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**Implementing the Human Rights Committee's
Concluding Observations
on Australia's Compliance with the ICCPR**

Submission to the Attorney-General's Department

20 November 2009

Human Rights Law Resource Centre Ltd

Level 17, 461 Bourke Street

Melbourne VIC 3000

Australia

www.hrlrc.org.au



Rachel Ball, Ben Schokman, Emily Howie and Philip Lynch
Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4433
F: + 61 3 8636 4455
E: rachel.ball@hrlrc.org.au
W: www.hrlrc.org.au

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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.

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1. Background

1. The Human Rights Law Resource Centre (**HRLRC**), together with the National Association of Community Legal Centres and Kingsford Legal Centre, was responsible for submitting a major NGO Report to the United Nations Human Rights Committee (**Committee**) in respect of Australia's compliance with its obligations under the *International Covenant on Civil and Political Rights (ICCPR)*.¹ The NGO Report was submitted in September 2008 and endorsed by more than 200 NGOs from all sectors of Australian civil society.
2. At its 95th session in New York, held between 16 March and 3 April 2009, the Committee issued its Concluding Observations in respect of Australia's compliance with the ICCPR, having considered Australia's fifth periodic report submitted under article 40 of the Covenant.
3. The Committee's Concluding Observations in respect of Australia noted a number of positive developments, raised a number of concerns, and included concrete recommendations for reform in respect of 20 issues.
4. 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 Attorney-General's Department for inviting its input.
5. This submission refers to many of the substantive paragraphs of the Committee's Concluding Observations, noting significant developments since April 2009, and commenting on the implementation of the Committee's recommendations. We note that this submission does not address all of the Committee's Concluding Observations.
6. The HRLRC adopts the recommendations in the major NGO Report submitted to the Committee, and the specific proposals contained in the three significant submissions made by the HRLRC to the National Human Rights Consultation, which address a number of the issues referred to in the Committee's Concluding Observations.²

¹ *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Human Rights Committee* (September 2008). An Addendum was submitted to the Committee in March 2009 just prior to its hearings. Available at <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/>.

² The Human Rights Law Resource Centre made three submissions to the Consultation: *Engage, Educate, Empower* (April 2009); *A Human Rights Act for All Australians* (May 2009); and *Supplementary Submission on Religion and Human Rights* (June 2009) available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/>.

7. This submission is endorsed by Liberty Victoria and the Human Rights Network of the National Association of Community Legal Centres.

2. Implementation of the Human Rights Committee's Recommendations

8. The HRLRC agrees with and endorses 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 is implemented in full.
9. The HRLRC notes that the major NGO report to the Committee contained specific discussion of each issue referred to in the Concluding Observations, including identification of problems and concrete proposals for reform. The HRLRC repeats those 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 the 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

10. The HRLRC commends the Australian Government's stated commitment to human rights and preparedness to constructively engage with the UN human rights treaty bodies.
11. Since the release of the Committee's Concluding Observations, the Australian Government has received the report of the National Human Rights Consultation Committee (discussed below), which considers the current state of human rights protection in Australia. The quality of the report shows that the Australian Government's investment in this process has been worthwhile, and has engaged a large proportion of the community from all parts of Australia and all walks of life.
12. Importantly, the Australian Government has also recently instigated consultation on a number of significant pieces of legislation, with human rights implications (some of these are discussed below where they relate to the subject of the Committee's Concluding Observations). The HRLRC recognises and welcomes that there are current legislative reform proposals in many

of the areas on which the Concluding Observations call for action by Australia and commends the Australian Government on the adoption of a human-rights framework in aspects of its legislative reform program.

4. Legal Framework for the Protection of Covenant Rights (paragraph 8)

The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.

