



Australian
Human Rights
Commission

everyone, everywhere, everyday

Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights

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Australian Human Rights Commission Submission
to the United Nations Committee on Economic
Social and Cultural Rights

17 April 2009

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1 Introduction

1. The Australian Human Rights and Commission (the Commission) makes this submission to the United Nations Committee on Economic Social and Cultural Rights (the Committee) for its Review of Australia's Fourth Periodic Report on the implementation of the International Covenant on Economic Social and Cultural Rights (the Covenant/ICESCR).¹

2 Summary

2. The Commission aims to provide the Committee with information on a number of key issues that the Commission believes may be relevant to its consideration of Australia's implementation of the Covenant. The Commission does not intend to provide a complete assessment of Australia's compliance with the Covenant, due to lack of available resources and competing domestic priorities at this time.
3. The Commission's comments reiterate some of its previous comments on a draft of the Common Core Document, which were provided to the Australian Government in February 2007.
4. As expressed to the Australian Government in 2007, the Commission believes that the Common Core Document provides an incomplete picture of human rights compliance in Australia. In particular, the Common Core Document does not acknowledge the limitations of the current legal framework for human rights protection and fails to identify and explain significant human rights issues.
5. The Commission notes the Human Rights Committee's recent comments to this effect noting that 'the fifth periodic report of Australia does not meet the requirements of article 40 of the Covenant regarding the provision of sufficient and adequate information on the measures adopted to give effect to the Covenant rights, as well as on the progress made in the enjoyment of those rights'.²

3 Recommendations

The Australian Human Rights Commission recommends that:

Recommendation 1: The Australian Government sign and ratify the Optional Protocol to the International Covenant on Economic Social and Cultural Rights

1 Note: As at 4 September 2008, the Australian Human Rights Commission is the new name for the Human Rights and Equal Opportunity Commission.

2 Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia (2009) UN Doc CCPR/C/AUS/CO/5, par 2.

Recommendation 2: The Australian Government pass a federal Human Rights Act that includes recognition and protection of economic, social and cultural rights.

Recommendation 3: The Australian Government introduce federal legislation to prohibit discrimination on the grounds of sexuality, sex identity and gender identity.

Recommendation 4: The Australian Government adopt the Commission's proposals in relation to the development of the new *National Plan of Action to Reduce Violence against Women and their Children*.

Recommendation 5: Asylum seekers released from immigration detention and those living in the community be granted work rights and access to Medicare. Those who are unable to work be granted access to financial and medical assistance.

Recommendation 6: The Australian Government take further action to address sexual harassment in Australia, including implementation of the Commission's proposals contained in its 2008 National Telephone Survey and Submission to the Senate Inquiry into the Effectiveness of the *Sex Discrimination Act 1984 (Cth)*.

Recommendation 7: The Australian Government introduce a national statutory scheme of paid parental leave, including paid maternity leave.

Recommendation 8: The Australian Government take further action to close the gender pay gap in Australia, including implementation of the Commission's proposals to the *House of Representatives Inquiry into Pay Equity*.

Recommendation 9: Australia's mandatory detention law be repealed.

Recommendation 10: The Migration Act be amended so that immigration detention occurs only when necessary. Detention should be the exception, not the norm. It must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law. These limited grounds for detention should be clearly prescribed in the Migration Act.

Recommendation 11: The Migration Act be amended so that the decision to detain a person is subject to prompt review by a court, in accordance with international law.

Recommendation 12: The Migration Act be amended to include periodic independent reviews of the ongoing need to detain an individual, and a maximum time limit for detention.

Recommendation 13: Only detain children as a measure of last resort and for the shortest appropriate period of time.

Recommendation 14: The Australian Government audit populations and projected populations of remote preschool and school-aged children and assess whether the existing education infrastructure and services meets the

needs of remote Indigenous populations. Where the school provision does not meet population needs, the government develop a national, funded plan to upgrade or build quality preschool, primary and secondary school infrastructure where populations warrant them.

4 Framework for human rights protection

4.1 Formal protection for economic, social and cultural rights

Summary of issue:

Under Australian law, a treaty only becomes a source of individual rights and obligations when it is directly incorporated by legislation. Many of the international human rights standards agreed to by the Australian Government, including this Covenant, have not been fully incorporated into Australian law. Individuals who experience human rights violations are often left without legal remedies.

The federal Government has appointed an independent committee to undertake a National Human Rights Consultation (Consultation). The committee is seeking the views of all people in Australia on human rights protections. The Australian Human Rights Commission will make a submission to the Consultation. In particular, the Commission supports a Human Rights Act for Australia. A Human Rights Act should contain economic, social and cultural rights.

Relevance to Covenant: Article 2

a) Australian Human Rights Commission

The Australian Human Rights Commission administers the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). Under the HREOC Act, the Commission is responsible for protecting and promoting human rights, including through the exercise of the following functions:

- inquiring into acts or practices by the Commonwealth which may be inconsistent with human rights
- promoting an understanding and acceptance of human rights in Australia
- undertaking research to promote human rights
- examining enactments that may be inconsistent with human rights
- advising the federal Attorney-General on laws and actions that are required to comply with our international human rights obligations.

The Commission's inquiry and examination of enactment functions may be exercised on the Commission's own motion. The Commission is also required to exercise its inquiry function upon receipt of a written complaint. However, those functions are limited by the definition of 'human rights' in s 3 of the HREOC Act, which includes those rights set out in the instruments scheduled to the HREOC Act and other designated 'relevant international instruments'.

ICESCR is not scheduled to the HREOC Act and has not been declared to be a 'relevant international instrument'. Therefore the rights under ICESCR may not be the subject of a complaint or a self initiated inquiry or examination of enactment conducted by the Commission, except to the extent that those rights are also incorporated in other treaties within the Commission's statutory mandate. One treaty reflecting many of the rights in ICESCR is the Convention on the Rights of the Child (CRC), which has been designated as a 'relevant international instrument' for the purposes of s 3 of the HREOC Act.

Under the HREOC Act, the Commission's jurisdiction is also limited to examining Commonwealth legislation and inquiring into acts by, or on behalf of, the Commonwealth government. It does not have jurisdiction to directly scrutinise the activities of State governments which are responsible for much of the delivery of the economic, social and cultural rights protected under ICESCR.

If the Commission does find a breach of human rights, it is required to report its findings to the Attorney-General (who must table the report in the Commonwealth Parliament) and may make recommendations for action to be taken by way of remedy (including financial compensation). However, the Commission's recommendations are not enforceable.

The functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner, as set out in section 46C of the HREOC Act, require the Commissioner to report annually to the federal Parliament on the status and enjoyment of human rights of Indigenous peoples; to promote awareness and discussion of Indigenous human rights; examine enactments and proposed enactments for compliance with Indigenous human rights; and conduct educational activities. In exercising those functions, the Commissioner is specifically required to have regard to ICESCR. The Commissioner is also empowered to obtain information from state and territory government agencies.

The Commission notes that there is no other Australian independent review body that has the specific jurisdiction to implement the Covenant.

The Commission further notes that the Committee's Concluding Observations in 2000 which recommended that 'the State party incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts'³ remain largely unimplemented.

b) Optional Protocol to the Covenant

The Commission welcomes the adoption by the General Assembly on 10 December 2008 of an Optional Protocol to the Covenant (GA resolution A/RES/63/117) which provides the Committee competence to receive and consider individual communications. The General Assembly took note of the adoption by the Human Rights Council by its resolution 8/2 of 18 June 2008, of the Optional Protocol. The Optional Protocol will be opened for signature at a signing ceremony in 2009.

³ UN Committee on Economic Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia (2000), U.N. Doc E/C.12/1/Add.50, par 24.

The signature and ratification of the Optional Protocol is consistent with the Federal Government's commitment to improve mechanisms for human rights protection in Australia.

The Optional Protocol is an important means of enabling individuals who have exhausted all domestic remedies to lodge an individual communication with the Committee to complain about a human rights violation.

The availability of this international remedy would enable Australians to obtain recognition if their human rights have been violated. It would also enable the Committee to provide guidance to the Federal Government as to the specific action that should be taken to address the violation for any person concerned.

The views of the Committee arising out of an individual communication under the Optional Protocol would also assist the Federal Government to identify areas where current domestic laws, policies, programmes or practices remain inadequate to implement the Covenant obligations. In this way, the international review of Australia's domestic implementation of the Covenant would make a positive contribution to promoting human rights in Australia.

The Commission recommends the Australian government sign and ratify the optional protocol to the International Covenant on Economic Social and Cultural Rights [Recommendation 1].

c) National Human Rights Consultation

On 10 December 2008, the Australian Government announced a National Human Rights Consultation. An independent Committee has been appointed to undertake the Consultation. The Committee is expected to report to the Australian Government by 31 August 2009. The Committee is asking for submissions from the public, and is holding a series of 'community roundtables' across Australia (including in regional and remote areas). The Committee is asking the Australian community three questions:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

The terms of reference of the National Human Rights Consultation exclude consideration of 'a constitutionally entrenched bill of rights'. Full details about the National Human Rights Consultation can be found at www.humanrightsconsultation.gov.au.

The Australian Human Rights Commission strongly welcomes the Australian Government's National Human Rights Consultation. The Commission considers this a unique opportunity to improve the protection of human rights in Australia. The Commission will make a submission to the Committee in support of a Human Rights Act, drawing on the Commission's extensive work over many years highlighting gaps in human rights protections.

The Commission has a range of materials to support participation in the Government's National Human Rights Consultation available on its website at <http://humanrights.gov.au/letstalkaboutrights/index.html>.

d) Human Rights Act

The Australian Human Rights Commission supports the introduction of a federal charter of rights (a Human Rights Act), as a statutory framework for protecting human rights in Australia.

The Commission believes that a Human Rights Act created in consultation with the Australian community could foster a human rights culture in Australian government and society by:

- making human rights an integral part of public decision-making, including law-making and policy-setting processes
- requiring courts to interpret laws consistently with human rights where possible, and to identify laws which do not comply with human rights
- providing accessible, appropriate and enforceable remedies for human rights breaches.

A Human Rights Act should hold the Australian government accountable to its international human rights obligations. It should fill gaps in Australia's current system of human rights protection. In particular, the Commission believes that a Human Rights Act should include economic, social and cultural rights.

The Commission recommends the Australian Government pass a federal Human Rights Act that includes recognition and protection of economic, social and cultural rights [Recommendation 2].

5 Protection against Discrimination

5.1 Protection against discrimination on the basis of sexual orientation, sex identity and gender identity

Summary of issue:

The Australian Human Rights Commission has welcomed the Australian Government's recent amendments to 84 laws which discriminate against same-sex couples and their children. The amendments follow the Commission's 2007 Same-Sex: Same Entitlements Inquiry, which recommended amending laws which discriminate against same-sex couples and their children in the area of financial and work-related entitlements and benefits.

However, there remains inadequate protection in Australia against discrimination on the grounds of sexuality. Whereas all state and territory anti-discrimination laws provide protection against discrimination on these grounds, there is still no federal law specifically prohibiting discrimination on the grounds of sexuality. While the Commission may investigate a complaint of discrimination in employment on the grounds of sexual orientation, any recommendations for remedies made by the Commission are not enforceable.

Further, there is inconsistent protection from discrimination on the basis of sex identity and gender identity across Australia. At the federal level, the Commission may investigate complaints of human rights breaches based on sex or gender identity but these protections are limited and any recommendations for remedies made by the Commission are not enforceable.

Relevance to Covenant: Article 2

a) Amendment of laws which discriminate against same-sex couples

In 2006, the Commission conducted a National Inquiry into discrimination against people in same-sex relationships in the area of financial and work-related entitlements and benefits (Same-Sex: Same Entitlements Inquiry). The final report, *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, found that more than 58 laws discriminate against people in same-sex relationships and their children in this way.⁴ These laws breach the right to non-discrimination and equality before the law.

