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AUSTRALIA

Submission to the UN Universal Periodic Review

**Tenth session of the UPR Working Group of the
Human Rights Council**

January 2011



Executive summary

In this submission, Amnesty International provides information under sections B, C and D as stipulated in the *General Guidelines for the Preparation of Information under the Universal Periodic Review*:¹

- Under section B, Amnesty International raises concern over provisions in the Australian Constitution which do not protect adequately against racial discrimination; the lack of sufficient human rights protection in both the Constitution and domestic law; and Australia's lagging behind on its commitments to the Millennium Development Goals.
- Section C highlights Amnesty International's concerns about violations of the human rights of Aboriginal and Torres Strait Islander peoples regarding land rights, social security, income quarantining, and other race-based rights violations particularly in the Northern Territory; offshore processing of asylum-seekers who arrive by boat; counter-terrorism laws which violate Australia's international law obligations, violations of women's human rights and discrimination against LGBT persons.
- In section D, Amnesty International makes a number of recommendations for action by the government to address the areas of concern.

¹ Contained in Human Rights Council decision 6/102, Follow-up to Human Rights Council resolution 5/1, section 1 adopted 27 September 2007.

Australia

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B. Normative and institutional framework of the State

1. Constitution and national laws

The Australian Constitution and domestic legislation provide only limited human rights protection. The Constitution and the Racial Discrimination Act falls short, for example, of providing the safeguards against discrimination required under the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is party. The Constitution still contains a provision which contemplates the disqualification by States (within Australia) of "all persons of any race" from voting in a federal election.² Further, some current laws specifically discriminate against Indigenous Peoples on the basis of race.³ Section 51(xxvi) of the Constitution also enables discrimination on the basis of race, granting the Australian Commonwealth the power to make special laws for people of any race.⁴ This facilitated the suspension of the Racial Discrimination Act in 2007 in relation to the Northern Territory Emergency Response (NTER) legislation which introduced measures such as income quarantining and acquisition of Indigenous land.

2. Absence of domestic human rights protections

Australia does not have overarching federal human rights legislation to reflect its international human rights obligations. In 2009, a national consultation took place on the need for a national human rights protection mechanism. In its report the consultation panel recommended, inter alia, a Human Rights Act to promote and protect rights recognised in the international human rights treaty ratified by Australia.⁵ This was rejected by the government. Instead the government announced in April 2010 a "Human Rights Framework", which included investment in human rights education and the establishment of a Parliamentary committee to scrutinise new legislation for compliance with human rights obligations.⁶ Amnesty International is concerned that despite these developments, Australia still lacks entrenched protection for human rights and freedoms.

3. Australia's commitment to foreign aid and the Millennium Development Goals

Australia has recently committed to increase its overseas development assistance to 0.5 per cent of Gross National Income (GNI) by 2015-16.⁷ Australia's commitment in 2009 was 0.29 per cent of GNI, which remains far below the Millennium Development Goals target of 0.7 percent.⁸

² Section 25, Commonwealth of Australia Constitution Act.

³ The UN Committee on the Elimination of Racial Discrimination has expressed this concern on several occasions. See their Concluding observations: Australia (2005), paragraph 9 and Concluding observations: Australia (2000), paras 6-10.

⁴ The Australian Constitution, Part V, Powers of the Parliament, Section 51 (xxvi): "The people of any race, for whom it is deemed necessary to make special laws"

⁵ Excepting rights against which a reservation is in force, Recommendations, Report of the Human Rights Consultation at [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)-NHRC+Report+\(Recommendations\).pdf/\\$file/NHRC+Report+\(Recommendations\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)-NHRC+Report+(Recommendations).pdf/$file/NHRC+Report+(Recommendations).pdf) (accessed 15 June 2010)

⁶ See Australia's Human Rights Framework at <http://www.ag.gov.au/humanrightsframework> (accessed 15 June 2010)

⁷ AusAID, *The Millennium Development Goals: the fight against global poverty and inequality*, available at <http://www.aid.gov.au/keyaid/mdg.cfm> (viewed 6 July 2010).

⁸ Oxfam Australia, *Australia's Aid effort*. Chart, available at <https://www.oxfam.org.au/explore/millennium-development-goals/australias-aid-effort> (viewed 6 July 2010).