13. The HRLRC congratulates the Australian Government on its commitment to the recently-conducted National Human Rights Consultation. The Consultation, announced on 10 December 2008, the 60th anniversary of the Universal Declaration of Human Rights, was conducted by an independent Committee chaired by Father Frank Brennan.
14. The Report of the National Human Rights Consultation was released following one of the most extensive exercises in participatory democracy in Australian political history. The Consultation Committee received over 35,000 submissions (by far the largest response to a national consultation in Australia), and hosted 66 roundtables in 52 locations throughout metropolitan, regional and rural Australia. The Committee held an online forum and a national phone survey, and commissioned focus group and social research as well as an economic and social cost/benefit analysis of various options for the protection and promotion of human rights.
15. The Committee found that human rights matter deeply to Australians: 'after 10 months of listening to the people of Australia, [there is] no doubt that the protection and promotion of human rights is a matter of national importance.'³ Specifically, over 80 per cent of the submissions (almost 28,000) called for the enactment of an Australian Human Rights Act.⁴
16. The Australian Government has announced that it will respond to the report in December 2009. The HRLRC strongly urges the Government to support and implement all of the report's recommendations. In particular, as recommended by the Committee in its Concluding Observations, the recommendation that a federal Human Rights Act be adopted is a critical step in responding to the Committee's Concluding Observations, and establishing an adequate legislative framework for the protection and promotion of human rights in Australia.

³ National Human Rights Consultation Report (2009) Chapter 1.

⁴ Ibid.

Recommendation 2:

The Australian Government should implement Recommendation 18 of the National Human Rights Consultation Report and enact a comprehensive national *Human Rights Act*.

5. Reservations (paragraph 9)

The State party should consider withdrawing its reservations to article 10, para. (2) (a) and (b) and 3; article 14 para.6; and article 20 of the Covenant.

17. The Australian Government continues to maintain the reservations that Australia has previously made in relation to the ICCPR.

Recommendation 3:

The HRLRC recommends that the Australian Government undertake a review of its reservations to the ICCPR to consider whether they are demonstrably justifiable and strictly necessary, with a view to withdrawing these reservations.

6. Response to Views (paragraph 10)

The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the Covenant which guarantees a right to an effective remedy and reparation when there has been a violation of the Covenant.

18. We refer to the HRLRC's recent submission to the Standing Committee on Procedure's Inquiry into the effectiveness of House Committees, entitled Human Rights and Parliamentary Scrutiny.⁵
19. As set out in that submission, the HRLRC considers that the Australian Government should establish a Joint Parliamentary Committee on Human Rights which, whether or not a Human Rights Act is introduced, should take a leading role on engagement with human rights issues, including by monitoring the implementation of Concluding Observations and Views of the United Nations treaty bodies.

Recommendation 4:

The Parliament should establish a Joint Parliamentary Committee on Human Rights to lead parliamentary engagement with and understanding of human rights issues, including by:

- (a) scrutinising all Bills and subordinate legislation for compatibility with Australia's international human rights obligations;
- (b) conducting thematic inquiries into human rights issues;
- (c) monitoring and reporting on the implementation of the Concluding Observations and Views of UN treaty bodies and the recommendations of the Special Procedures of the UN Human Rights Council; and
- (d) monitoring and assisting in government responses to Declarations of Incompatibility (under any Australian Human Rights Act) and other court and tribunal decisions and judgments.

⁵ See Human Rights Law Resource Centre, *Submission to the House Standing Committee on Procedure: Inquiry into the Effectiveness of House Committees* (July 2009). Available at <http://www.hrlrc.org.au/files/hrlrc-submission-june-2009-final.pdf>

7. Counter-Terrorism Legislation (paragraph 11)

The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences. The State party should in particular: a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; b) ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release on bail; and c) envisage to abrogate provisions providing Australian Security Intelligence Organization (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods

20. Since the release of the Committee's Concluding Observations, on 12 August 2009 the Attorney-General published the National Security Legislation (NSL) Discussion Paper (NSL review), which set out the measures that the Government proposes to take to respond to a number of recent reviews of counter-terror laws. Submissions to the NSL review were due in September 2009, and the outcomes of the review are not yet known.
21. However, the scope and nature of the NSL review means that the outcomes are unlikely to fully implement or comply with the Committee's Concluding Observations, for the following reasons:⁶
 - (a) The NSL Discussion Paper did not discuss or consider the human rights impacts or concerns raised by existing counter-terrorism laws, and it did not propose human rights-based reforms.
 - (b) The proposed amendments to the definition of 'terrorist act' in the NSL review do not resolve the vagueness or breadth of the definition in the Criminal Code.
 - (c) The NSL review does not address some of the most controversial elements of Australia's counter-terror laws, including the control order and preventative detention order schemes; the excessively broad powers of ASIO to detain and question people, including non-suspects; the process for listing of terrorist organisations and reviewing such listing; and the offence of association with a terrorist organisation.