At the end of 2008 the Australian Parliament passed the two remaining bills to remove discrimination against same-sex couples in most Commonwealth laws. The Australian Government has now amended 84 discriminatory laws. The Commission welcomes the reforms, which are a significant step to equality for same-sex couples.

b) Inadequate protection from discrimination on the basis of sexuality, sex identity and gender identity

Despite the above amendments to remove discriminatory provisions of employment-related federal laws, the Commission submits that there remains insufficient protection against discrimination experienced by gay, lesbian, bisexual, transgender and intersex people.

There is still no federal law specifically prohibiting discrimination on the grounds of sexuality, sex identity or gender identity. While the Commission may investigate a complaint of discrimination in employment on the grounds of sexual orientation, and complaints of human rights breaches based on sex or gender identity, these protections are limited and any recommendations for remedies made by the Commission are not enforceable. In addition, same-sex couples in Australia do not enjoy equality of rights regarding relationship recognition, including civil marriage rights.

In the Same-Sex: Same Entitlements Inquiry, the Commission received a number of submissions about the absence of federal anti-discrimination laws protecting against

⁴ Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, 2007, available on the Commission website at http://humanrights.gov.au/human_rights/samesex/index.html.

discrimination on the basis of sexual orientation.⁵ It also heard directly from people who had experienced homophobia, and others who had experienced discrimination on the grounds of sex identity or gender identity.

In 2008, the Commission also conducted a project on the human rights concerns of people who are sex and gender diverse. The project concentrated on the legal recognition of sex identity in government documents.⁶ However, during the course of the project consultations, discrimination in employment on the grounds of sex identity and gender identity was raised as a human rights issue.

The Commission recommends the introduction of federal legislation to protect against discrimination on the grounds of sexuality, sex identity and gender identity.

Federal anti-discrimination legislation would not only provide a legal remedy for discrimination, it would send a strong message to the community as a whole that gay, lesbian, bisexual, transgender and intersex people are entitled to the same rights as any other person.

The Commission recommends the Australian Government introduce federal legislation to prohibit discrimination on the grounds of sexuality, sex identity and gender identity [Recommendation 3].

5.2 Racial Discrimination under the Northern Territory Emergency Response

Summary of issue:

The Commission notes with concern that the application of the *Race Discrimination Act 1975* (Cth) (Race Discrimination Act) continues to be suspended in relation to the Northern Territory Emergency Response (NTER), an intervention strategy introduced by the Australian Government in 2007 to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.⁷

Relevance to Covenant: Articles 2, 11-14

Indigenous disadvantage is an indicator of the discrimination and inequality faced by Aboriginal people.⁸ Aboriginal and Torres Strait Islander people continue to experience significant inequalities in the realisation of their economic, social and cultural rights. This includes lower life expectancy, lower incomes, higher rates of unemployment, poorer educational outcomes and lower rates of home ownership.

5 Same-Sex Inquiry, section 6.7.

6 Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, 2009, available on Commission website at http://humanrights.gov.au/genderdiversity/sex_files2009.html.

7 Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT', (Media Release, 21 June 2007). At: http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm (viewed 18 October 2007). The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'*.

8 Article 2(1) and Article 26.

For example, in 2001 the unemployment rate for Indigenous peoples was 20% - three times higher than the rate for non-Indigenous Australians.

The Commission notes with concern that the application of the Race Discrimination Act continues to be suspended in relation to the NTER, an intervention strategy introduced by the Australian Government in 2007 to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.⁹

The legislation enacted for the NTER declares itself, and any acts done pursuant to it, to be a special measure for the purposes of the Race Discrimination Act and exempt from the operation of Part II of the Race Discrimination Act. It also declares that, where relevant, it is exempt from Northern Territory and Queensland anti-discrimination legislation.¹⁰

The *Social Justice Report 2007* assessed the NTER's compliance with Australia's human rights obligations and found that:

- the Government has an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse.
- the NTER legislation is inappropriately classified as a 'special measure' under the Race Discrimination Act because of the negative impacts of some of the measures on Indigenous peoples and the absence of adequate consultation or consent by Indigenous peoples to the measures.
- the NTER legislation contains a number of provisions that are racially discriminatory.
- some provisions raised concerns for the compliance with human rights obligations (e.g. the lack of access to review of social security matters and the compulsory acquisition of land without just compensation).¹¹

While the Commissioner highlighted the importance of government addressing family violence and child abuse in Indigenous communities, he noted the need for this to be done through measures that are not racially discriminatory.

The Commissioner recommended a ten point plan be implemented to address the lack of compliance of the NTER with Australia's human rights obligations. The ten point plan sets out how to:

9 Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT', (Media Release, 21 June 2007). At: http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm (viewed 18 October 2007). The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'.

10 Northern Territory National Emergency Response Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth).

11 The Social Justice Report 2007 is available at: http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2008).

- remove formal discrimination under the NTER legislation
- ensure that schemes for income management and alcohol control are undertaken in a manner that is consistent with the Race Discrimination Act and that qualify as a 'special measure'
- transition from a crisis or emergency approach to a community development approach through ensuring participatory processes, the creation of community development plans and rigorous participatory based monitoring and reviews.

The Northern Territory Emergency Response Review Board was supportive of such recommendations, and recommended that the Government respect Australia's human rights obligations and conform with the Race Discrimination Act.

The ease with which the obligations under the Race Discrimination Act have been set aside highlights the weak status of protections against race discrimination in the Australian legal system. Underlying this weakness is the absence of any constitutional protection against race discrimination and the absence of a federal charter of rights.

The UN Committee on the Elimination of Racial Discrimination, in response to an Early Warning and Urgent Action Procedure submitted in relation to the NTER, has asked the State party to submit further details and information on the following issues no later than 31 July 2009:

- Progress on the drafting of the redesigned measures, in direct consultation with the communities and individuals affected by the NTER, bearing in mind their proposed introduction to the Parliament in September 2009.
- Progress on the lifting of the suspension of the Race Discrimination Act.

The UN Human Rights Committee has similarly noted in its recent review its concerns at the negative impact of the NTER measures, the suspension of the operation of the *Racial Discrimination Act 1975* and the lack of adequate consultation with Indigenous peoples. The Human Rights Committee recommended the NTER measures be redesigned in consultation with the Indigenous peoples concerned, to ensure that they are consistent with the Race Discrimination Act and the International Covenant on Civil and Political Rights.¹²

5.3 Gender-based violence

Summary of issue

Gender-based violence continues to be a serious problem in Australia. Experiences of violence limit the capacity of women to equally enjoy their economic, social and cultural rights. Since November 2007, the Australian Government has introduced a number of initiatives to address gender-based violence in Australia. The Commission has commended these developments. However, the Commission has

¹² Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia (2009) UN Doc CCPR/C/AUS/CO/5, par 14.

recommended that programs to address violence against women and children should reflect human rights principles.

Relevance to Covenant: Articles 2(2), 3, 11 and 12

As many as one in three Australian women are affected by domestic and family violence.¹³ Further, nearly one in five Australian women has experienced sexual violence since the age of 15.¹⁴ Domestic violence has been identified as the leading contributor to preventable death, disability and illness in women aged 15 to 44 in the state of Victoria.¹⁵ Further, domestic violence is the most common reason cited by individuals seeking assistance with Australian housing services.¹⁶

During her national *Listening Tour*, the Sex Discrimination Commissioner consistently heard from women about the ongoing impact of violence and concerns about the shortage of appropriate services. Indigenous women, women with disability and culturally and linguistically diverse women reported to the Commissioner that there was a lack of appropriate and accessible services to meet their specific needs.¹⁷

Since November 2007, the Australian Government has introduced some key initiatives to address gender-based violence. In May 2008, the Australian Government formed a *National Council to Reduce Violence Against Women and Children* (the National Council). The Council was directed to develop a 12 year *National Plan to Reduce Violence Against Women and Children* (the National Plan).

The submissions and consultations to inform the development of the National Plan highlighted a number of issues including the need for:

- improving support and services for those effected by domestic violence and sexual assault
- improving the legal system so that perpetrators are held to account
- increasing primary prevention efforts so that more children and young people are educated about respectful relationships

13 Jenny Mouzos and Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004).

14 Australian Bureau of Statistics, *Personal Safety Survey*, (Cat. No. 4906.0) (2005).

15 VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004).

16 Australian Institute of Health and Welfare, *Homeless people in SAAP: SAAP National Data Collection annual report 2006-07 Australia* (2008) p 35. Available at <http://www.aihw.gov.au/publications/index.cfm/title/10523> (viewed 6 April 2009).

17 The Sex Discrimination Commissioner, Elizabeth Broderick, conducted a national *Listening Tour* from November 2007 to May 2008 to seek community and stakeholder feedback on three key themes relevant to gender equality: economic independence for women; work and family balance over the lifecycle; and freedom from discrimination, harassment and violence. For further information see Human Rights and Equal Opportunity Commission, *What matters to Australian women and men: Gender equality in 2008, The Listening Tour Community Report* (2008). Available at http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html (viewed 9 February 2009).

- increasing research and setting targets so that Australia can track its progress.¹⁸

The Commission has commended these developments, while making the following recommendations to the Australian Government¹⁹:

- The Minister on the Status of Women should ensure that there is representation from the perspective of women with disability on the National Council.
- The development, implementation and evaluation of the National Plan should reflect key human rights principles. The National Plan should include participatory decision-making processes; strategies to ensure non-discrimination; strong data collection and evaluation mechanisms; and independent monitoring and accountability mechanisms to assess the progress and implementation of the Plan.
- The National Plan should include a comprehensive definition of violence that includes the range of behaviours that occur in private or public life resulting in physical, sexual, emotional or psychological harm. It should include strategies to address violence in all its forms, including sexual harassment, trafficking in women and children, race-based violence and reproductive violence such as forced and non-therapeutic sterilisation.²⁰

The Commission recommends that the Australian Government adopt the Commission's proposals in relation to the development of the new *National Plan of Action to Reduce Violence against Women and their Children* [Recommendation 4]

6 Rights to work and welfare

6.1 Limited work rights, social security or health care for asylum seekers on bridging visas

Summary of issue:

Restrictive conditions attached to some bridging visas in Australia have had a significant impact on the ability of some asylum seekers and refugees to exercise their basic human rights, including the right to work, the right to social security, the right to an adequate standard of living and the right to the highest attainable standard of health.

The Commission understands that the Department of Immigration and Citizenship has indicated it will introduce some policy reforms in this area.

18 Australian Domestic & Family Violence Clearinghouse, E-News December 2008 (2008) Available at <http://www.adfvc.unsw.edu.au/e-news/e-news%20December%202008.rtf> (viewed 17 March 2009).

19 The Commission has made further recommendations in the area of domestic and family violence in Aboriginal Torres Strait Islander communities. See section xxx. Further, the Commission's comments on sexual harassment in the workplace are at section xxx.

20 Please see the definition of "violence against women" definition from the Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, UN Doc A/CONF.177/20 (1995) .

Relevance to Covenant: Articles 6, 9, 11 and 12

a) The impact on asylum seekers of restrictive conditions attached to some bridging visas

A bridging visa is a temporary visa granted to people who are in the process of applying for a longer-term visa or making arrangements to leave Australia. Bridging visas are granted for many purposes, including to asylum seekers who are seeking refugee status in Australia.

Bridging visas come with various conditions and restrictions, depending on the class of the visa and the circumstances of the visa holder. These conditions and restrictions may relate to

- **Permission to Work:** Bridging visas may be subject to work restrictions, which prohibit the visa holder from working in Australia. This also means they are unable to do voluntary work or study. In cases of severe financial hardship, a visa holder may seek permission to work.
- **Social security:** Bridging visa holders cannot access social security benefits (while some visa holders may be entitled to access financial and medical assistance through the Asylum Seeker Assistance Scheme (ASAS), many asylum seekers do not meet the eligibility criteria).
- **Health care:** Bridging visa holders who are not allowed to work are also ineligible for healthcare entitlements under Medicare and the Pharmaceutical Benefits Scheme (although some states also provide healthcare entitlements to asylum seekers).

Bridging visas with these restrictions are commonly granted to asylum seekers who:

- come to Australia under a valid visa and wish to apply for a Permanent Protection visa, but do not lodge their application within 45 days of arriving in Australia
- are released from immigration detention for reasons such as health or age
- appeal a decision of the Refugee Review Tribunal
- request a Ministerial intervention.

