and increase shelters and support services for the victims. The Committee further recommends that the State party increase its efforts to prosecute acts of domestic violence. The Committee request the State party to include in its next periodic report available information on the number and nature of reported cases of domestic violence, on the conviction, and the sanctions imposed on perpetrators, as well as any assistance and rehabilitation measures provided to victims of domestic violence.

52. The HRLRC commends the Australian Government's commitment to addressing violence against women through its *National Plan of Action to Reduce Violence against Women and their Children*. This plan was the Government's response to the report of the National Council to Reduce Violence against Women and their Children (**Council**) entitled *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*. The Government has adopted several of the Council's recommendations as a matter of priority. The HRLRC welcomes the adoption of these recommendations but urges the

Government to adopt or work with the States and Territories to implement the rest of the Council's recommendations. The HRLRC also urges the Government to increase its funding of these initiatives. As noted by Amnesty International, *Time for Action* does not include an increase on the funding provided for domestic violence initiatives over the past four years.²⁹

53. The HRLRC is also concerned about the existing lack of services for women who are experiencing or at risk of family violence and the lack of measures that specifically target the elimination of violence against Indigenous women.

Recommendation 17:

The HRLRC recommends that the Australian Government implement all the Council's recommendations in its *National Plan of Action to Reduce Violence against Women and their Children* and / or work with the states and territories to do so. The HRLRC also recommends that the Government take action to:

- (a) fund its plan adequately and in a sustained way to reflect the extent of the problem, including increasing funding to provide comprehensive and accessible services for women experiencing or at risk of family violence; and
- (b) Specifically targeting elimination of violence against Indigenous women by:
 - (i) increasing funding to expand culturally appropriate community legal education sessions and services to Indigenous women and children who are experiencing domestic and sexual violence; and
 - (ii) establishing of a national level body specifically tasked to undertake research, build capacity and drive policy on efforts related to end violence against Indigenous women.

13. Mandatory Detention (Paragraph 25)

The Committee is concerned at the retention of the mandatory detention policy for asylum-seekers for unauthorized arrivals and notes that in its 2008 Immigration Detention Report, the Australian Human Rights Commission expressed serious concerns about the immigration detention facilities, in particular in Christmas Island. It is also concerned at the fact that some asylum-seekers are detained for prolonged and indefinite periods of time, which results in a negative impact on their mental health, in spite of the measures taken by the State party to improve the protection of asylum-seekers, including its new "seven values" policy. (arts. 2, para. 2; 11 and 12).

²⁹ Amnesty International Australia, 'National Plan must increase funding to services cautions Amnesty International', (media release, 29 April 2009); Amnesty International, 'Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence against Women' (2008), www.amnesty.org.au/images/uploads/svaw/NPOA_report_-_Master_13June_opt_rfs.pdf.

The Committee encourages the State party to implement without delay its new “seven values” in policy, and carry out the Australian Human Rights Commission's recommendations adopted in its 2008 Immigration Detention Report, including the repeal of the mandatory immigration detention system and the closure of the Christmas Island detention Centre.

54. In June 2009 the Government introduced the Migration Amendment (Immigration Detention Reform) Bill 2009 (**Detention Bill**) to parliament, purportedly to implement the ‘seven values’ policy in legislation.³⁰ However, the Bill still provides for mandatory and, effectively, indefinite detention.³¹ Further, the Australian Government has recently made a decision to suspend all new Afghan and Sri Lankan claims for asylum and to reopen the Curtin Detention Centre in order to house those asylum seekers. Meanwhile, Christmas Island remains open and crowded and children continue to be held in closed detention facilities.

Recommendation 18:

The Australian Government should:

- (a) End its policy and practice of mandatory detention of asylum seekers and ensure, through all necessary legislative and administrative measures, that the detention of asylum seekers is truly a measure of last resort and will not amount to arbitrary detention. The Migration Amendment (Immigration Detention Reform) Bill 2009 in its current form does not achieve this purpose.
- (b) Immediately close all detention facilities at Christmas Island and the newly reopened Curtin Detention Centre.
- (c) Provide all asylum seekers with equal rights to apply for protection as a refugee in Australia and for review of any decisions made, regardless of how the asylum seeker arrived in Australia.
- (d) Immediately remove the suspension on processing visa applications from asylum seekers from Sri Lanka and Afghanistan, and review its policies and procedures regarding asylum seekers to eliminate any discrimination in the visa application process.
- (e) Take all necessary steps to ensure that asylum seekers and refugees in detention are provided adequate health care.