⁶ Further information on the human rights impacts of the proposed amendments in the NSL review can be found in the joint submission of HRLRC and Amnesty to the review, 'Human Rights and Human Security', 1 October 2009, available at <http://www.hrlrc.org.au/content/topics/counter-terrorism/counter-terrorism-and-human-rights-submission-to-national-security-legislation-review-oct-2009/>.

22. In order to implement the Committee's Concluding Observations, the Government should conduct a human rights audit of all counter-terrorism legislation, policies and practices. This audit could ensure that the counter-terror regime is in full conformity with the human rights in the ICCPR. The National Human Rights Consultation Committee also recommended that the government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's human rights obligations and then amend the legislation, policies and practices so that they are complaint. The National Human Rights Consultation specified that priority should be given to reviewing national security legislation, policies and practices.⁷
23. Separately, the Government has introduced the *National Security Legislation Monitor Bill 2009*, which seeks to establish the position of the National Security Legislation Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation. The HRLRC welcomes and supports the Bill, subject to certain amendments as proposed in the recommendations of the Senate Standing Committee on Finance and Public Administration, particularly:
- (a) that the Government actively and regularly assess the adequacy of the resources and staff allocated to the Monitor's office;⁸
 - (b) that the Monitor be given the power to conduct inquiries on his or her own motion;
 - (c) that the Monitor can take into account the implications of State and Territory counter-terrorism laws;
 - (d) that the Monitor be empowered to consult with independent statutory agencies such as the Australian Human Rights Commission; and
 - (e) that the Monitor be explicitly required to assess whether legislation under review is consistent with Australia's international human rights obligations and is a proportionate response to the threat posed to national security.⁹

Recommendation 5:

The Government should conduct a human rights audit of all counter-terrorism legislation, policies and practices, and then amend the legislation, policies and practices so that they are compliant with Australia's international human rights obligations.

⁷ National Human Rights Consultation Report, September 2009, Recommendation 4.

⁸ National Human Rights Consultation Report, September 2009, Recommendation 4.

⁹ For further information, see Human Rights Law Resource Centre and PILCH, *Joint Submission to the Senate Standing Committee on Finance and Public Administration in relation to the National Security Legislation Monitor Bill 2009* (July 2009).

Recommendation 6:

The Government should pass *National Security Legislation Monitor Bill 2009*, subject to the amendments proposed by the Senate Standing Committee on Finance and Public Administration's report on the Bill.

8. Equality and Non-Discrimination (paragraph 12)

The State party should adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.

24. The federal anti-discrimination legislative regime currently consists of a number of stand-alone anti-discrimination laws which provide inadequate protection of the right to equality.¹⁰ The National Human Rights Consultation Report recognised that noted that '[a] large number of submissions focused on the inadequacies of the anti-discrimination legislation' and recommended that the Federal Government audit and amend anti-discrimination legislation to ensure that it complies with Australia's human rights obligations.¹¹
25. The HRLRC considers that Australia's patchwork of anti-discrimination laws should be replaced by a comprehensive and cross-jurisdictional *Equality Act* that should, among other things:
- (a) provide a legal right to substantive equality;
 - (b) provide comprehensive coverage through a non-exhaustive list of prohibited grounds or protected attributes;
 - (c) have the capacity to retain distinct features regarding specific grounds of discrimination;
 - (d) take account of the historical and contextual framework of disadvantage;
 - (e) directly challenge and seek to eliminate systemic discrimination;
 - (f) recognise and address compounded or intersectional discrimination;
 - (g) allow for both representative and individual complaints;

¹⁰ *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth).

¹¹ National Human Rights Consultation Report, September 2009, Recommendation 4.

- (h) allow for temporary special measures and general conditions to promote equal opportunity; and
- (i) cover public and private life, without any permanent exemptions or exceptions.

Recommendation 7:

The Government should implement a single, comprehensive Equality Act.