As a result of these restrictions, many asylum seekers and refugees may face poverty and homelessness. Without the ability to support themselves through work or social security, they are entirely dependent on community services for their basic subsistence. The restrictions on volunteer work and study also mean that many people are unable to engage in any constructive or meaningful activity. These conditions can have negative effects on the physical and social well-being of asylum seekers, including anxiety, depression, mental health issues and family breakdown.

The Commission understands that the federal Department of Immigration and Citizenship has indicated it will introduce some policy reforms in this area. The Commission welcomes this development and looks forward to the implementation of these reforms.

The Commission recommends asylum seekers released from immigration detention and those living in the community be granted work rights and access

to Medicare. Those who are unable to work be granted access to financial and medical assistance [Recommendation 5].

6.2 Protecting migrant workers from exploitation

Summary of issue:

Temporary business visa holders (457 Visa Holders) have been vulnerable to workplace exploitation, including discrimination, due to a limited knowledge and understanding of Australian workplace rights, limited English language and the ongoing reliance on a sponsor for their visa status.

The Commission has recommended that the Australian Government ensure that 457 Visa Holders and employers should receive more information about their rights and responsibilities under workplace and anti-discrimination laws, and that there be effective complaints and monitoring mechanisms in place.

In 2008, the Australian Government commissioned a review of the 457 temporary business visa system. The recommendations from the review have been referred to a Skilled Migration Consultative Panel consisting of representatives of business and industry groups as well as state governments and unions.

Relevance to Covenant: Articles 2 and 7

a) Complaints to the Australian Human Rights Commission

The Australian Human Rights Commission has received complaints from 457 Visa Holders alleging discrimination in the workplace. The types of issues raised by people making complaints include:

- not being paid overtime
- working longer hours or days than non-visa employees
- limited access to sick leave and dismissal if the Visa Holder takes sick leave
- dismissal because the Visa Holder is pregnant
- dismissal for taking leave to care for a sick spouse or child
- overcharges on rent or other expenses organised by the employer
- sexual harassment.

Many 457 Visa Holders will be unaware of their workplace rights under Australian law. As new arrivals, they may be unfamiliar with mechanisms for protecting the rights of workers. This may be compounded by English language difficulties. 457 Visa Holders are also vulnerable to exploitation because they rely on their employers, as sponsors, for their visa status.

Because of this vulnerability, it is important for 457 Visa Holders to know that they are protected by Australian anti-discrimination and workplace laws, similar to any other worker in Australia.

In January 2007, the Commission made a submission to a parliamentary Joint Standing Committee on Migration 'Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas' in January 2007 (available at <http://www.humanrights.gov.au/legal/submissions/2007/migration457.html>). In that submission, the Commission raised its concerns about the need for 457 Visa Holders to understand their rights, and for adequate monitoring of employment of 457 Visa Holders.

On 14 April 2008 the Minister for Immigration and Citizenship, Senator Chris Evans, announced the establishment of an independent integrity review process, following concerns raised about the Subclass 457 visa program. The Commission made a submission in response to Issues Paper Three of that Review.

The Commissioner recommended that

- 457 Visa Holders should be properly informed of their rights under workplace and anti-discrimination laws
- The Department of Immigration and Citizenship (DIAC) should inform sponsoring employers of their obligations towards 457 Visa Holders under workplace and anti-discrimination laws.
- DIAC should ensure that 457 Visa Holders are able to access effective complaints mechanisms.
- DIAC should ensure rigorous monitoring of 457 Visa Holders workplaces.

The final report of the Integrity Review was completed in October 2008. The Minister for Immigration has referred the implementation of the recommendations of the review to a Skilled Migration Consultative Panel consisting of representatives of business and industry groups as well as state governments and unions.

6.3 Human Trafficking

Summary of Issue

The Commission is concerned that the rights to work and just and favourable conditions are violated by the trafficking of people to Australia for the purpose of exploitation and the practices of slavery, sexual servitude, debt bondage, and forced labour. The Commission believes that Australia's response to people trafficking will benefit from a stronger focus on protecting the human rights of trafficked people.²¹

²¹ See Elizabeth Broderick, 'Slavery in the 21st Century', A Human Rights Challenge, speech presented at the Australian Human Rights Commission, 16 October 2008.

Relevance to Covenant: Articles 6 and 7

a) Rights of trafficked persons in Australia

Article 6 of the Covenant protects the right of everyone to take the opportunity to gain their living by work which they freely choose or accept and obliges the Australia to take appropriate steps to safeguard this right. Article 7 recognises the right of everyone to just and favourable conditions of work.

The precise number of people trafficked to Australia each year is not known.²² Since 2004, 107 suspected trafficking victims have been placed on the government funded victim support program for trafficking victims.²³ The vast majority of people on the program have been trafficked into sex industry.

The Commonwealth Anti-Trafficking Strategy seeks to address all form of trafficking. Although the Australian Government's response to the problem of trafficking initially focused on the trafficking of women for sexual servitude, recently there has been a growing focus on how to improve Australia's response to trafficking for labour exploitation.²⁴

At the 2008 National Roundtable on People Trafficking (NRPT) it was agreed that Australia needs to develop 'best practice models for identifying and responding to possible victims of labour trafficking, including investigating the effectiveness of responses based on education about rights, rather than victims'.²⁵ The Commission urges the Australian Government to develop and promote best practices models for responding to labour trafficking.

The Commission notes that the problems of slavery, forced labour and debt bondage needs to be distinguished from lesser forms of exploitation which do not fall with the criminal offences of 'slavery', 'sexual servitude', 'trafficking in persons', 'trafficking in children', and 'debt bondage' contained in the *Criminal Code Act 1995* (Cth). However, it is also important that the problem of labour trafficking is analysed within the broader context of Australian labour laws. The application of labour laws could assist to protect the rights of people who have been, or are at risk of, trafficking.²⁶

b) Visa options and access to victim support

22 In February 2009, the United Nations Office of Drugs and Crime (UNODC) reported that between 2003 and November 2008, 34 people have been charged with trafficking related offences (AFP) resulting in eight convictions. So far almost everyone who has been placed on the victim support program has been trafficked into the sex industry. Four people have been identified as having been trafficked for forced labour: UNODC, *The Global Report on Trafficking*, (2009), 166. The Australian Federal Police states that since 1 January 2004, the TSETT has undertaken more than 150 assessments and investigations of allegations of trafficking-related offences including slavery, deceptive recruiting and/or sexual servitude. AFP, *Annual Report 2007-2008*, (2009), p. 28.

23 See generally Elizabeth Broderick, 'Slavery in the 21st Century', A Human Rights Challenge, speech presented at the Australian Human Rights Commission, 16 October 2008.

24 The National Roundtable on People Trafficking, 'Statement of Outcomes', October 2008, available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/PeopleTrafficking_PeopleTrafficking.

25 The Australian Institute of Criminology (AIC) is currently conducting research on the issue of labour exploitation. See AIC, 'Labour Trafficking: key concepts and issues', *Transnational Crime Brief*, No. 3, 2009.

26 *ibid.*

People who have been trafficked to Australia and who find themselves in conditions of sexual servitude, slavery, forced labour and debt bondage are often non-citizens and, in many cases, in Australia illegally. Access to culturally appropriate services (including medical treatment, counselling, housing, social support and legal and migration advice) is vital to help trafficked people recover from their experience and to enable them to enjoy their rights to health, housing and family life.²⁷

The government funded and administered Victim Support Program is part of the Commonwealth Government's Anti-Trafficking Strategy.²⁸ The Victim Support Program is available to victims of people trafficking in Australia who are assessed by the Australian Federal Police as eligible for visa under the People Trafficking Visa Framework.²⁹

The People Trafficking Visa Framework has been criticised by the Commission, academics and anti-trafficking NGOs on the grounds that it fails to protect the rights of people who are unable or unwilling to assist a criminal investigation or prosecution.³⁰

While trafficked persons may be able to apply for a refugee protection visa, they may face particular difficulties 'establishing the requisite link between the persecution and

27 These rights are protected by art 10 (protection of the family), art 11 (right to adequate standard of living including an adequate standard of living for himself and his family, including adequate food, clothing and housing), art 13 (right to health) and art 13 (right to education) of the ICESCR.

28 Commonwealth Anti-Trafficking Strategy, available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/People_Trafficking.

29 Under the People Trafficking Visa Framework a bridging visa F (BVF) may be granted to a suspected trafficking victim who is a 'person of interest' in relation to trafficking offences for a maximum of 30 days. After the expiry of BVF, if the person can be of ongoing assistance to police a criminal justice stay visa may be issued to allow the holder to remain in Australia for so long as they are required for the administration of criminal justice. A holder of a CJSV who is deemed by the Attorney-General to have made a significant contribution of a police investigation or prosecution and who may be in danger if they are returned to their country of origin may be offered a Witness Protection (Trafficking) (Temporary) Visa. A holder of this visa who continues to meet its criteria for more than two years may be offered a Witness Protection (Trafficking) (Permanent) visa which enables them to stay in Australia permanently.

30 For discussion in the Australian context see Dorevitch and Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law', (2008) 9 Melbourne Journal of International Law 1; Elaine Pearson, 'Australia' in Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World', Global Alliance Against Trafficking in Women, 2007; Bernadette McSherry and Miriam Cullen, 'The Criminal Justice Response to Trafficking in Persons: Practical Problems with Enforcement in the Asia-Pacific Region, Global Change, Peace & Security', (2007) 19 Global Change Peace and Security 3, 205-220. Segrave M. "Surely Something is better than nothing? The Australian response to the trafficking of women into sexual servitude in Australia", Current Issues in Criminal Justice, vol 16, no 1, 2004. The National Roundtable on People Trafficking – Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) and NGO Recommendations for changes to the trafficking visa framework (23 June 2008);

the state' and establishing that the reason that they fear persecution is because of their membership of a particular social group.³¹

The Commission advocates reforming the current people trafficking visa framework so that access to victim support and protection is contingent upon the needs of the trafficked person, and not conditional on a person's ability to assist police investigations and prosecutions. The Commission supports:

- Extending the period of time that a bridging visa F can be granted for from 30 days to 3 months so that people who may have been trafficked have time to reflect upon their experience and decide whether to assist police. Access to this visa should not be contingent on the person's ability to assist police investigations but based on their status and needs as a victim of trafficking.
- Restructuring of decision-making processes so that the permanent witness protection visa are granted early in the investigation and prosecution process, rather than at the end of the criminal justice process and abolishing the temporary witness protection visa.
- Giving consideration to amending the Criminal Justice Stay Visa and the Witness Protection (Trafficking) Temporary visa to enable the reunion of a visa holder with his or her children.³²

The Department of Immigration and Citizenship (DIAC) is conducting a review of the people trafficking visa regime. The Commission is hopeful that the outcome of this review will mean that people who have been trafficked to Australia will receive support and protection on the basis of need, regardless of whether they are of interest or assistance to police.

In 2008 the Commission chaired a National Roundtable on People Trafficking working group that developed guidelines for NGOs working with trafficked people.³³ The accompanying two-page 'Know Your Rights' fact sheet gives trafficked people information about how they can get advice about their visa status, contact police and access support services. It has been translated into Thai, Vietnamese, Korean, Chinese and Tagalog.

The Commission urges the Government to continue to develop culturally appropriate information for people who have been trafficked. The development of these resources is vital so that migrant workers in Australia are aware that slavery, sexual servitude, debt bondage and trafficking in persons are crimes under the Australian Criminal Code and understand that their rights under the *Workplace Relations Act 1996* (Cth). The Commission supports the development of specific education and

31 See Dorevitch and Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law', (2008) 9 Melbourne Journal of International Law 1.

32 The National Roundtable on People Trafficking – Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) and NGO Recommendations for changes to the trafficking visa framework (23 June 2008).

33 The National Roundtable on People Trafficking, NGO Guidelines for Working with Trafficked People, 2008, available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/People_Trafficking.

training packages which raise awareness of labour trafficking and the rights of migrant workers under Australian law.

c) Providing an effective remedy: compensation for trafficking victims

Article 6 (6) of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the Convention on Transnational Crime* provides Australia 'shall ensure its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'.