C. Promotion and protection of human rights on the ground

1. Discrimination against Aboriginal and Torres Strait Islander Peoples

Aboriginal and Torres Strait Islander Peoples face discrimination in areas such as housing, employment, education, healthcare and the criminal justice system. Racial disparities exist at every stage of the criminal justice system, which is evident in the over-representation of Indigenous people being prosecuted for criminal offences and in the prison system.

In addition, there are widespread problems with access to care, quality of care and of accommodation for Indigenous people requiring mental health services.⁹ Indigenous people have faced gross discrimination in the past, such as strict assimilation and child removal practices. Adequate compensation to Indigenous people who suffered such discriminatory practices in the past has not yet been provided by the government.

NGOs, including Amnesty International, have repeatedly called for the reinstatement of the Racial Discrimination Act (RDA) which was suspended by the government in 2007 to facilitate the Northern Territory National Emergency Response (NTER). While Amnesty International recognizes the gravity of the situation, in particular concerning children, which prompted the NTER, and the government's obligation to defend children and others from abuse, this must be done without violating human rights, including freedom from discrimination. The Northern Territory National Emergency Response Act 2007 includes provisions for the compulsory acquisition of Indigenous lands: section 31, for example, provides for the compulsory acquisition of leases over 64 specified Indigenous communities and allows the government to acquire further leases by regulation. The acquisition of these leases occurred without the consent of the Aboriginal landowners or local Aboriginal land councils. The terms of the leases do not allow community residents the right of residence.¹⁰ This is incompatible with Article 27 of the UN Declaration on the Rights of Indigenous Peoples, formally acknowledged by Australia in April 2009, which requires governments to establish a fair and independent process to recognise and decide the rights of Indigenous Peoples to their lands, waters and resources.

The purpose of the RDA was to implement Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination; its suspension under the NTER means that more than 45,000 Aboriginal people in 73 communities in the Northern Territory risk compulsory acquisition of their land and the quarantining of their social security payments. The discriminatory nature of the NTER, such as compulsory lease acquisitions, bans on gambling in Indigenous communities, and failure to restore the permit system, which ensures Aboriginal control over who enters their land, has sparked outrage and condemnation. A number of UN human rights monitoring bodies, including the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, have urged the government to reinstate the RDA. The UN Special Rapporteur on Indigenous Peoples has similarly concluded that the NTER "is in several aspects racially discriminatory" and called for its reform.¹¹

Following the Special Rapporteur's visit the government promised to take steps to reinstate the RDA. In June 2010, legislation amending the NTER arrangements was passed; however, it only partly reinstated the RDA and provided only limited power to challenge NTER measures. The government is currently proposing to designate some practices, such as the land access permit system, compulsory acquisition of leases, alcohol and pornography bans, as "special measures" to allow them to continue. Amnesty International is concerned that the government's view of "special measures" does not conform to well-established principles for such measures under international law which require the free, prior and informed consent of the communities concerned, including as stipulated in the UN Declaration on

⁹ Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to Australia, 23 November to 4 December 2009 (A/HRC/14/20/Add.4).

¹⁰ Northern Territory Emergency Response Review Board, "Northern Territory Emergency Response: Report of the NTER Review Board", Commonwealth of Australia, 2008, p39. Available at: <http://www.nterreview.gov.au/report.htm> (accessed 12 July 2010).

¹¹ Human Rights Council, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum: The situation of Indigenous People in Australia, Appendix B, para. 60.

the Rights of Indigenous Peoples and ILO Convention 169 on Indigenous and Tribal Peoples.¹² Some of the measures proposed by the government risk defeating the purpose and spirit of the RDA.

Asylum-seekers in Australia

Overall, Amnesty International welcomes the government's policy changes to immigration detention, which will bring Australia closer into line with international standards for the treatment of asylum-seekers.¹³ The organisation remains concerned, however, that these changes are yet to be legislated and that they do not change the fundamental basis of the policy, i.e. the mandatory detention of asylum-seekers.

Amnesty International also has serious concerns over the ongoing policies of excising islands in Australian territorial water to enable the offshore processing of asylum-seekers. Due to excision, asylum-seekers who arrive by boat in Australia are granted fewer rights, such as limited access to health and legal services, than those who arrive by plane. The use of Christmas Island as an excised, offshore processing centre is of particular concern due to the ongoing detention of women, children and other vulnerable groups in overcrowded and remote detention facilities on the island. According to the Special Rapporteur on health, "the lack of local mental health services" for the vulnerable population held at Christmas Island "presents exacerbating factors for poor mental health".¹⁴ Treating asylum-seekers differently based solely on their mode of arrival places the government in contravention of its international obligations of equal treatment and protection before the law.