³⁰ The Detention Bill has not yet been passed and incorporated into the *Migration Act* or its regulations.

³¹ For a full discussion of the Bill's impact on mandatory detention, see the HRLRC's submission to the Senate Legal and Constitutional Affairs Committee inquiry, available at www.hrlrc.org.au/files/HRLRC-Submission4.pdf.

14. Homelessness (Paragraph 26)

The Committee recommends that the State party take effective measures, in line with the Committee's general comment No.4 (1991) on the right to adequate housing (art. 11, para. 1, of the Covenant), to address homelessness in its territory. The State party should implement the recommendations of the Special Rapporteur on the Right to Adequate Housing contained in the report of his mission to Australia (A/HRC/4/18/Add.2). The Committee requests the State party to provide, in its next periodic report, disaggregated data and information which will allow the Committee to assess the progress made by the State party in improving the housing situation in its territory, in particular with respect to indigenous peoples.

55. In November 2009, the House of Representatives Standing Committee on Family, Community, Housing and Youth undertook an inquiry into the content of the proposed Homelessness Legislation, offering 15 recommendations to strengthen the legislative framework.³²
56. The Australian Government should develop homelessness legislation in the terms recommended by that Committee, in particular legislation should:
- (a) expressly provide the right of all Australians to adequate housing (Recommendation 7);
 - (b) explicitly commit to reducing homelessness through an integrated and coordinated approach with partnerships between all levels of government, and governments and the not-for-profit and for-profit sectors (Recommendation 4);
 - (c) give priority access to services and supports based on an assessment of the needs and vulnerability (Recommendation 8);
 - (d) include provision for independent monitoring of the progress towards the realisation of the right of all Australians to adequate housing, with data collection mechanisms allowing the monitoring of progress for specified vulnerable and marginalised population groups (Recommendation 9);
 - (e) conduct an audit of laws and policies that impact disproportionately on people experiencing homelessness for the purpose of amending those laws to alleviate any adverse impacts (Recommendation 10); and
 - (f) provide overarching principles to underpin a national standards and accreditation framework for services used by homeless people and those at increased risk of homelessness (Recommendation 11).

³² House of Representatives Standing Committee on Family, Community, Housing and Youth, Australian Parliament, *Housing the Homeless: Report on the inquiry into homelessness legislation*, (November 2009).

57. As well as adopting the Standing committee's recommendations, the Government should ensure that the proposed new homelessness legislation properly uses a human rights-based approach by including the following:
- (a) protection against unlawful, forced or arbitrary evictions;
 - (b) a requirement for meaningful participation by persons experiencing homelessness in the development of policy and delivery of homelessness services;
 - (c) the provision of housing on a non-discriminatory basis to ensure equal access;
 - (d) an immediately enforceable right of access to emergency accommodation; and
 - (e) provision of a range of remedies, including judicial, for breaches of the right to adequate housing.

Recommendation 19:

The HRLRC recommends that the Government adopt Homelessness legislation in the terms recommended by the House of Representatives Standing Committee on Family, Community, Housing and Youth. However, the legislation should also contain the following protections:

- (a) protection against forced or arbitrary evictions;
- (b) a requirement for meaningful participation by persons experiencing homelessness in the development of policy and delivery of homelessness services;
- (c) the provision of housing on a non-discriminatory basis to ensure equal access;
- (d) an immediately enforceable right of access to emergency accommodation; and
- (e) provision of a range of remedies, including judicial, for breaches of the right to adequate housing.

**15. Right to food and the Right to affordable drinking water and sanitation
(Paragraph 27)**

The Committee recommends that the State party take all the necessary and adequate measures to ensure the enjoyment of the right to food and of the right to affordable drinking water and sanitation in particular by indigenous peoples, using a human-rights based approach, in line with the Committee's general comments No. 15 (2002) on the right to water, No. 14 (2000) on the right to the highest attainable standard of health and No. 12 (1999) on the right to food.. It also recommends that the State party intensify its efforts to address issues of climate change, including through carbon reduction schemes. The State party is encouraged to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change, impacting the right to food and the right to water for indigenous peoples, and put in place effective mechanisms to guarantee consultation of affected Aboriginal and Torres Strait-Islander peoples, so to enable them to exercise their rights to an informed decision as well as to harness the potential of their traditional knowledge and culture (in land management and conservation).