To date, the Commission is only aware of one award of compensation to a person who was trafficked to Australia.³⁴ There are significant practical obstacles that may prevent a trafficked person from making compensation claims, including obstacles to obtaining legal advice about claiming compensation, a lack of visa options to stay in Australia to pursue compensation claims, and the limited legal avenues to pursue compensation claims.

The Commission urges the Australian Government to explore a variety of legal options which will improve the ability of people who have been trafficked with effective access to compensation.³⁵ These could include:

- establishing a federal compensation scheme for victims of crime;³⁶
- exploring the potential of the *Proceeds of Crime Act 2002* to enable the forfeiture of an offender's assets to provide compensation to the victim of trafficking or a related offence³⁷ and pursuing reparations orders under s 21B of the *Crimes Act 1914 (Cth)*;³⁸ and
- improving the access of trafficked people to information and legal advice about their existing avenues for making compensation claims, including claims for the recovery of unpaid wages.³⁹

34 In May 2007, The Age newspaper reported that '[a] former child sex slave has become the first person in Australia to be compensated as a victim of sex trafficking'. The award was actually made under the Victims Support and Rehabilitation Act 1996 (NSW) and the woman, Ms Chaladone, who was trafficked to Australia in 1995 when she was 13, claimed compensation as a victim of sexual assault, not a victim of trafficking. Natalie Craig, 'Sex slave victim wins abuse claim – EXCLUSIVE - 'It still hurts to talk about it ... I have been depressed'', The Age, 29 May 2007. For discussion of another effort to obtain compensation in a trafficking case see Julie Lewis, 'Out of the Shadows', Law Society Journal 17, February 2007.

35 See further Elizabeth Broderick, 'Slavery in the 21st Century', A Human Rights Challenge, speech presented at the Australian Human Rights Commission, 16 October 2008.

36 Jonathon Pearlman, Rights Charter to Vindicate Victims', Sydney Morning Herald, 7 February 2008.

37 Fiona David notes the Proceeds of Crime Act 2002 (Cth) has been used to restrain the alleged proceeds of trafficking in persons in at least one Australian prosecution (see, for example, Commonwealth DPP v Xu [2005] NSWSC 191). See Fiona David, 'Prosecuting trafficking in persons: known issues, emerging response', Australian Institute for Criminology, Trends and Issues in Criminal Justice, no.358, June 2008.

38 Crimes Act 1914 (Cth) s 21(1) (c).

39 Trafficked people may also be able to make claims for unpaid wages or occupation health and safety and workers compensation under workplace relations laws. See Elaine Pearson,

6.4 Stolen wages

Summary of Issue

The issue of 'stolen wages' has impacted on Aboriginal and Torres Strait Islander peoples' right to just and favourable conditions of work. It has also contributed to the entrenched and inter-generational disadvantage, and consequent discrimination and inequality, experienced by Indigenous peoples in Australia.

Relevance to Covenant: Article 7

The Stolen wages compensation schemes are a means by which Indigenous peoples access their right to a remedy for the human rights violations they experienced. The Human Rights Committee recommended, in their concluding observations on Australia in 2000,⁴⁰ such a remedy be made available where rights have been violated.

Stolen wages compensation schemes have been established in Queensland and New South Wales to compensate Indigenous peoples for the withholding, non-payment and underpayment of wages in the control of government.⁴¹ Investigations and consultations on the nature and extent of stolen wages are also underway in Western Australia.

The right to remedy remains unfulfilled in areas where compensation schemes have not been established. The Commission notes the need for stolen wages compensation schemes to be established in other States and Territories as appropriate.

The Commission also has significant concerns about the adequacy and fairness of the regimes established, particularly by the Queensland Government, to address injustices inflicted on Aboriginal and Torres Strait Islander people through the underpayment of wages.⁴²

In December 2006 the Senate Standing Committee on Legal and Constitutional Affairs published a report titled *Unfinished business: Indigenous stolen wages*, which recommended that governments provide unhindered access to archives for the purposes of researching the stolen wages issue as a matter of urgency. They also recommended that funding be made available for education and awareness in

'Australia' in *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*, Global Alliance Against Trafficking in Women, 2007.

40 Human Rights Committee, Concluding observations: Australia, 24/07/2000UN Doc A/55/40, paras.498-528. At

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e1015b8a76fec400c125694900433654?Opendocument>.

41 See Common Core Document, par 230. International Covenant on Civil and Political Rights, arts 2, 8.

42 See Australian Human Rights Commission, Submission to the Senate Legal and Constitutional References and Legislation Committee Inquiry into Stolen Wages (2006), pars 13-24.

Indigenous communities as well as for preliminary legal research into stolen wages issues.⁴³ These recommendations have not been adopted.

6.5 Income management welfare schemes

Summary of Issue

As exemplified by reports such as the *Little Children are Sacred Report* (NT) and the *Breaking the Silence Report* (NSW), child abuse, child sexual abuse and family violence are critical issues for Indigenous communities.⁴⁴ An Indigenous child is six times more likely to be involved with the statutory child protection system than a non-Indigenous child, but four times less likely to have access to child care or preschool service that can offer family support to reduce the risk of child abuse.⁴⁵

To address such issues the government has introduced a range of income management welfare schemes, where welfare incomes are quarantined or deducted, which raises a number of human rights concerns, including for the right to social security.

Relevance to Covenant: Articles 9, 10 and 13

The *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) provides for the quarantining and control of welfare income available to Indigenous peoples in prescribed Northern Territory Communities for a period of 12 months, with the possible extension of this for up to five years. It also puts in place the legislative framework for delegated legislation to be enacted to set up an administrative body called the Queensland Commission to regulate income management in Cape York.

The new federal government is also currently developing a national framework for child protection that consolidates the different state and territory child protection systems, to ensure an integrated response across all government and non-Government organisations. As part of this framework, the government has looked to introduce income management schemes, where welfare incomes are quarantined or deducted subject to the enrolment and participation of children in schools.

The *Social Justice Report 2007* provides a detailed review of the income management measures under the NTER legislation. The income management measures raise the following concerns relating to compatibility with the right to social security:

- The blanket application of the income management regime in the 73 prescribed communities in the NT means that the measures are applied to individuals that are not responsible for the care of children, do not gamble,

⁴³ The report is available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/report/index.htm (viewed 23 September 2008).

⁴⁴ See Common Core Document, pars 365-368. ICCPR, art 24.

⁴⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, p116.

and do not abuse alcohol or other substances. The criteria for being subject to the income management provisions is therefore solely on the basis of the race of the welfare recipient instead of being on the basis of need.

- The scheme is also established so that it is difficult for individuals to be exempted from the income management provisions. A decision by the Minister is required for an exemption to be granted. It would be more appropriate for the decision-making about the applicability of the scheme to be inverted, so that for the scheme to operate in relation to a particular individual it would require a decision, based on clearly defined criteria, that the scheme should be applied.
- This also means that the method for delivery of welfare provisions is extremely costly, with significantly increased bureaucratic involvement and costs. It is questionable that this is the most appropriate approach for delivering welfare. Better outcomes could be obtained at a more reasonable cost by focusing efforts on ensuring that there is appropriate education and awareness about social security issues in Indigenous communities.
- As the income management measures are so broadly applied, there is a tenuous connection between the operation of the scheme and the object of addressing family violence and abuse. When coupled with the lack of participation and consultation with Indigenous communities, this renders it very difficult to support the view that these measures are appropriately characterised as a special measure.
- If the measures were targeted solely to parents or families in need of assistance to prevent neglect or abuse of children, as they are in s123UC of the legislation, then some form of income management may be capable of being seen as an appropriate exercise of the governments 'margin of discretion' to ensure that families benefit from welfare and receive the minimum essentials for survival.
- It is difficult, however, to see how the quarantining of 100% of welfare entitlements can be characterised as an adapted and appropriate response, given the impact that benefits are being provided in a form that is onerous and potentially undignified.
- As discussed earlier, the limitations on reviewing decision-making in relation to the income management regime, and especially the denial of external merits review processes, significantly undermines the ability to characterise the income management regime as an adapted and appropriate response. This is a clear denial of justice, is discriminatory in its impact and does not meet the requirement for the provision of effective judicial or other appropriate remedies that is integral to the right to social security. The absence of access to complaints processes such as under the Race Discrimination Act also breaches the right to social security.

It is arguable that some forms of income management could be undertaken consistent with the right to social security. For example, it is likely that the model proposed by the Cape York Institute in its report *From a hand out to a hand up* contains the appropriate procedural guarantees and participatory requirements to enable those proposed measures to potentially be characterised as a special measure and as consistent with the right to social security.

Notably, however, some of those procedural guarantees – such as access to merits review and to access Queensland discrimination laws – are removed in the

provisions that are contained in the social security amendments in the NTER legislation and so it is not clear that the Queensland Commission that has been authorised actually complies.

Consistent with the right to social security, the provisions on income management in the NTER legislation should be reviewed and amended to ensure that these provisions are compatible with obligations arising from the right to social security.

Such a review should ensure that the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security are made an integral part of the NTER process into the future.

The NTER legislation should also be amended to ensure that adequate protections are provided to protect the privacy of individuals in the handling of personal information.

A further objective of income management is to provide an incentive for Aboriginal families to ensure that their children attend school. However, the income management scheme as set forth in the NTER legislation presupposes that children in the Northern Territory could access ordinary educational opportunities if they so wished.

An emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Indigenous students is preferable to measures that penalise parents. Along with extensive Federal and Northern Territory government financial commitments to improve the quality and availability of education, such measures should be extensively trialled before options as punitive as income management of 100% of welfare entitlement recipients are utilised.

The Commission has recommended against the introduction such schemes as part of the national child protection framework. The Commission has called for the government to adopt a human rights-based approach to the framework that would uphold the 'best interests of the child', 'non-discrimination', and the child's 'right to life' and 'right to participation'.

The Commission's report on *Ending Family violence and Abuse in Aboriginal and Torres Strait Islander Communities* highlights the need for support for Indigenous community initiatives and networks, human rights education, government action, and robust accountability and monitoring.⁴⁶

6.6 Sexual harassment

Summary of issue

Despite nearly 25 years of legislative protection under the *Sex Discrimination Act 1984* (Cth), sexual harassment remains a problem in Australian workplaces. The

⁴⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues* (2006), pp5-6. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, pp 194-95.

widespread incidence of sexual harassment impacts on the capacity of women to equally enjoy safe and healthy working conditions. In June 2008, the Australian Government announced a Senate Inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality. Sexual harassment was a specific terms of reference for the Inquiry. The Commission made a number of recommendations to the Inquiry to improve the capacity of the *Sex Discrimination Act 1984* (Cth) (SDA) to redress sexual harassment. A number of the Commission's recommendations were adopted by the Inquiry. The Government is yet to respond to the Senate Committee's report.

Relevance to Covenant: Articles 2(2), 3, 6 and 7(b).

Sexual harassment featured as a common concern during the Sex Discrimination Commissioner's national *Listening Tour*. The Commissioner heard sexual harassment was present across diverse industries and occupations. She also heard that victims of sexual harassment commonly fear that making a complaint will lead to further victimisation. Addressing sexual harassment is one of the five priority areas for the term of the current Sex Discrimination Commissioner, set out in her Plan of Action Towards Gender Equality.

In 2008, the Commission conducted its second national telephone survey about the nature and extent of sexual harassment in Australian workplaces. The national telephone survey was first conducted in 2003.

The Commission has found that despite a slight improvement, sexual harassment continues to be prevalent. The national telephone survey revealed that 22% of females and 5% of males had experienced sexual harassment in the workplace at some time, compared to 28% of females and 7% of males in 2003. In the 2008 national telephone survey, only 16% of those who have been sexually harassed in the last five years in the workplace formally reported or made a complaint, compared to 32% in 2003.⁴⁷

The 2008 survey also found a lack of understanding as to what sexual harassment is. Around one in five (22%) respondents who said they had not experienced 'sexual harassment'¹ then went on to report having experienced behaviours that may in fact amount to sexual harassment under the SDA.