Furthermore, policies initiated by the government at various times, suspending the processing of applications from Sri Lankan and Afghan asylum-seekers, violate the principles of the Refugee Convention and the International Convention on the Elimination of All Forms of Racial Discrimination.¹⁵ The processing of applications from Afghan asylum seekers is still suspended. Amnesty International also has serious concerns with regard to the government's proposal to establish processing centres for asylum-seekers in other countries such as Timor Leste. Such policies set a dangerous precedent, discriminate against asylum-seekers on the basis of the nation of origin, and may lead to the prolonged arbitrary detention of such asylum-seekers.

2.1 Humanitarian program

Amnesty International welcomes the government's commitment to the offshore Refugee and Special Humanitarian Program for the resettlement of refugees from third countries. However, Australia's onshore processing program is linked to its offshore humanitarian program quota which limits Australia's ability to fully meet its obligations under the Refugee Convention with respect to asylum-seekers who arrive onshore. According to the Convention, all asylum-seekers who arrive onshore must be processed and offered protection if found to be refugees. Amnesty International is concerned that the number accepted under Australia's onshore program is determined by the number accepted under its offshore humanitarian resettlement program.

Australia's migration laws currently permit discrimination on the basis of disability by establishing strict health criteria to meet the visa requirements.¹⁶ The effect of these is that people with disabilities and their families are often not granted visas to Australia entirely on the basis of the family member's disability.

3. Counter-terrorism and security legislation

¹² Article 19 of the UN Declaration on the Rights of Indigenous Peoples and Article 6 of ILO Convention 169 on Indigenous and Tribal Peoples.

¹³ The Minister for Immigration announced "Key immigration detention values" in his July 2008 speech "New directions in detention" (see <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>).

¹⁴ Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to Australia, 23 November to 4 December 2009 (A/HRC/14/20/Add.4), 3 June 2010, para. 98.

¹⁵ 1951 Refugee Convention Article 3: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." The action is also in violation of certain provisions in the International Convention on the Elimination of All Forms of Racial Discrimination, including Articles 1(3), 5(a) and 6.

¹⁶ Health criteria are found in the Migration Regulations 1994 (Cth) sch 4, cl 40. See 'Health Requirements for Visa Applicants' available at <http://www.immi.gov.au/allforms/health-requirements/>.

In a joint submission, dated 1 October 2009, with the Human Rights Law Resource Centre Ltd to the Commonwealth Attorney-General's Department regarding National Security Legislation, Amnesty International Australia identified significant shortcomings in Australian National Security Legislation with respect to control orders, preventative or administrative detention, and the Australian Security Intelligence Organisation's broad powers to detain and question people, including non-suspects.¹⁷ Amnesty International is concerned that Australia's counter-terrorism laws violate its obligations under international human rights law, in particular the rights set out in the International Covenant on Civil and Political Rights.¹⁸ A key concern is the provision in the laws to keep people in detention without charge.

4. Women's human rights

4.1 Lack of social, economic and political equality

Australian women do not fully enjoy economic, social and cultural rights on an equal basis with men in areas such as superannuation and job opportunities. Discrimination affects many women's ability to participate in the workforce and to balance work and family commitments, to secure adequate retirement income, and to achieve equality and security in relationships with a partner.

Australian women on average earn approximately 83 cents for every dollar men earn.¹⁹ Women form the majority (59 per cent) of the nearly 1.5 million workers reliant on minimum wages²⁰ and are overrepresented in the lowest-paying occupations such as cleaning, hospitality and tourism.²¹ On average, Australian women have only around 60 per cent of the superannuation balances of men²² as a result of pay inequities²³ and broken work patterns to accommodate child care responsibilities. Furthermore, women are under-represented in the Commonwealth Government²⁴ and the private sector where they hold around one in eight private sector executive management positions and less than nine per cent of private board directorships.²⁵ Amnesty International welcomes, however, the government's efforts to improve equality between women and men through a number of new initiatives, including strengthening the *Sex Discrimination Act* and introducing a national Paid Parental Leave scheme.