58. The HRLRC is concerned about the government's delay until 2013 of the *Carbon Pollution Reduction Scheme Bill* and the absence of any other legislative initiatives to address climate change such as an emissions trading scheme or the implementation of a carbon tax.

Recommendation 20:

The HRLRC recommends that the Australia Government:

- (a) does not delay legislative responses to address climate change and moves to immediately implement a legislative strategy to reduce greenhouse gas emissions;
- (b) takes a human rights based approach to responding to the threat of climate change, and its potential impact on access to food and water by Indigenous Australians; and
- (c) actively includes affected Aboriginal and Torres Strait Islander peoples in consultations on the impact of climate change and any infrastructure designated to improve access to food and affordable water and sanitation in remote communities.

16. Indigenous Health (Paragraph 28)

The Committee calls on the State party to take immediate steps to improve the health situation of indigenous people, in particular women and children, including by implementing a human rights framework that ensures access to the social determinants of health such as housing, safe drinking water, electricity and effective sanitation systems. Further, the Committee invites the State party to identify disaggregated health indicators and appropriate national benchmarks in relation to the right to health, in line with the Committee's general comment No. 14, and to include information on the process of identifying such indicators and benchmarks in its next periodic report.

59. Since the release of the Committee's Concluding Observations, the Prime Minister has released his 'Closing the Gap' report for 2010 which addresses some of these recommendations. However, the HRLRC believes that more extensive disaggregated health indicators are required.
60. The Closing the Gap report contains disaggregated information for child and infant mortality rates and health risk factors but provides no comparison between Indigenous and non-Indigenous rates of preventable diseases. Similarly, while targets have been set for halving Indigenous child mortality and life expectancy, more specific targets in relation to national benchmarks for the leading causes of Indigenous preventable deaths have not been set. Consequently, the HRLRC urges the Australian Government to disaggregate Indigenous preventable death data and develop corresponding targets based on national benchmarks to address the disparity in health equality between Indigenous and non-Indigenous Australians.

Recommendation 21:

The HRLRC recommends that the Australian Government:

- (a) investigate and publish disaggregated health indicators for preventable diseases amongst Indigenous people to enable comparison with the non-Indigenous population and the creation of targets addressing individual diseases and health indicators; and
- (b) otherwise ensure that the Committee's Concluding Observations with respect to the availability of housing, safe drinking water, electricity and effective sanitation systems are addressed.

17. Indigenous Education (Paragraph 31)

The Committee recommends that the State party produce accurate national data on indigenous school-age children in remote areas to assess whether the existing education infrastructure and services meet the needs of indigenous peoples living in remote areas. The Committee also recommends that wherever the school provision does not meet the populations' needs, the State party develop an adequate national plan to improve the educational system for indigenous peoples, including in remote areas.

- 61. Since the release of the Committee's Concluding Observations, the Prime Minister has released his 'Closing the Gap' report for 2010 which has committed the Government to various outcomes with respect to Indigenous education. This report identifies the level of Indigenous involvement in early childhood education although these figures do not specifically identify attendance levels in remote communities. The report also identifies the gap between Indigenous and non-Indigenous children with respect to reading, writing, numeracy and Year 12 (or equivalent) completion and goes some way to dealing with the question of remoteness in this context. This report has gone some way to identifying the needs of Indigenous peoples living in remote areas.
- 62. The HRLRC also welcomes the Government's efforts in drawing up the draft national Indigenous education action plan and its attempts to address the needs of Indigenous children in remote communities. As the Government commences the process of redrafting its action plan in response to the submissions it has received on its draft, the HRLRC urges the Government to continue to consider the needs of Indigenous students in rural or remote areas.

Recommendation 22:

The HRLRC recommends that the Australian Government collates and publishes more extensive data on Indigenous education in rural and remote areas. The HRLRC also recommends that the Government's work towards ensuring that the final draft of its national Indigenous education action plan adequately addresses the needs of Indigenous peoples in remote areas.

18. Native Title (Paragraph 32)

The Committee recommends that the State party increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples.

63. Access and control over traditional lands continues to be a major human rights issue for Indigenous Australians.
64. 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.³³ Furthermore, as part of the Northern Territory Intervention, the Government retains leases over Indigenous townships without the permission of the land-owners. The Indigenous land-owners are not given the opportunity to negotiate the terms of the leases, which confer exclusive possession on the Australian Government and do not guarantee the right of residence for the affected peoples or provide for compensation to the land owners. This deprives the traditional owners the right to make decisions about the use of the land and contrary to the right of self-determination.