Arising out of the findings of the 2008 national telephone survey, the Commission made a number of recommendations for action. The recommendations include that the Australia Government should provide sufficient funding to:

- Enable the Commission to work with relevant Australian Government agencies and small business representatives to develop and promote the use of specific sexual harassment training guidelines for small business;

⁴⁷ Human Rights and Equal Opportunity Commission, *Sexual harassment: Serious business, Results of the 2008 Sexual Harassment National Telephone Survey* (2008). Available at http://www.humanrights.gov.au/sexualharassment/serious_business/index.html (viewed 6 April 2009).

- Expand the capacity of the Commission to provide information to ensure people under the law and rights and responsibilities under the law, and ensure the ongoing provision of an efficient and effective complaint service;
- Enable the Equal Opportunity for Women in the Workplace Agency or the Commission to develop an audit kit to assist employers to monitor the incidence of sexual harassment; and
- Enable the Commission to repeat its national telephone survey ever five years in order to independently monitor trends in the nature and extent of sexual harassment in Australian workplaces.⁴⁸

Further in its submission to the Senate and Legal Constitutional Affairs Committee Inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality, the Commission highlighted the need for expanded legal protection and comprehensive education efforts to eliminate sexual harassment. The Commission made recommendations to increase the capacity of the SDA to better redress sexual harassment. The Commission also recommended that the Australian Government increase funding to the Commission to perform its policy development, education, research, submissions, public awareness and inquiry functions to eliminate discrimination and promote gender equality.⁴⁹

These recommendations were adopted by the Senate Committee. The Australian Government is yet to respond to the report.

The Commission recommends that the Australian Government take further action to address sexual harassment in Australia, including implementation of the Commission's proposals contained in its 2008 National Telephone Survey and Submission to the Senate Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) [Recommendation 6].

6.7 Women and retirement

Summary of issue

One of the key pillars of Australia's retirement income system is the 'Superannuation Guarantee'. The Superannuation Guarantee is a compulsory contribution system linked to paid work and the level of earnings. The linking of the superannuation guarantee ('the SG') exclusively to engagement in paid work disadvantages women and other groups with marginal labour force attachment and

48 Human Rights and Equal Opportunity Commission, *Sexual harassment: Serious business*, Results of the 2008 Sexual Harassment National Telephone Survey (2008). Available at http://www.humanrights.gov.au/sexualharassment/serious_business/index.html (viewed 6 April 2009).

49 For further information please see Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality (2008) ('SDA Submission (2008)')*. At http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html (viewed 6 February 2009).

lower earnings. Current figures show that women's superannuation balances are less than half of those of men.⁵⁰

Superannuation is a type of social insurance under Article 9 of the ICESCR.⁵¹ Due to superannuation being linked to paid work, women do not currently equally enjoy the right to social security in Australia.

The Australian Government is currently reviewing the retirement income system as part of a broader review of the national tax system. The Commission has lodged a submission urging the Australian Government to redress the disadvantage faced by women in the current system.

Relevance to Covenant: Articles 2(2), 3, 7(a)(i), 9 and 11.

Women are more likely to have broken paid work patterns due to caring responsibilities and have lower life-time earnings due to pay inequity. This means that not only do women generally have lower levels of superannuation coverage over the lifetime, but when they do engage in paid work, they accumulate lower amounts of superannuation. Current figures show that women's superannuation balances are less than half of those of men.⁵² This stark figure is a clear marker of gender inequality in Australia.

With women generally retiring earlier and living longer than men, there are a number of serious implications stemming from the gender inequality in retirement savings. Many women face prospects of financial insecurity and poverty in retirement, often solely relying on the Age Pension. Of all household types in Australia,⁵³ elderly single women are at the greatest risk of poverty.⁵⁴ Around 73% of those on the single rate of the Age Pension are women.⁵⁵

During her national *Listening Tour*, the Sex Discrimination Commissioner consistently heard deep concerns from women about financial security in retirement and the adequacy of the Age Pension. Reducing the gender gap in retirement savings to

50 Ross Clare, Retirement Savings Update (2008) p 3. Available at <http://www.superannuation.asn.au/Reports/default.aspx> (viewed 11 February 2009).

51 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 19: The Right to Social Security, E/C.12/GC/19 (2007).

52 Ross Clare, Retirement Savings Update (2008) p 3. Available at <http://www.superannuation.asn.au/Reports/default.aspx> (viewed 11 February 2009).

53 This includes: working age couple with no children; working age couple with children; working age lone female; working age lone male; lone mother household; elderly couple household; elderly lone male; elderly lone female.

54 The poverty measurement tool for this study is 50% of the median income poverty line. Bruce Heady and Diana Warren, Families, Incomes and Jobs, Volume 3: A Statistical Report on Waves 1 to 5 of the HILDA Survey (2008) p.55. Available at <http://www.melbourneinstitute.com/hilda/statreport/statreport-v3-2008.pdf> (viewed on 9 February 2009).

55 Robert Tanton, Yogi Vidyattama, Justine McNamara, Quoc Ngu Vu and Ann Harding, Old Single and Poor: Using Microsimulation and Microdata to Analyse Poverty and the Impact of Policy Change Among Older Australians (2008) p 15. Available at https://guard.canberra.edu.au/natsem/index.php?mode=download&file_id=880 (viewed 9 February 2009).

increase financial security across the lifecycle is a key priority for the Sex Discrimination Commissioner as part of her *Plan of Action Towards Gender Equality*.⁵⁶

The Australian Government is also undertaking a review of the Age Pension and the retirement income system. In the submission to Australia's Future Tax System, the Commission has expressed concern that that current system does not enable women to *equally* enjoy their right to social security and subsequently, *equally* enjoy their right to an adequate standard of living.⁵⁷

The Commission has recommended actions in the following areas to increase women's economic security in retirement:

- Remove barriers to women's labour market participation.
- Increase life-time earnings for women by reducing the gender pay gap.
- Extend initiatives to increase superannuation contributions for low income earners and those on welfare payments, including investigation of a system to recognise the value of unpaid caring work.
- Ensure the Age Pension protects individuals from poverty and fulfils Australia's international human rights obligations for women and men to equally enjoy a right to an adequate standard of living, and to social security.
- Regularly monitor and report on the gender impact of Federal budgets and reforms.
- Independently monitor and report on Australia's progress towards achieving substantive gender equality.

It is expected that the Australian Government will report on the review of the retirement income system and Age Pension by the end of 2009.

6.8 Paid maternity leave

Summary of issue

Australia does not provide for a national statutory right to paid maternity leave.

Relevance to Covenant: Articles 2(2), 3, 6 and 7.

⁵⁶ For further information see Human Rights and Equal Opportunity Commission, What matters to Australian women and men: Gender equality in 2008, The Listening Tour Community Report (2008). Available at http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html (viewed 9 February 2009).

⁵⁷ Australian Human Rights Commission, Submission to Australia's Future Tax System (Retirement Income System) (2009). Available at http://www.humanrights.gov.au/legal/submissions/2009/20090227_tax.html (viewed 6 April 2009).

In 2000, the Committee's Concluding Observations recommended that the 'State party consider enacting legislation on paid maternity leave and ratifying ILO Convention No. 103 concerning maternity protection.'⁵⁸

Australia remains one of only two OECD countries without minimum paid maternity leave entitlements, the other country being the United States.⁵⁹ Australia also retains its reservation under art 11(2)(b) of CEDAW regarding paid maternity leave.

The Commission welcomed the Federal Government's referral to the national Productivity Commission (the Federal Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians) of an inquiry into the introduction of Paid Maternity Leave, Paternity Leave and Parental Leave

The Commission made a detailed submission to the Productivity Commission's Inquiry.⁶⁰

The Productivity Commission released a draft report in September 2008 which recommended a federal government-funded universal scheme of 18 weeks paid leave for mothers and 2 weeks for fathers or supporting parents (in same sex relationships).⁶¹ The Commission made a supplementary submission in response to this draft report.⁶²

The Productivity Commission's final report was completed on 28 February 2008 and submitted to the Federal Government. The final report has yet to be publicly released.

At the present time, there is no indication as to whether the Australian Government will commit to implementing the final recommendations of the Productivity Commission regarding introduction of paid maternity leave, particularly in light of the current economic situation in Australia, and the context of the Global Financial Crisis.

The Commission continues to support introduction of paid maternity leave in order to fulfill the Australian Government's obligations regarding the right to non-discrimination in relation to women's rights, including the right to work. The Commission considers paid maternity leave would also act as an economic stimulus, and is an inexpensive reform that would maximise the ability for both men and women to retain workforce attachment into the future.

58 UN Committee on Economic Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia (2000), U.N. Doc E/C.12/1/Add.50, par 25.

59 Note that in the United States, whilst there is no federal statutory entitlement to paid maternity leave, the large states of California and New York State have each introduced statutory entitlements to paid parental leave.

60 See Human Rights and Equal Opportunity Commission, Submission to the Productivity Commission's Inquiry into Paid Maternity Leave, Paternity Leave and Parental Leave (June 2008). Go to http://www.hreoc.gov.au/legal/submissions/2008/20080602_productivity.html.

61 Productivity Commission, Paid Parental Leave: Support for Parents with Newborn Children Draft Report (September 2008). Go to <http://www.pc.gov.au/projects/inquiry/parentalsupport/draft>.

62 Human Rights and Equal Opportunity Commission, Submission to the Productivity Commission's Inquiry into Paid Maternity Leave, Paternity Leave and Parental Leave (November 2008). Go to http://www.hreoc.gov.au/legal/submissions/2008/20081124_maternity.html.

The draft proposal by the Productivity Commission is reasonable, and affordable. The cost to the Australian taxpayer is estimated to be \$452 million, a modest increase of two per cent over Australia's current overall spending on family payments.

It is important to note that, while Australia is the number one country for women's educational attainment, there is a serious lag on women's workforce participation, with Australia ranked only 40th in the world, behind the UK, New Zealand and Canada.⁶³ Paid maternity leave is an important measure to improve the ability of women to participate in paid work.

The Commission recommends that the Australian Government introduce a national statutory scheme of paid parental leave, including paid maternity leave [Recommendation 7].

6.9 Gender pay gap

Summary of Issue

There is a gender pay gap in Australia, with female workers earning 16.7% less than male workers. The gender pay gap has slightly widened in recent years.

Relevance to Covenant: Articles 2(2), 3 and 7

The gender pay gap in Australia is measured using data on average weekly earnings collected by the Australian Bureau of Statistics. In August 2008, women working full time were earning 83.3% in the male dollar – this equates to a 16.7% pay gap. And then, when part-time and casual work is included, women were earning around two thirds of what men earn. Although the pay gap for full time earnings has hovered between 15-19 percentage points in the last three decades, in recent years the gender pay gap has widened slightly.⁶⁴

Breaking the gender pay gap down by industry in Australia, the hospitality industry has the smallest pay gap at 1.1%, followed by government at 2.2%. The industries with the largest pay gap are the finance and insurance industries (24.7%) and mining (22.3%).⁶⁵

A recent report looking at the pay of top earners in Australian companies shows that there is a large gender pay gap at the highest levels of large Australian companies. Women hold just seven percent of the top earner positions (80 out of 1136). Female

63 World Economic Forum, Global Gender Gap Report 2008. Go to <http://www.weforum.org/en/Communities/Women%20Leaders%20and%20Gender%20Parity/GenderGapNetwork/index.htm>.

64 Australian Bureau of Statistics, Average Weekly Earnings, August 2008, Cat no. 6302.0 (2008). Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0/> (viewed 23 February 2009).

65 Department of Education, Employment and Workplace Relations, Submission to the House of Representatives Standing Committee on Employment and Workplace Relations On Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce (2008). Available at <http://www.aph.gov.au/house/committee/ewr/payequity/subs/sub58.pdf> (viewed 23 February 2009).