4.2 Violence against women

Violence against women is widespread in Australia. National surveys indicate that at least 40 per cent of women suffer physical or sexual violence in their lifetime,²⁶ while this increases to 57 per cent of women if the threat of harm is

¹⁷ Amnesty International Australia and the Human Rights Law Resource Centre Ltd, 2010, *Human Rights and Human Security*, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, available at http://www.aph.gov.au/senate/committee/legcon_ctte/National_Security_Legislation/submissions.htm

¹⁸ The UN Human Rights Committee, the Committee against Torture and the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism have all raised concerns that some provisions of Australia's counter-terrorism laws are incompatible with fundamental rights (see UN Human Rights Committee, Concluding Observations: Australia (2009), (CCPR/C/AUS/CO/5), para 3-4); UN Committee against Torture, Concluding Observations: Australia (2008), (CAT/C/AUS/CO/3), 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 (2006), (A/HRC/4/26/Add.3), para 3.

¹⁹ Australian Bureau of Statistics, Average Weekly Earnings, Australia, November 2009, seasonally adjusted data, cat. no. 6307.0, ABS, Canberra, 2010.

²⁰ Australian Bureau of Statistics, Employee Earnings and Hours Survey, August 2008, cat. no. 6306.0, ABS, Canberra, 2009.

²¹ Australian Bureau of Statistics Forms of Employment, Australia, November 2007, cat. no. 6359.0, ABS, Canberra, 2007.

²² Australian Treasury estimates based on the Australian Bureau of Statistics Survey of Employment Arrangements, Retirement and Superannuation, Expanded CURF, Australia, April to July 2007 (SEARS 2007), ABS cat. No. 6361.0.55.001

²³ Australian Government, by the National Centre for Social and Economic Modelling, The impact of a sustained gender wage gap on the Australian economy, Office for Women, Canberra, 2010.

²⁴ According to "Women in national parliaments" Australian women only make up 27.3 per cent representation in the Lower House, 35.5 per cent in the Upper House and only four women in the 20 member Cabinet according to the Prime Ministers webpage, available at <http://www.ipu.org/wmn-e/classif.htm>, viewed 1 June 2010.

²⁵ Australian Government, Office for Women, "Ensuring women's equal place in society, Fact sheet 5", November 2008. available at http://www.fahcsia.gov.au/sa/women/pubs/general/factsheet_women_issues/Pages/facts5.aspx#end2, viewed 14 May 2010.

²⁶ ABS's *Personal Safety Survey*, Australian Bureau of Statistics, 2005

included.²⁷ Amnesty International notes that the government is currently drafting a National Plan of Action to Reduce Violence against Women and their Children. The organization believes that such a plan should address violence against women as a societal problem ultimately rooted in gender-based discrimination.

Violence affects women from Indigenous backgrounds disproportionately; for example, Indigenous women are 35 times more likely to be hospitalised due to domestic violence than non-Indigenous women.²⁸ Amnesty International supports a combination of robust steps to prevent violence against women, punish perpetrators and ensure reparation for victims, and a longer-term response to these disproportionately high levels premised on the progressive realisation of the rights of Indigenous people to self-determination, health, housing, education, social security and employment.

4.3 Abortion laws

Australian women face criminal penalties if they attempt to terminate a pregnancy outside the strict conditions placed on accessing termination services.²⁹ These conditions vary between the Australian states and territories as criminal law is the subject of state jurisdiction. Indirectly, criminalising abortion may deter women from accessing termination services through the formal health system or deny them access to safe abortions even in circumstances where they are legally entitled. International, regional and national human rights mechanisms have increasingly called on states to address unwanted pregnancy and unsafe abortion from the perspective of women's human rights as a public health concern, rather than a criminal concern, and a key cause of preventable maternal illness and death.

5. Inequality for lesbian, gay, bisexual and transgender (LGBT) people

Recent amendments have been made to federal laws relating to equality for same-sex couples in areas such as social security, taxation, workers' compensation, family law and child support.³⁰ However, a number of areas of inequality in rights of members of LGBT communities remains; for example, same-sex couples cannot legally marry in Australia and same-sex marriages which take place overseas are not recognised domestically.³¹ Further, currently same-sex couples cannot become adoptive parents.