Recommendation 23:

The HRLRC recommends that the Federal Government:

- (a) reform the current Native Title legislation to improve accessibility to the Native Title system in consultation with Aboriginal and Torres Strait Islander Peoples;
- (b) commit to a self-determination approach to Indigenous land ownership, transferring leases to Indigenous community leaders and representative councils; and
- (c) adequately compensate Indigenous communities for land acquired under the Northern Territory intervention.

19. Preservation of Indigenous Languages and Bilingual Schools (Paragraph 33)

The Committee recommends that the State party (a) strengthen its efforts to guarantee the indigenous peoples' rights under articles 1 and 15 to enjoy their identity and culture, including through the preservation of their traditional languages; (b) consider

³³ See *Native Title Act 1993* (Cth)

improving the Maintenance of Indigenous Languages and Records Program; (c) preserve and promote bilingual education at schools; (d) reform the Copyright Act 1986 to extend its legal protection to indigenous people; and (e) develop a special intellectual property regime that protects the collective rights of indigenous peoples, including protection of their scientific products, traditional knowledge and medicine. The Committee also recommends that a registry of intellectual property rights of indigenous peoples be opened and that the State party ensure that the profits derived thereof benefit them directly.

65. The HRLRC is concerned by the Northern Territory Government's policy that requires schools to teach the first four classroom hours of each day in standard Australian English.³⁴ As noted recently by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people:

*The Special Rapporteur is aware of the value of and need to improve literacy in the national language, but emphasises that the Northern Territory government must make greater effort to respect cultural diversity and find a better approach to addressing the challenges of bilingual education.*³⁵

66. In December 2009 the Federal Ministers for Education and Early Childhood Development and Youth Affairs called for submissions on a draft national Indigenous education action plan. Whilst the action plan seeks to address poor attendance and retention rates, it did not address bilingual education programs for Indigenous students.³⁶ Various NGOs made submissions on the need for bilingual education programs to resume in schools with a high population of Indigenous students in response to this draft plan. One submission noted:

*In addition to issues of basic rights and student engagement, purely pragmatic considerations support the use, maintenance and strengthening of children's mother tongues in their education. Decades of practical experience and an overwhelming body of research show that second/additional language learning is most effective if based on a firm foundation in the learner's mother tongue... This submission cannot emphasise too strongly the necessity of giving Indigenous languages a valued place in policy making and curriculum for Indigenous students.*³⁷ *The Steering Committee of*

³⁴ Northern Territory Government Department of Education and Training, 'Compulsory teaching in English for the first four hours of every school day' (Policy statement, October 2008) available at www.det.nt.gov.au/_data/assets/pdf_file/0016/628/CompulsoryEnglishFourHoursEachDay.pdf.

³⁵ *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya* (UN Doc A/HRC/15/), available at www.hrlrc.org.au/content/topics/indigenous/indigenous-rights-special-rapporteur-releases-report-on-country-visit-to-australia-march-2009/.

³⁶ The Hon Julia Gillard MP, 'Comments sought on Indigenous Education Action Plan' (16 December 2009) available at www.deewr.gov.au/ministers/gillard/media/releases/pages/article_091216_114019.aspx.

³⁷ Australian Council of Tesol Associations, Applied Linguistics Association of Australia and Australian Linguistic Society, *Response to Indigenous Education Action Plan Draft 2010-2014* (3 March 2010).

the Close the Gap Campaign³⁸ also submitted that in relation to an indigenous education action plan, "bilingual education [should] be available to all Aboriginal and Torres Strait Islander students whose first language is not English."³⁹

Recommendation 24:

The HRLRC recommends that the Australian Government amend its indigenous education action plan to ensure it more adequately supports and promotes bilingual education in schools for Indigenous students.

20. Human Rights Education (Paragraph 34)

The Committee recommends that the State party provide human rights education on economic, social and cultural rights to students at all levels of education and make available extensive human rights training for members of all professions and sectors having a direct role in the promotion and protection of human rights, including judges, lawyers, civil servants, teachers, law enforcement officers, migration officers, the police and the military.