Chief Financial Officers and Chief Operating Officers earn just half of what their male counterparts earn. In Chief Executive Officer positions, a female earns two thirds of the salary earned by her male counterpart.⁶⁶

The Commission welcomes the House of Representatives Inquiry into Pay Equity and associated issues related to increasing female participation in the workforce, and has made a submission to this Inquiry.⁶⁷ The Commission has recommended that the Australian Government:

- Amend the *Sex Discrimination Act 1984* (Cth) in accordance with the recommendations of the Senate Inquiry Report into the Effectiveness of the Sex Discrimination Act 1984 (Cth) (2008),⁶⁸ particularly to: provide for full protection from discrimination in employment on the grounds of family and carer responsibilities; impose a positive duty on employers to reasonably accommodate the needs of workers in relation to pregnancy or family and carer responsibilities; and expand the powers of the Commission and the Sex Discrimination Commissioner to undertake inquiries, and to initiate complaints;
- Amend the federal industrial relations laws (formally the *Workplace Relations Act 1996* (Cth) which the Federal Government is replacing with the *Fair Work Act 2009* (Cth)), in relation to equal remuneration provisions;
- Improve national institutional arrangements, and data collection and monitoring mechanisms, including providing for the Commission to independently monitor and regularly report on progress in achieving gender equality at the national level; and
- Increase funding to the Commission to enable it to exercise its existing and proposed new powers and functions in this area.

The Commission welcomes the new equal remuneration provisions in the *Fair Work Act 2009* (Cth) which have substantially adopted the Commission's proposals for legislative reform in this area.

The Commission recommends that the Australian Government take further action to close the gender pay gap in Australia, including implementation of the Commission's proposals to the *House of Representatives Inquiry into Pay Equity* [Recommendation 8].

7. Land rights, native title rights and environmental management

66 Equal Opportunity for Women in the Workplace Agency, Gender Income Distribution of Top Earners in ASX200 Companies, 2006 EOWA Census of Women in Leadership, 25 January 2007. Available at

http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2006_Australian_Women_In_Leadership_Census/Top_Earner_Report/Media_Kit.asp (viewed 23 February 2009).

67 Australian Human Rights Commission, Submission to House of Representatives Inquiry into Pay Equity (September 2008). Go to

http://www.hreoc.gov.au/legal/submissions/2008/20080923_pay_equity.html.

68 Senate Committee on Legal and Constitutional Affairs, Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (2008). Go to

http://www.aph.gov.au/SEnate/committee/legcon_ctte/sex_discrim/report/index.htm.

7.1 Native Title System Reform

Summary of Issue

The *Native Title Act 1993* (Cth) (Native Title Act) is the primary mechanism through which Aboriginal and Torres Strait Islander people access their cultural rights to land. The Act was intended to advance and protect Indigenous peoples by recognising their traditional rights and interests in the land.⁶⁹

However, in practice, there are a number of limitations of the native title system such as:

- The courts have construed the Native Title Act as requiring that Indigenous peoples claiming native title need to prove traditional laws and customs at sovereignty and their continued observance generation by generation until today.⁷⁰ One of the cruel consequences is that the greater the impact of colonisation on Indigenous peoples (for example, if they were forcibly removed from their land), the less likely that they will be able to prove native title under Australian law.
- Indigenous peoples bear the burden of proof and strict rules of evidence generally apply. The result is that Indigenous peoples whose culture is based on the oral transmission of knowledge, must prove every aspect, including the content of the law, and custom and genealogy, back to the date of sovereignty (up to almost 200 years) in a legal system based on written evidence.
- Only the traditional laws and customs that existed at the time of sovereignty and which are still observed and practiced today will be recognised. There is little room for revival of cultural traditions or adaptation of the traditions to today.⁷¹ Similarly, the rights recognised are severely limited in terms of how Indigenous peoples can utilise any resources associated with that land for economic or social benefit.

The reforms to the Native Title system do not reach far enough to overcome the limitations of the native title system or enable the full realisation of rights to land and culture.

69 Native Title Act 1993 (Cth), Preamble.

70 *Bodney v Bennell* [2008] FCAFC 63, 89 (Finn, Sundberg and Mansfield JJ); affirming *Risk v Northern Territory of Australia* [2006] FCA 404, 97(c) (Mansfield J).

71 See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, 25-26 (Gleeson CJ, Gummow and Hayne JJ) for the High Court's comments on the Full Federal Court's consideration of 'traditional'. See also paragraphs 44, 78-89 of that decision for what level of adaptation of traditional law and custom is allowed for in the law. See *Native Title Reports 2007*, pp 178- 181 and *Native Title Report 2008*, pp 87-88 for commentary on the limitations of the the Native Title Act to recognise or allow for revitalisation of culture, and limited adaptation of cultural traditions. See also M Barcham, 'The limits of recognition' in B Smith and F Morphy (eds), *The social effects of native title: recognition, translation, coexistence* (2007) and S Young, *The trouble with tradition* (2008). See Chief Justice Robert French, 'Lifting the burden of native title – some modest proposals for improvement' Federal Court, Native Title User Group, Adelaide, 9 July 2008, copy available at: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf for comments on revitalisation of culture.

Relevance to Covenant: Articles 11 and 15

Native Title reforms which were announced in 2005 have resulted in the *Native Title Amendment Act 2007* and the *Native title Amendment (Technical Amendments) Act 2007*.

The *Native Title Reports 2007* and *2008* provided detailed discussion and a number of recommendations regarding the Native Title Reforms. The Aboriginal and Torres Strait Islander Social Justice Commissioner has expressed concerns that the reforms announced by the Australian Government in 2005 do not ensure any significant improvement in outcomes for Aboriginal and Torres Strait Islander peoples.⁷² Of particular concern is:

- the extent to which the reforms will impact on the realisation of the human rights of Aboriginal and Torres Strait Islander Peoples
- the failure to place the recognition and protection of native title at the centre of the government's reform agenda. Instead, the changes were directed at achieving a more efficient and effective native title system
- the failure to provide a mechanism to review the implementation of the changes.⁷³

To date, the Attorney-General has not formally responded to the *Native Title Reports 2007* and *2008* or advised the Commission of the Australian Government's position in relation to its recommendations.

The CERD Committee in its concluding observations in 2005 expressed its concerns on many of the issues raised in the Native Title Reports referred to above:

The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention.

The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples

⁷² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 24-27.

⁷³ R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.

with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.⁷⁴

While the Commission notes that the previous Government has provided a response to some of the Committee's concerns, many of the concerns raised by the Committee have not been addressed. These are:

- That the 1998 amendments to the Native Title Act rolled back some protections previously offered to Indigenous peoples and provide legal certainty for Government and third parties at the expense of Indigenous title.
- That the burden of proof for Indigenous peoples in Australia continues to be a significant barrier to Indigenous peoples' success in achieving a determination that native title exists.

7.2 Land Rights under the Northern Territory Emergency Response (NTER)

Summary of Issue

The NTER legislation has allowed the federal government to acquire a wide range of interests in land. For example, while generally, any rights, titles or interests that existed in relation to lands to be covered by a five-year lease immediately before the lease is to take effect are preserved, the federal minister may, at any time, terminate the right, title or interest by giving notice in writing to the person who holds it.⁷⁵

The NTER legislation reduces the protection of Aboriginal people's rights and interests in their traditional lands as provided by both the Aboriginal Land Rights Act and the Native Title Act. This legislation also impacts on the ability for those Aboriginal people affected to leverage economic, social and cultural development through the future acts regime.

Relevance to Covenant: Articles 11 and 15

The NTER legislation has allowed the federal government to acquire a wide range of interests in land. For example, while generally, any rights, titles or interests that existed in relation to lands to be covered by a five-year lease immediately before the lease is to take effect are preserved, the federal minister may, at any time, terminate the right, title or interest by giving notice in writing to the person who holds it.⁷⁶

The rights, titles and interests the federal government has acquired include:

- compulsory acquisition of five-year leases over certain lands
- control of leases for town camps in Darwin, Katherine, Tennant Creek and Alice Springs including the power to forfeit the lease and resume the land

74 Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia (2005), UN Doc CERD/C/AUS/CO/14, par 16. At: <http://www.hreoc.gov.au/legal/submissions/cerd/report.html> (viewed 24 March 2009).

75 NTNER Act, s37(1)(a).

76 NTNER Act, s37(1)(a).

- power to acquire all rights, titles and interests in the land subject to a town camp lease
- rights in construction areas, and buildings and infrastructure constructed on Aboriginal land.

The High court in its decision on *Wurridjal v the Commonwealth*⁷⁷ (February 2009) held that the Constitution required any acquisition under the Northern Territory Emergency Response legislation to be on 'just terms'. The court further held that there had been an acquisition of property under the legislation and that the laws provided for just terms for any acquisition. The court also found that the statutory formula provided for in the NTER legislation provided for 'just terms'.

Additionally, Schedule IV of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), modifies the existing permit system for Aboriginal land in the Northern Territory set out by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ALRA by giving the Northern Territory Legislative Assembly the power to make laws authorising entry onto Aboriginal land. Schedule IV also gives the administrator of the Northern Territory the power to declare an area of Aboriginal land to be an area not requiring a permit for entry.

The removal of the permit system affected specified townships - prescribed areas and roads but it did not affect all areas. Sacred sites and land outside the identified areas still required permits. The removal of the permit system, consequently removed the capacity for Aboriginal Northern Territorians to exercise self-determination and self governance on their lands and territories.

The Commission supports the view that the blanket removal of the permit system on roads, community common areas and other places is not an appropriate measure and does not have a sufficient relationship to the purpose of the legislation to qualify as a special measure. In the absence of contrary evidence, these provisions should be repealed.

With regard to the implications for the operation of the native title system, the preservation of pre-existing rights, titles or other interests does not apply to native title rights and interests. Any native title rights and interests, to the extent that they may occur over the area covered by a five year lease, are not expressly preserved by the legislation.

While the legislation states that the non-extinguishment principle⁷⁸ applies to the granting of a five year lease and other specified acts as determined by the NTER legislation, the legislation does ensure the suspension of the future acts regime.⁷⁹

⁷⁷ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009)

⁷⁸ NTNER Act s51(2). The non-extinguishment principle is set out in s 238 Native Title Act 1993 (Cth). In essence, where the non-extinguishment principle is said to apply then if the act affects any native title in relation to the land or waters concerned the native title is nevertheless not extinguished, either wholly or partly by the act.

The future act regime provided for in Part 2, Division 3 of the Native Title Act, provides for procedures to be followed to ensure that a future act is valid and prescribes the affect of future acts on any native title rights and interests. The preamble to the Native Title Act states:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and, if whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

In some cases compliance with procedural requirements is a precondition for a future act to be valid. Notification to those who hold, or may hold, native title in the land in question may be required and the parties may be required to negotiate in good faith for the doing of the act. Where procedural requirements must be followed, failure to do so will mean that the future act is invalid.⁸⁰

The NTER legislative amendments to the ALRA displace the protection given in Section 71 of the ALRA, to the traditional rights of use and occupation of Aboriginal land. In effect, an Aboriginal or group of Aboriginals is no longer entitled to enter upon Aboriginal land and use or occupy that land in accordance with Section 71(1) of the ALRA if to do so would interfere with the use or enjoyment of the statutory rights of a government (or authority or a third party with a permit to exercise those rights) acquired under Part IIB of the ALRA.

The NTER legislation significantly reduces the protection of Aboriginal people's rights and interests in their traditional lands as provided by both the ALRA and the Native Title Act. However, this legislation also impacts on the ability for those Aboriginal people affected to leverage economic, social and cultural development through the future acts regime.

7.3 Indigenous participation in environmental management

Indigenous participation in the management of environment, cultural heritage and climate change Indigenous Australians have had very limited influence in decision-making affecting their natural environment and their means of subsistence. For example, while the Australian Government has been developing a policy for climate change, and while they developed laws and policies for water use and access, there has been minimal consultation or discussion with Indigenous peoples.

79 NTNER s51(1). Provides that Part 2, Division 4 of the Native Title Act 1993 (Cth) which deals with future acts, does not apply. A 'future act' is an act ('act' is defined in s226 of the Native Title Act) which affects native title (or would affect native title if it were valid) and: consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993; or is any other act taking place on or after 1 January 1994.