D. Recommendations for action by the State under review

Amnesty International calls on the Australian authorities:

Constitution and national laws

- To initiate reforms to recognise the rights of Aboriginal and Torres Strait Islander Peoples in the Constitution and to remove Section 25 which enables laws to discriminate against a particular race by excluding its members from voting in elections;
- To implement a Human Rights Act that embeds Australia's international human rights obligations and sets out ways of dealing effectively with human rights violations;

Millennium Development Goals

- To take concrete actions following a human rights based approach, particularly through its lead agency AusAid, to achieve the Millennium Development Goals and its target of 0.7 per cent of GNI in overseas development assistance.

Discrimination against Aboriginal and Torres Strait Islander Peoples

²⁷ *Australian Component of the International Violence Against Women Survey (IVAW)*, Australian Institute of Criminology, 2004

²⁸ Australian Institute of Health & Welfare (2006) "Family Violence among Aboriginal & Torres Strait Islander Peoples" at <http://www.aihw.gov.au/publications/index.cfm/title/10372>, viewed 14 May 2010.

²⁹ With the exception of Victoria and the Australian Capital Territory.

³⁰ Australian Government, Attorney General's Department, Same-Sex Reforms. Available at:

<http://www.ag.gov.au/samesexreform> (accessed 08/07/2010).

³¹ National LGBT Health Alliance, Recognising LGBT Relationships and Removing Discrimination. Available at <http://www.lgbthealth.org.au/relationship-recognition> (accessed 06/07/2010).

- To fully reinstate, without any qualifications, the Racial Discrimination Act into the arrangements under the Northern Territory Emergency Response and any subsequent arrangements, including the provision of appropriate compensation;
- To stop the compulsory acquisition of Aboriginal and Torres Strait Islander Peoples land and the quarantining of their social security payments under the current Northern Territory Emergency Response legislation;
- To address the disproportionate representation of Indigenous people in the criminal justice system;
- To reform the Native Title Act 1993 to address measures that have been found to be racially discriminatory by the Committee on the Elimination of Racial Discrimination;
- To allocate adequate resources for mental health services and other support measures for Indigenous persons with mental health problems, in line with international human rights law standards and the recommendations by the Special Rapporteur on health following his mission to Australia in November-December 2009;
- To ratify ILO Convention 169 on Indigenous and Tribal Peoples.

Treatment of asylum-seekers

- To increase the yearly intake of asylum-seekers under the offshore humanitarian program and to de-link the onshore program from the offshore humanitarian program quota;
- To stop the use of Christmas Island as an excised offshore processing centre for asylum-seekers who arrive by boat and to process them onshore;
- To rescind the policy of excision of Australian territory and to ensure that asylum-seekers are treated equally under Australian law and have their claims processed on mainland Australia in accordance with the UN Refugee Convention;
- To rescind the policy of suspending the processing of applications from Afghan asylum-seekers;
- To ensure that border control and anti-smuggling efforts are carried out in a manner that respects and protects human rights, do not interfere with search and rescue operations, and do not block access to asylum procedures or identification and protection of victims of human trafficking.

Counter-terrorism laws

- To review the human rights implications of the control order and preventative and administrative detention order schemes, the excessively broad powers of the Australian Security Intelligence Organisation to detain and question people, the process for listing of terrorist organisations and reviewing such lists; and the offence of association with a terrorist organisation.

Violence against women

- To develop and implement a National Plan of Action to Reduce Violence against Women and their Children which defines objectives, targets, indicators, and activities and is sustained with a permanent leadership body to oversee the implementation of the plan and its ongoing funding;
- To include in the National Plan of Action provisions for a national body dedicated to ending violence against Indigenous women with the active participation of Indigenous women.

Abortion laws

- To decriminalise abortion and to harmonize laws related to the termination of pregnancy across jurisdictions.

LGBT rights

- To guarantee the rights of LGBT people to marry and to become adoptive parents, as well as to amend federal discrimination laws to include sexuality and gender identity as a prohibited ground.

Appendix: Documents for further reference³²

- Australia asylum suspension could harm world's most vulnerable, 9 April 2010, AI Index: PRE01/127/2010
- Australia: Government must end state-sponsored racially discriminatory measures, 18 November 2009
- Australia apologises for abuses of Indigenous, 13 February 2008

³² These documents are available on Amnesty International's website: <http://www.amnesty.org/en/region/australia>