67. The Australian Government is to be commended for its new focus on human rights education through the 'Australian Human Rights Framework'.
68. In particular, the HRLRC welcomes the Government's commitment to supporting human rights education in Australian primary and secondary schools, the allocation of \$6.6 million to the Australian Human Rights Commission over four years, and funding of \$2 million to non-government organisations (NGOs) for the provision of human rights education in the community. The HRLRC also welcomes the Government's contribution of \$3.8 million for the development of human rights education and training programs in the Commonwealth public service and its commitment to take a human rights-based approach to any revision of the APS Values or Code of Conduct.
69. However, the draft K-10 Australian Curriculum (**Curriculum**) proposed for all Australian States and Territories does not include any requirement for teaching of ESC rights (or any human

³⁸ The Steering Committee's members include the Australian Human Rights Commission and the Aboriginal Health and Medical Research Council (NSW) among many others.

³⁹ Steering Committee of the Close the Gap Campaign for Indigenous Health Equality, 'Submission against the draft Indigenous Education Action Plan 2010-2014' (8 March 2010) available at www.mceecdya.edu.au/verve/resources/IEAP2010Sub-Close_the_Gap_Campaign_Steering_Com.pdf.

rights at all).⁴⁰ Instead the curriculum makes reference to human rights, notions of diversity and seeks to educate on various cultures.⁴¹

70. Secondly, in the absence of a National Human Rights Act, education on human rights is more difficult and less effective. Domestic human rights instruments are a basic tool for teaching human rights. A comprehensive study of human rights education in Australia concluded that not only is the existence of a domestic human rights bill or law influential when it comes to a teacher's understanding of human rights education, 'but it is also critical to the nature and extent of human rights education provided in schools.'⁴²

Recommendation 25:

The Government should reconsider its deferral of a Human Rights Act to 2014 and develop a proposed Human Rights Act, including ESC rights, for the purpose of protecting human rights in Australia and enabling the best possible approach to teaching human rights to be taken.

The Australian Government should ensure that the National Curriculum incorporates the teaching of all human rights, including ESC rights.

21. Optional Protocol to ICESCR (Paragraph 36)

The Committee encourages the State party to give positive consideration to signing and ratifying the Optional Protocol to the Covenant.

71. The HRLRC urges the Australian Government to unreservedly commit to signing and ratifying the Optional Protocol to the ICESCR in order to better protect the human rights of all Australians.
72. Signing and ratifying the Optional Protocol, and participating in its procedures, will complement and strengthen the protection of ESC rights in Australia. Ratification will improve protection of ESC rights both directly, by providing an avenue of redress for individuals, and

⁴⁰ ACARA Releases Draft Australian Curriculum for National Consultation (1 March 2010) Australian Curriculum, Assessment and Reporting Authority, www.acara.edu.au/verve/resources/Media_release_Draft_Aust_Curriculum_for_National_Consultation_20100301.pdf at 5 May 2010.

⁴¹ The history curriculum for senior students considers the struggle for freedom and rights, and the contributions of the United Nations and other international bodies in establishing human rights internationally: ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, History (5 May 2010) Australian Curriculum Assessment and Reporting Authority <<http://www.australiancurriculum.edu.au/Documents/History%20curriculum.pdf>> at 5 May 2010; ⁴¹ ACARA Australian Curriculum Consultation Portal - Draft Consultation version 1.0.1, English (30 April 2010) Australian Curriculum Assessment and Reporting Authority, www.australiancurriculum.edu.au/Documents/English%20curriculum.pdf at 5 May 2010.

indirectly, by improving awareness and understanding of ESC rights in government through engagement in the constructive, participatory and capacity building processes created by the Optional Protocol.

73. A full discussion of the benefits of signing OP ICESCR are contained in the HRLRC's submission entitled *Australia's Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.⁴³
74. The Australian Government has consistently stated the importance, as part of its reengagement with the international human rights community, of Australia playing a leadership role in human rights.⁴⁴ Signing and ratifying the Optional Protocol will also re-affirm Australia's commitment to constructive engagement with UN treaty bodies. It will enable the Australian Government to take a leadership role with respect to international human rights. Further, the Optional Protocol can be implemented into Australia's legal system with ease and is unlikely to lead to a flood of complaints and investigations. Finally, it advances the principle that human rights are universal, indivisible and interdependent.

Recommendation 26:

The HRLRC urges the Australian Government to sign and ratify the Optional Protocol to ICESCR.

⁴² Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008, VDM) 324.

⁴³ See *Australia's Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, available at www.hrlrc.org.au/content/topics/esc-rights/op-icescr-australia-can-provide-international-leadership-and-ratify-op-icescr-july-2009/.

⁴⁴ See for example, The Hon Robert McClelland, Attorney-General, 'Human Rights: A Moral Compass', speech delivered to the Lowy Institute for International Policy, Sydney, 22 May 2009.