80 Native Title Act 1993 (Cth), s28. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 2007, Australian Human Rights Commission (2008), p 201. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

8 Housing

Summary of issue:

Indigenous peoples are likely to experience homelessness because of the high levels of social and economic disadvantage. According to the 2006 Census, there were 4116 Indigenous peoples who were homeless on Census night.⁸¹ In every state and territory, Indigenous clients of SAAP services were substantially over-represented relative to the proportion of Indigenous peoples in those jurisdictions.⁸²

Relevance to Convention: Article 11

In 2006, the Special Rapporteur on Adequate Housing identified that there was an Indigenous housing crisis in Australia. He argued that the following factors have led to a 'severe housing crisis' which is likely to worsen in coming years as a result of the rapid rate of population growth in Indigenous communities:

- lack of affordable and culturally appropriate housing
- lack of appropriate support services
- significant levels of poverty
- underlying discrimination.⁸³

Further factors that contribute to Indigenous homelessness include:

- Many Indigenous peoples enter poverty and homelessness as a result of poor educational and employment opportunities
- Indigenous peoples are vulnerable to homelessness when they are forced to move in order to access employment and income support
- The removal or temporary suspension of welfare benefits can increase the chances of an Indigenous person becoming homeless
- A survey of housing in the Northern Territory by Professor Torzillo found that 65% of houses surveyed in remote communities did not have a working shower. Such inadequate housing can severely impact on the health of residents. While initiatives to improve health through better housing, like the 'Fixing Houses for Better Health' program, are to be applauded, there is still a long way to go to close the gap in Indigenous and non-Indigenous housing and health outcomes.
- The amendments to the *Aboriginal Land Rights Act 1976* (NT) were a point of concern noted by the Special Rapporteur, as contributing to inadequate housing, by undermining security of tenure. The *Social Justice Report 2007* also outlined concerns about the compulsory acquisition of property without the provision of just terms compensation as further undermining security of tenure on a community-wide level.

81 ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, p46.

82 ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, p47.

83 Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Addendum - Mission to Australia (31 July to 15 August 2006), U.N. Doc. A/HRC/4/18/Add.2, 11 May 2007, para 80, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/72/PDF/G0712572.pdf?OpenElement>.

- Ensuring that housing is culturally appropriate is necessary to make a difference to Indigenous homelessness. This means that consultation must occur with local people to ensure that housing design meets local cultural and environmental needs.⁸⁴

9 Health

9.1 Impact on mandatory immigration detention on health

Summary of issue:

The Commission's 2008 immigration detention report reveals that, despite improvements in conditions in immigration detention facilities, some people are still being detained for prolonged and indefinite periods of time. It is well-established that detaining people in these circumstances leads to negative impacts on their mental health. As a result, the Commission has repeatedly recommended the repeal of the mandatory immigration detention system, which requires the detention of all unauthorised arrivals, without the opportunity for judicial review of the need to detain.

The Commission has welcomed the Australian Government's announcement in 2008 of new directions in the immigration detention system. However, until the new values announced by the Australian Government are translated into policy, practice and legislative change, the Commission is concerned that prolonged and indefinite detention will continue to occur, with negative impacts on health.

Relevance to Convention: Articles 10 and 12

a) Impact of prolonged and indefinite detention on health

Since 1992, the *Migration Act 1958* (Cth) (Migration Act) has made it mandatory, under s 189, for any person in Australia without a valid visa to be detained. Section 196 requires that, once detained, unlawful non-citizens must be kept in detention unless they are removed or deported from Australia, or granted a visa.

While there are some mechanisms in place to release people onto bridging visas, or into alternative forms of detention,⁸⁵ in practice most unlawful non-citizens are detained in immigration detention facilities for a significant period of time. Further, the need to detain is not subject to review by the courts.

⁸⁴ The CESCR has noted that cultural adequacy is an essential aspect of housing adequacy: "the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing": CESCR, General Comment 4: The right to adequate housing, para 8(g).

⁸⁵ The Minister has the discretion to release people on visas. He or she also has the power to place detainees into community detention on Residence Determinations or into alternative detention arrangements.

On 13 January 2009 the Commission released the *2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities*.⁸⁶ The Commission conducts annual visits to immigration detention facilities to monitor conditions, with the aim of ensuring they meet internationally recognised human rights standards. This report follows the Commission's 2006 and 2007 annual inspection reports.

The Commission's 2008 inspection report shows that, despite improvements in the physical conditions of immigration detention facilities over the past few years, the most critical human rights issue remains: some people are being detained for prolonged and indefinite periods, without knowing when they will be released or whether they will be allowed to stay in Australia when that happens. It is well established that detaining people in these circumstances leads to negative impacts on their mental health.⁸⁷

The Commission has noted in its past two annual inspection reports, and in previous National Inquiries, that this continues to be a fundamental problem which cannot be adequately addressed by the delivery of mental health services in immigration detention.⁸⁸ This is because, often, the detention itself causes or exacerbates mental health concerns. Mental health staff have little control over the length of detention, so they cannot effectively address this cause of distress for detainees.

The Commission has consistently called for the repeal of the mandatory detention system in Australia, in part because of the devastating effects it has had, and continues to have, on the mental health and well-being of people detained.

b) Changes to immigration detention

In July 2008, the federal Minister for Immigration and Citizenship announced new directions for Australia's immigration detention system.⁸⁹ The new directions are based on seven key values. Of these values, the Commission welcomes the following:

- Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review.
- Detention in immigration detention centres is only to be used as a last resort and for the shortest practicable time.
- Children and, where possible, their families, will not be detained in an immigration detention centre.

86 Australian Human Rights Commission, 2008 Immigration detention report: Summary of observations following visits to Australia's immigration detention facilities, 2008, at www.humanrights.gov.au/human_rights/immigration/idc2008.html.

87 See, for example A last resort, note 9, chapter 9.

88 See Human Rights and Equal Opportunity Commission's 2006 and 2007 Summary of Observations following the inspection of Mainland Immigration detention Facilities; A last resort? : National Inquiry into Children in Immigration detention, 2004; and Those who've come across the seas, 1997.

89 C Evans, New Directions in Detention – Restoring Integrity to Australia's Immigration System (Speech delivered at the Centre for International and Public Law Seminar, ANU, Canberra, 29 July 2008).

- People in detention will be treated fairly and reasonably within the law.
- Conditions of detention will ensure the inherent dignity of the human person.

While the Commission welcomes the statement of the above values, it hopes to see them translated into policy, practice and legislative change as soon as possible.

The legal architecture of the mandatory immigration detention system remains in place. There are fewer people in immigration detention and the number of long-term detainees is decreasing. However, some people are still held for long and indefinite periods. During its 2008 visits, the Commission met with people who had been in detention for periods of up to six years. As discussed above, prolonged and indefinite immigration detention has led to significant health concerns.

With respect to children in immigration detention, the Commission's 2004 report of its Inquiry into Children in Immigration Detention – *A last resort?* - found that Australia failed to ensure that children and parents in immigration detention centres could enjoy the right to the highest attainable standard of physical and mental health. The Australian Government's immigration detention policy was ameliorated in 2005 so that most children were released from the more secure closed immigration detention centres. However, some children continue to be held in alternative forms of closed immigration detention for periods of time, both on the mainland and on Christmas Island. While the physical environment of these places of detention is highly preferable to the more secure closed immigration detention centres, the psychological effects of being detained are similar. For children and their families, these facilities are inappropriate for anything but the briefest of periods.

The Commission recommends:

- **Australia's mandatory detention law be repealed [Recommendation 9].**
- **the Migration Act be amended so that immigration detention occurs only when necessary. Detention should be the exception, not the norm. It must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the aims outlined in international law. These limited grounds for detention should be clearly prescribed in the Migration Act [Recommendation 10].**
- **the Migration Act be amended so that the decision to detain a person is subject to prompt review by a court, in accordance with international law [Recommendation 11].**
- **the Migration Act be amended to include periodic independent reviews of the ongoing need to detain an individual, and a maximum time limit for detention [Recommendation 12].**
- **children only be detained as a measure of last resort and for the shortest appropriate period of time [Recommendation 13].**

9.2 Indigenous health inequality

Summary of Issue

The Close the Gap Campaign and the closing the gap commitments of all Australian governments have the potential to be a turning point in Indigenous affairs in Australia. The government has already made substantial investments, backed up by emerging health system reforms. They have elevated the urgency of dealing with the Indigenous health crisis to a national priority and one that shares bipartisan support.

The groundwork has now been laid to make inroads into this longstanding issue. It is, however, a task that will take a generation. And there remains significant work to be done. This includes:

- the creation of a new partnership between Indigenous Australians and their representatives and Australian governments to underpin the national effort to achieve Indigenous health equality;
- the development of an appropriately funded, long-term national plan of action to achieve Indigenous health equality, in part to coordinate the many different streams of activity underway that have the potential to contribute to that end; and
- the establishment of adequate mechanisms to coordinate and monitor the multiple service delivery roles of governments that impact on Indigenous health, and to monitor progress towards the achievement of Indigenous health equality.

Relevance to convention: Article 12

a) The Close the Gap Campaign on Indigenous health inequality

The adoption of targeted approaches to Indigenous health equality was substantially progressed by the establishment of the Close the Gap Campaign for Indigenous Health Equality.⁹⁰ This is a historic event, being the first time that such authoritative and influential peak bodies and key organisations from Australian civil society have worked together in partnership in such a sustained manner towards a single goal - Indigenous health equality.

Indigenous leadership, and the leadership of the Indigenous health peak bodies in particular, has also been a hallmark of the Close the Gap Campaign. Through these members in particular, the Campaign draws on a support base from within the Indigenous community.

In March 2008, the Australian Government also signed a historic *Close the Gap Statement of Intent* in which it committed with the Campaign partners:

90 The Close the Gap Campaign partners are: Australian General Practice Network; Australian Human Rights Commission; Australian Indigenous Doctors' Association; Australian Medical Association; Australians for Native Title and Reconciliation; Congress of Aboriginal and Torres Strait Islander Nurses; Cooperative Research Centre for Aboriginal Health; Fred Hollows Foundation; Heart Foundation; Indigenous Dentists' Association of Australia; Menzies School of Health Research; National Aboriginal Community Controlled Health Organisation; Oxfam Australia; Royal Australasian College of Physicians; Royal Australian College of General Practitioners; and Torres Strait Island and Northern Peninsula District Health Service.

- To developing a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non- Indigenous Australians by 2030.
- To ensuring primary health care services and health infrastructure for Aboriginal and Torres Strait Islander peoples which are capable of bridging the gap in health standards by 2018.
- To ensuring the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs.
- To working collectively to systematically address the social determinants that impact on achieving health equality for Aboriginal and Torres Strait Islander peoples.
- To building on the evidence base and supporting what works in Aboriginal and Torres Strait Islander health, and relevant international experience.
- To supporting and developing Aboriginal and Torres Strait Islander community-controlled health services in urban, rural and remote areas in order to achieve lasting improvements in Aboriginal and Torres Strait Islander health and wellbeing.
- To achieving improved access to, and outcomes from, mainstream services for Aboriginal and Torres Strait Islander peoples.
- To respect and promote the rights of Aboriginal and Torres Strait Islander peoples, including by ensuring that health services are available, appropriate, accessible, affordable, and of good quality.
- To measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.⁹¹

Since then, the *Close the Gap Statement of Intent* has received bi-partisan support from the Parliaments of Victoria and Queensland. Efforts are underway for every Australian government to have signed the Statement of Intent in 2009.

The *Close the Gap Statement of Intent* is one of the most significant compacts between Australian governments and civil society in Australian history. There was substantial support given it by the health peak professional bodies whose members play a central role in the delivery of primary health care services.

b) National Indigenous Health Equality Targets

91 Close the Gap National Indigenous Health Equality Summit Statement of Intent, 20 March 2008
http://humanrights.gov.au/social_justice/health/statement_intent.html.