8.1 Reform of the Sex Discrimination Act

26. We refer to the 2008 review into the effectiveness of the *Sex Discrimination Act* 1975 (Cth) (*SDA*) undertaken by the Senate Standing Committee on Legal and Constitutional Affairs. The Senate Committee's Report recommends a more comprehensive, robust regime better able to attack systemic discrimination and promote substantive equality. The Government should implement the recommendations of the SDA Report, which would assist in tackling the more insidious and entrenched forms of sex discrimination not adequately addressed by the existing legal framework. These amendments can be made immediately and do not need to be made subject to additional consultation.

Recommendation 8:

The Government should fully implement the Legal and Constitutional Affairs Committee's recommendations for reform of the *Sex Discrimination Act* before the next election.

8.2 Constitutional Amendment to Enshrine the Right to Equality

27. The strongest legal mechanism available to promote the right to equality in Australia is a Constitutional guarantee of equality. Constitutional entrenchment would not only have significant symbolic power; it would ensure that the Government cannot easily amend or overturn the right to equality simply by passing legislation.
28. Constitutional entrenchment and protection of equality is particularly necessary in Australia given that the Commonwealth has the power to pass racially discriminatory laws. Using the race power in section 51(xxvi) of the Constitution, the Commonwealth has the power to pass laws that are detrimental to, or discriminatory against, the people of any race by reference to

- their race.¹² A guarantee of equality in the Constitution should be framed to remove the ability of the Commonwealth to pass discriminatory laws.
29. In recognition of the considerable difficulty involved in amending the Constitution, and also of the need to consider carefully how an equality provision might work in the Constitution, we recommend that a referendum on a Constitutional equality guarantee be considered after the introduction and implementation of an Equality Act and preferably with bipartisan support. To ensure that such a review takes place, provision for it should be made in legislation.
30. The HRLRC urges the Australian Government to commence the process with an examination of the merits of replacing existing Federal anti-discrimination laws with a single Equality Act.

Recommendation 9:

A Federal Equality Act should include a provision mandating that after three years of operation an inquiry be held into a constitutional amendment aimed at enshrining the right to equality.

9. Indigenous Australians (paragraphs 13 to 15)

9.1 Indigenous Representative Body

The State party should increase its efforts for an effective consultation with indigenous peoples in decision-making in all areas having an impact on their rights and establish an adequately resourced national indigenous representative body.

31. The HRLRC welcomes the final report of the Steering Committee for the creation of a new national representative body for Aboriginal and Torres Strait Islander peoples delivered by Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma.¹³ The HRLRC supports the process initiated by the Government to establish a new national Indigenous representative body, and the extensive consultations that were undertaken as part of that process.

¹² *Kartinyeri v Commonwealth ('the Hindmarsh Island Case')* (1997) 152 ALR 140, 571-573.

¹³ *Our future in our hands - Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples* (August 2009).

32. The HRLRC notes that the CESCR, in its recent Concluding Observations on Australia, also recommended that the Australian Government 'establish a national indigenous representative body with adequate resources'.

Recommendation 10:

The HRLRC urges the Government to:

- (a) implement the recommendations of the Steering Committee for the creation of a new national representative body for Aboriginal and Torres Strait Islander peoples; and
- (b) ensure that the national Indigenous representative body is adequately resourced and can fully participate in policy-making in domestic Indigenous affairs.

9.2 Northern Territory Intervention

The State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1995 and the Covenant.

33. The HRLRC understands that the Australian Government is in the process of re-designing key measures of the Northern Territory Intervention to ensure that they are capable of being characterised as 'special measures' under the *Racial Discrimination Act 1975*. The HRLRC is concerned that amendments to the Northern Territory Intervention have still not been made, despite recommendations of the Northern Territory Emergency Response Review Board more than 12 months ago.
34. The HRLRC notes that the Northern Territory Intervention has already been criticised by other United Nations bodies, including:
- (a) CESCR, in its recent Concluding Observations on Australia;
 - (b) the Committee on the Elimination of Racial Discrimination, in response to a Request for Urgent Action; and
 - (c) the UN Special Rapporteur on the Rights of Indigenous Peoples following his recent country visit to Australia.
35. The HRLRC is also concerned about the Federal Government's recent consultation process with affected communities relating to the re-design of key measures of the Northern Territory

Intervention. In particular, the HRLRC is concerned that there has been very limited consultation and that the consultation process itself is inadequate. Inadequate notice is being provided to Indigenous people in remote communities; in particular, leaders of communities complained they were not informed of meetings in a timely manner and as a result were not able to attend the meetings. There are also concerns that notice of meetings is being restricted to 'supporters' of the Northern Territory Intervention. There are also concerns that there has been a lack of commitment to a genuine consultation process leading to informed consent, and suggestions that the consultation process was initiated in order to avoid any legal challenges to the Australian Government's actions.

Recommendation 11:

The Australian Government must immediately reinstate the operation of the *Racial Discrimination Act 1975* in respect of all measures of the Northern Territory Intervention. Reinstatement of the Act is vital to ensure that the Northern Territory Intervention measures are, in fact, properly classified as 'special measures' and to ensure that Australia is complying with its international human rights obligations.

Recommendation 12:

The HRLRC recommends that the Australian Constitution be amended to enshrine the prohibition against racial discrimination and to provide that the 'Race Power' may only be used to the benefit, and not to the detriment, of persons of a particular race.

9.3 Stolen Generations

The State party should adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies.

36. While welcoming the historic Parliamentary Apology to the Stolen Generations, the HRLRC considers that there remains a pressing need for specific assistance tailored to the particular circumstances of those forcibly removed from their families.

Recommendation 13:

The Australian Government must implement the many recommendations of the *Bringing Them Home* report that have not been implemented to date. In particular, the HRLRC refers to Recommendation 3 of the *Bringing Them Home* report, which states that reparation should consist of guarantees against repetition, measures of restitution, measures of rehabilitation, and monetary compensation, in addition to acknowledgment and apology.

10. Violence Against Women (paragraph 17)

The State party should strengthen its efforts towards the elimination of violence against women, especially perpetrated against indigenous women. The State party is encouraged to promptly implement its National Plan of Action to Reduce Violence against Women and their Children, as well as the recommendations of the 2008 Family Violence and Homeless report.

37. The Australian Government is to be commended for its zero tolerance approach to violence against women and intention to implement a National Plan of Action to Reduce Violence against Women and their Children. However, the Committee noted with concern that Australia needs to strengthen its efforts to eliminate violence against women, especially violence against Aboriginal and Torres Strait Islander women.
38. In April 2009, the Australian Government demonstrated its commitment to addressing violence against women in *The National Plan to Reduce Violence against Women: Immediate Government Actions*, adopting several actions recommended by the National Council to reduce violence against women and their children. The HRLRC welcomes the proposed actions identified in the Government's response to *Time for Action*, however the HRLRC also recognises the shortcomings of the National Action Plan. As noted by Amnesty International, the new National Action Plan represents no increase on the funding provided over the previous four year period.¹⁴

¹⁴ 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), available at http://www.amnesty.org.au/images/uploads/svaw/NPOA_report_-_Master_13June_opt_rfs.pdf.

39. 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 14:

HRLRC recommends that the Australian Government implement the National Plan of Action to Reduce Violence against Women and their Children incorporating the following measures:

- (a) Funding the National Plan of Action 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.
- (b) Specifically targeting elimination of violence against Indigenous women by:
 - (i) increasing funding to expand culturally appropriate community legal education sessions and services to Aboriginal and Torres Strait Islander 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 Aboriginal women.

11. Homelessness (paragraph 18)

The State party should increase its efforts in order to ensure that social, economic and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the Covenant.

40. Homelessness can be both a cause and a consequence of poverty and other human rights violations. The National Human Rights Consultation Report confirms that 'for most Australians the main concern is the realisation of primary economic and social rights, such as the rights to education, housing and the highest attainable standard of health.'¹⁵

¹⁵ National Human Rights Consultation Report, September 2009, 365.

41. Subsequent to the release of the Committee's Concluding Observations, the House of Representatives Standing Committee on Family, Community, Housing and Youth undertook an inquiry into the content of proposed Homelessness Legislation. The Committee is yet to report on the outcomes of its inquiry.
42. To implement the Committee's Concluding Observations on homelessness, the Australian Government should adopt a human rights-based approach in considering the introduction and content of national homelessness legislation. This requires meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services.
43. The Government should introduce homelessness legislation which must, at a minimum, guarantee the right to adequate housing. This would entail, for example:
 - (a) proper legislative protection against forced or arbitrary evictions;
 - (b) the prohibition of all forms of discrimination in access to housing; and
 - (c) an immediately enforceable right of access to emergency accommodation, with priority given to vulnerable groups such as families and young people.
44. Further specific recommendations about the content of homelessness legislation reflecting a human rights-based approach are contained in the HRLRC's submission to the Standing Committee on Family, Community, Youth and Housing's inquiry.¹⁶ The HRLRC urges the Australian Government to implement all recommended measures in developing appropriate homelessness legislation.

¹⁶ Human Rights Law Resource Centre, *Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth inquiry into proposed homelessness legislation for Australia* (August 2009) at <http://www.hrlrc.org.au/content/topics/esc-rights/housing-rights-submission-to-australian-parliament-on-homelessness-legislation-aug-2009/>.

Recommendation 15:

The Government should introduce homelessness legislation which includes:

- (a) the guarantee of a justiciable right to adequate housing;
- (b) a requirement for the Australian Government to take reasonable legislative and other measures to progressively realise the right to adequate housing, as defined in international law;
- (c) the provision of priority to vulnerable groups through an immediately enforceable right of access to emergency accommodation. Within a 10 year period, this right should be progressively expanded to apply to all persons in need;
- (d) adequate protection of persons from forced evictions, including providing for necessary procedural protection and effective remedies;
- (e) a requirement for meaningful participation by persons experiencing homelessness during policy development and in the delivery of homelessness services;
- (f) a requirement for the Australian Government to adopt a comprehensive national housing strategy;
- (g) clear provision for the right to adequate housing to be protected and provided on a non-discriminatory basis, ensuring equal access to housing;
- (h) the establishment of an independent Housing Commissioner appointed to investigate and conciliate complaints relating to the right to adequate housing, and to investigate systemic issue;
- (i) provision for a range of remedies for breaches of the right to adequate housing, including judicially enforceable remedies; and
- (j) appropriate structural, process and outcome indicators to monitor the progressive realisation of the right to adequate housing, in particular the enjoyment of the right by vulnerable groups.

12. Non-refoulement (paragraph 19)

The State party should take urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily

deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment.

45. We refer to our submission to the Senate Legal and Constitutional Affairs Committee in respect of proposed complementary protection legislation.¹⁷ The HRLRC commends the Australian Government on considering the enactment of such legislation, which would be an important step towards the recognition of Australia's non-refoulement obligations.
46. The HRLRC's submission argues that the proposed legislation should provide protection for all grounds recognised under international law, adopt the same threshold test requirements for protection as contained in international law, and not exclude protection for any classes of persons.¹⁸ A number of these recommendations are adopted by the Senate Legal and Constitutional Affairs Committee in their Report, which ultimately recommends that the Bill be passed.¹⁹

¹⁷ See Human Rights Law Resource Centre, *The Right to Protection and the Obligation of Non-Refoulement: Submission on Complementary Protection Bill* (September 2009). Available at <http://www.hrlrc.org.au/files/Complementary-Protection-Bill-HRLRC-Submission.pdf>

¹⁸ See Human Rights Law Resource Centre, *The Right to Protection and the Obligation of Non-Refoulement: Submission on Complementary Protection Bill* (September 2009).

¹⁹ The Senate Legal and Constitutional Affairs Committee, *Report on the Migration Amendment (Complementary Protection) Bill 2009*. Available at http://www.aph.gov.au/senate/committee/legcon_ctte/migration_complementary/report/report.pdf

Recommendation 16:

The *Migration Amendment (Complementary Protection) Bill 2009* should be passed with consideration given to the recommendations contained in the HRLRC's submission to the Senate Legal and Constitutional Affairs Committee in respect of the Bill, including that complementary protection will be available if:

- (a) the non-citizen will be subject to a violation of Article 3 of the Convention against Torture;
- (b) the non-citizen will be subject to a violation of Articles 6 or 7 of the International Covenant on Civil and Political Rights;
- (c) the non-citizen will be subject to a violation of the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty;
- (d) the non-citizen will be subject to a violation of Article 6 or 37 of the Convention on the Rights of the Child;
- (e) the non-citizen will be subject to a flagrant denial of justice contrary to Article 14 of the International Covenant on Civil and Political Rights; or
- (f) the non-citizen will be subject to a violation of human rights under the treaties to which Australia is a party and which is recognised by international law to engage an obligation of non-refoulement.

13. Extradition and Mutual Assistance (paragraph 20)

The State party should take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state, and revoke the residual power of the Attorney-General in this regard.

47. In July 2009, the Australian Government released the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009*, which seeks to amend aspects of the *Extradition Act 1988* (Cth) (**Extradition Act**) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (**Mutual Assistance Act**). Despite the content of the proposed legislation, the HRLRC considers that further safeguards must be protected in legislation to ensure that

Australia implements the recommendations contained in paragraph 20 of the Concluding Observations.²⁰

48. We refer to the HRLRC's submission to the Attorney-General's Department in respect of the Bill.

13.1 Amendments to the Extradition Act

49. The HRLRC considers that the safeguards within the Extradition Act protecting people from being exposed to the death penalty need to be strengthened.

Recommendation 17:

The grounds of refusal contained in section 7 of the *Extradition Act* be expanded to ensure that extradition is refused in situations where it would expose a person to the real risk that they may face the death penalty.

13.2 Amendments to the Mutual Assistance Act

50. The HRLRC supports the provisions of *the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009* that seek to clarify that the provisions of the Mutual Assistance Act relating to the grounds for refusal apply to requests apply to investigation, as well as the prosecution or punishment, of a person. The HRLRC also considers that the Attorney-General's discretion to grant assistance in these circumstances should not be retained. That is, it should be mandatory to refuse assistance in any circumstances where such assistance may contribute to or result in the death penalty being imposed against a person.

Recommendation 18:

Section 8 of the *Mutual Assistance Act* should be amended to provide that a request by a foreign country for assistance in respect of an investigation of, or prosecution or punishment for, an offence in relation to which the death penalty may be imposed must be refused unless the provision of assistance would assist the defence.

²⁰ For more detailed information, see the HRLRC's submission to the Attorney-General's Department, *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill* (August 2009), available at <http://www.hrlrc.org.au/files/HRLRC-Submission-Extradition-and-Mutual-Assistance-in-Criminal-Matters-Legislation-Amendment-Bill.pdf>.

14. Police Powers (paragraph 21)

The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators; c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERs, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and e) provide adequate reparation to the victims.

51. There are no uniform laws governing police use of force in Australia. The use of force by law enforcement officials in Australia is regulated by legislative schemes in each state and territory.
52. The Committee's Concluding Observations themselves are very prescriptive on the particular action that Government needs to take to eradicate excessive use of force by police.

Recommendation 19:

The Federal Government should ensure that the laws, policies and practices of the Australian Federal Police are amended to comply with the Concluding Observations.

Recommendation 20:

The Federal Government should work with state and territory governments to ensure that their laws, policies and practices governing police use of force are brought into line with the Committee's recommendations.

15. Immigration Detention (paragraph 23)

The State party should: a) consider abolishing the remaining elements of its mandatory immigration detention policy; b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008; c) consider closing down the Christmas Island detention centre; and d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.

53. We refer to two submissions made by the HRLRC concerning:
- (a) the Joint Standing Committee on Migration's Inquiry into Immigration Detention (addressing the New Directions in Detention policy);²¹ and
 - (b) the *Migration Amendment (Immigration Detention Reform) Bill 2009*.²²
54. The Australian Government is to be commended for taking steps to introduce legislation giving effect to its stated 'New Directions in Detention' policy, announced by Immigration Minister Chris Evans in July 2008, which, in part at least, reflects positive steps towards promoting human rights considerations within the immigration system in Australia.²³
55. However, the HRLRC notes that the proposed changes are insufficient to ensure that Australia's immigration system complies with human rights standards. The HRLRC urges the Australian Government to ensure all necessary changes are made to the *Migration Act* to ensure compliance with Australia's international human rights obligations. In particular, in order to reflect a human rights-based approach to the issues posed by immigration, the following policies should be overturned:
- (a) mandatory immigration detention;
 - (b) the possibility of children being detained in closed detention facilities;
 - (c) the unavailability of judicial review of a decision to detain and the fact of detention itself; and

²¹ Available at <http://www.hrlrc.org.au/files/1422ECTRGU/HRLRC%20Submission%20-%20Immigration%20Detention.pdf>

²² Available at <http://www.hrlrc.org.au/files/HRLRC-Submission4.pdf>

²³ Chris Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System*, speech at Australia National University, Canberra, 29 July, 2008

- (d) the designation of exclusion zones in which asylum seekers do not have access to the refugee determination process under the *Migration Act*.²⁴

Recommendation 21:

The Government should conduct a wholesale review of the *Migration Act 1958* and the *Migration Regulations 1994* insofar as they apply to immigration detention and ensure that these instruments adequately reflect Australia's obligations under international human rights law.

Recommendation 22:

The Government should abolish its policy of mandatory immigration detention and close down the Christmas Island immigration detention facilities.

16. Access to Justice (paragraph 25)

The State party should take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including indigenous people and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services.

56. The Legal and Constitutional Affairs Committee has this year conducted an inquiry into Access to Justice, which is due to report on 26 November 2009. The HRLRC's submission to the inquiry identified the central importance of giving real protection to the right to a fair hearing (article 14 of the ICCPR).²⁵ Practically, this is best achieved by increased funding for legal aid, community legal centres, and impecunious and disadvantaged litigants. A range of other recommendations were included in the HRLRC submission, including legislative reforms which should form part of the Australian Governments actions in implementing this aspect of the Committee's Concluding Observations.²⁶

²⁴ See Human Rights Law Resource Centre, *Submission to the Senate Legal and Constitutional Affairs Committee on the Migration Amendment (Immigration Reform) Bill 2009* (August 2009).

²⁵ Human Rights Law Resource Centre, *Submission to the Access to Justice Inquiry* (March 2009).

²⁶ Human Rights Law Resource Centre, *Submission to the Access to Justice Inquiry* (March 2009).

57. The HRLRC has also considered ways in which to improve access to justice in Australia in its second submissions to the National Human Rights Consultation: *Engage, Educate, Empower*.²⁷

Recommendation 23:

The Australian Government should ensure that it adequately resources community legal centres, legal aid commissions and the Australian Human Rights Commission to provide human rights education, advocacy and legal services.

Recommendation 24:

The Attorney-General should introduce a mandatory contractual requirement that each legal firm that is a participant of the Commonwealth legal scheme must commit to provide pro bono services of at least 5-10% of the value of the legal fees they derive under the panel arrangements.

17. Education (paragraph 27)

The State party should consider adopting a comprehensive plan of action for human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on the rights protected under the Covenant and the First Optional Protocol. Human rights education should also be incorporated at every level of general education.

58. We refer to the recommendations contained in section 4 of our April 2009 submission to the National Human Rights Consultation.²⁸
59. The Committee's Concluding Observations note that Australia lacks a framework and programme to promote knowledge of the ICCPR and the Optional Protocol domestically, and that the Australian Government should consider adopting a comprehensive plan of action for human rights education. Notably, one of the strongest recommendations in the National Human Rights Consultation Committee report is that the Australian Government develop a

²⁷ The Human Rights Law Resource Centre made three submissions to the Consultation: *Engage, Educate, Empower* (April 2009), section 5. Available at <http://www.hrlrc.org.au/files/hrlrc-submission-2-engage-educate-empower.pdf>.

²⁸ Human Rights Law Resource Centre, *Engage, Educate, Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, 21-26.

national plan of comprehensive human rights education. The National Human Rights Consultation Committee states that 'education [should] be the highest priority for improving and promoting human rights in Australia'.

60. This finding was acknowledged by the Attorney-General in formally launching the Committee's report, stating the Australian Government's belief that 'access to information and education about human rights is critical'.²⁹ The HRLRC urges the Australian Government to fully implement this aspect of the National Human Rights Consultation Committee report.

Recommendation 25:

The Government should fully implement the recommendations made in the National Human Rights Consultation Report concerning human rights education.

²⁹ The Hon Robert McClelland MP, *The Protection and Promotion of Human Rights in Australia*, October 2009.