National Indigenous Health Equality Targets were also developed by the Close the Gap Campaign partners over a period of six months by three working groups. A notable Indigenous person with extensive health experience led each working group.⁹² The targets working groups drew on the expertise of a wide range of health experts, and, in particular, Indigenous health experts.⁹³

The following considerations framed the thinking of the Steering Committee and the assisting experts when developing targets:

- What targets (if achieved) will reduce disparity to the greatest degree?
- What targets (if achieved) will improve health outcomes to the greatest degree? What is the disease-specific burden experienced by Indigenous populations?
- Can the current/future indicators adequately measure whether or not the target has been reached, or if significant additional investment, infrastructure or capacity required?
- To what targets can government be held to account for as their primary responsibility?

The targets represent the ‘industry perspective’ on what needs to be done and the time frame for doing so in relation to achieving Indigenous health. As noted, this

92 Dr Mick Adams, Chair, National Aboriginal Community Controlled Health Organisation; Associate Professor Dr Noel Hayman, Indigenous Health Committee of the Royal Australasian College of Physicians; and Dr Ngjare Brown, then at the Menzies School of Health Research.

93 The following assisted with the creation of the targets -- Dr Christopher Bourke, Indigenous Dentists’ Association of Australia; Ms Vicki Bradford, Congress of Aboriginal and Torres Strait Islander Nurses; Mr Tom Brideson, Charles Sturt University’s Djirruwang Aboriginal and Torres Strait Islander mental health program; Dr David Brockman, National Centre in HIV Epidemiology and Clinical Research; Dr Alex Brown, Baker IDI Heart and Diabetes Institute; Professor Jonathon Carapetis, Menzies School of Health Research; Dr Alan Cass, The George Institute for International Health; Professor Anne Chang, The Queensland Centre for Evidence Based Nursing and Midwifery; Dr Margaret Chirgwin, National Aboriginal Community Controlled Health Organisation; Dr John Condon, Menzies School of Health Research; Mr Henry Councillor, former National Aboriginal Community Controlled Health Organisation; Dr Sophie Couzos, National Aboriginal Community Controlled Health Organisation; Professor Sandra Eades, Sax Institute; Ms Dea Delaney Thiele, National Aboriginal Community Controlled Health Organisation; Mr Mick Gooda, Cooperative Research Centre for Aboriginal Health; Dr Sally Goold OAM, Chair, Congress of Aboriginal and Torres Strait Islander Nurses; Ms Mary Guthrie, Australian Indigenous Doctors’ Association; Associate Professor Colleen Hayward, Kulunga Research Network and Curtin University; Ms Dawn Ivinson, Royal Australasian College of Physicians; Dr Kelvin Kong, Australian Indigenous Doctors’ Association; Dr Marlene Kong, Australian Indigenous Doctors Association; Mr Traven Lea, Heart Foundation; Dr Tamara Mackean, Australian Indigenous Doctors’ Association; Dr Naomi Mayers, National Aboriginal Community Controlled Organisation; Mr Romlie Mokak, Australian Indigenous Doctors’ Association; Professor Helen Milroy, Associate Professor and Director for the Centre for Aboriginal Medical and Dental Health; Professor Kerin O’Dea, Menzies School of Health Research; Dr Katherine O’Donoghue, Indigenous Dentists’ Association of Australia; Ms Mary Osborn, Royal Australasian College of Physicians; Professor Paul Pholeros AM, University of Sydney; Professor Ian Ring, Professorial Fellow, Faculty of Commerce, Centre for Health Services Development, University of Wollongong; Professor Fiona Stanley AC, Telethon Institute for Child Health Research; Professor Paul Torzillo AM, Department of Respiratory Medicine, Royal Prince Alfred Hospital; Dr James Ward, Collaborative Centre for Aboriginal Health Promotion; Ms Beth Warner, Royal Australasian College of Physicians; Associate Professor Ted Wilkes, National Indigenous Drug and Alcohol Committee of the Australian National Council on Drugs; and Dr Mark Wenitong, Australian Indigenous Doctors’ Association.

unprecedented body of work is intended to be the basis of negotiations with Australian governments as to the main elements and time frames of a national plan to achieve Indigenous health equality by 2030.

The targets identify the following five key subject areas for target setting as priorities, and the key elements of any national plan to achieve Indigenous health equality:

- Partnership;
- Health status;
- Primary health care and other health services;
- Infrastructure; and
- Social and cultural determinants (currently under development).

The integration of the Close the Gap targets into policy settings remains an ongoing concern of the Campaign partners. The targets in the Statement of Intent, for example, are still not reflected in the government's *Overcoming Indigenous Disadvantage Framework*.

c) Partnership with Indigenous organisations

A further concern of the Campaign partners remains in relation to partnership and the achievement of Indigenous health equality. While the Campaign partners have therefore been encouraged by the commitments to partnerships including by the Prime Minister in the *Apology to Australia's Indigenous Peoples*⁹⁴ there are few signs that the Australian Government is otherwise embracing a partnership approach. In part, this could be because the Australian Government is waiting for the establishment of the national Indigenous representative body as a vehicle for partnership.

When talking of partnership, the Steering Committee see this as meaning partnership between:

- Indigenous peoples and their representatives;
- Australian governments (with an internal, cross sectoral dimension; and at the intergovernmental level); and
- Key players in the Indigenous and non-Indigenous health sector.

The Steering Committee has identified partnership as being so fundamental to the achievement of Indigenous health equality that they included partnership targets in the *National Indigenous Health Equality Targets*. These targets propose that within 2 years (meaning by the end of 2009):

- A National Framework Agreement to secure the appropriate engagement of Aboriginal people and their representative bodies in the design and delivery of accessible, culturally appropriate and quality primary health care services is established; and

94 Prime Minister, Kevin Rudd MP, Apology to Australia's Indigenous Peoples, 13 February 2008.

- That nationally agreed frameworks exist to secure the appropriate engagement of Aboriginal people in the design and delivery of secondary care services.⁹⁵

The Steering Committee believes that Australian governments are aspiring to engage with Indigenous peoples more effectively as partners. The challenge is to identify *how* this is to be achieved.

Particularly in relation to a national primary health care strategy, Aboriginal representative bodies must be active participants in development and implementation. Aboriginal community controlled health services must be involved in health planning at the local and regional level with the National Aboriginal Community Controlled Health Organisation, and State/Territory NACCHO Affiliates at national and jurisdictional levels respectively. Where relevant, additional partners would include the Indigenous health professional bodies and a national Indigenous representative body when it is established.

10 Education

10.1 Indigenous education

Summary of Issue

While some small improvements have been made in the education outcomes of Indigenous students in Australia schools, the disparity of outcomes for remote students compared with their urban counterparts remains unacceptable. The provision of quality education services in remote Australia continues to be of concern.

Relevance to Covenant: Articles 13 and 14

a) The provision of education in remote Australia

The vast majority of the Australian continent is defined as remote or very remote. In 2006 there were 1,187 discrete Indigenous communities in Australia with 1,008 of these communities in very remote areas. Of the very remote communities, 767 had population sizes of less than 50 persons. In 2006 there were 69,253 Indigenous peoples living in very remote Australia.⁹⁶

95 Aboriginal and Torres Strait Islander Social Justice Commissioner and the Close the Gap Steering Committee for Indigenous Health Equality for Indigenous Health Equality for Indigenous Health Equality National Indigenous Health Equality Targets, Human Rights and Equal Opportunity Commission, Sydney, 2008., p22. Available online at: http://humanrights.gov.au/soial_justice/health/targets/index.html.

96 A Fordham, R Schwab, Summarising: Fordham, Preliminary analyses of access to education and discrete Indigenous communities in Australia, Reference No. 48, Centre for Aboriginal Economic Policy Research (2006). At <http://www.anu.edu.au/caepr/educationfutures/ref048.pdf> (viewed 18 September 2008). Data Source: ABS 2006 Community Housing and Infrastructure Needs Survey (CHINS) of Aboriginal and Torres Strait Islander communities

31 percent of Indigenous Australians live in major cities and 24 percent live in remote and very remote Australia.⁹⁷ The remainder of the Indigenous population lives in regional centres. The Accessibility/Remoteness Index of Australia describes remote and very remote locations as having very little accessibility of goods, services and opportunities for social interaction.⁹⁸

Remoteness has obvious implications for school education, including limiting access to early childhood services, primary and secondary schools as well as other resources such as libraries and information technology. In remote areas, road access may be limited during times of the year and during wet season there may be no access for months on end. If internet access is available in remote Australia, it is usually via satellite, offering a dial-up service with limited and slow internet speeds.

In some remote areas there is a very poor or part time primary school service and in others there is no service at all. Of great concern is the fact that the Australian Government has no instrument to assess the extent to which remote students have reasonable access to schools services. The poor educational outcomes for this cohort suggest that action must be taken to assess and remedy this situation. Assessing school accessibility for remote students by region is one essential future action to which the Australian Government must commit. Such action is a starting point to address the poor outcomes as described *Review of Government Service Provision* to Indigenous Australians.

Indigenous children in remote areas have, on average, much lower rates of school attendance, achievement and retention than Indigenous children in urban areas and other Australian children (Storry 2006). In remote areas of the NT, only 3 to 4 per cent of Indigenous students achieved the national reading benchmark in 1999 (ANAO 2002).⁹⁹

At this time Australia has no accurate national data to assess the number of Indigenous school-aged children who have access or **no** access to a school within travelling distance. In the Northern Territory, where the total Indigenous population is approximately 68,000, there are conservatively estimated to be 2,000 Indigenous school-aged children with no access to a school. It is believed that these young people are not attending school.

In Australia, secondary education is not generally available in locations with small populations. The majority of small, remote communities in Australia are known as

97 Australian Bureau of Statistics, 4705.0 - Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument> (viewed 19 January 2009).

98 Measuring Remoteness: Accessibility/Remoteness Index of Australia (ARIA), Revised Edition, Occasional Papers: New Series Number 14, (2001), p. 19 At [http://www.health.gov.au/internet/main/publishing.nsf/Content/7B1A5FA525DD0D39CA25748200048131/\\$File/ocpanew14.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/7B1A5FA525DD0D39CA25748200048131/$File/ocpanew14.pdf) (viewed 21 September 2008).

99 Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage: Key Indicators 2007 Report (2007), Section 6. At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2007/keyindicators2007.pdf> (viewed 20 March 2009).

Indigenous Homelands. Homelands are made up of Aboriginal clan families who live on ancestral lands, usually in very remote parts of Australia.

In 2006 the number of discrete Indigenous communities spread across Australia was 1,187. Of this number 767 Indigenous communities were in very remote locations with a usual population of less than 50 persons. These communities are not likely to have schools, or if they do, the school is most likely to provide primary level education with a visiting teacher who attends for a number of days each fortnight. In many cases the communities have limited infrastructure, no power or running water.

The Commission recommends the Australian Government audit populations and projected populations of remote preschool and school-aged children and assess whether the existing education infrastructure and services meets the needs of remote Indigenous populations. Where the school provision does not meet population needs, the government should develop a national, funded plan to upgrade or build quality preschool, primary and secondary school infrastructure where populations warrant them [Recommendation 14].

b) Bilingual education

Apart from some notable exceptions, most government and non-government schools in Australia provide a Western model of education. They follow a Western calendar, celebrate Christian holidays and provide education that reinforces Western culture and ways of learning.¹⁰⁰ Assimilation and the forces of mainstream culture mean that any Indigenous-focussed study is directed to teaching a past history and (in some rare instances) revitalising Indigenous languages that are no longer spoken. Indigenous culture is usually taught through a history syllabus. The revitalisation of Indigenous language and culture occurs at the margins of mainstream education, if at all.

Previous government policies of assimilation and the prevailing 'mainstream' Western cultural approach to culture in schools has all but eliminated Indigenous culture and languages in the densely populated areas of Australia. Of the estimated 250 original Indigenous languages that existed in Australia prior to colonisation, less than 20 languages exist as full languages and are considered to be safe in terms of their continuation.

Bilingual education is considered to be one way to keep Indigenous language and culture alive. Of the 9,581 schools that exist in Australia today, nine schools are Bilingual schools, instructing students in their first Indigenous language.

In 2009 the Northern Territory Government implemented a policy which makes it mandatory for schools to begin each school day with four hours of English literacy. The impact of this policy will be felt most markedly by the Bilingual schools. In fact, the four hours of English is likely to destroy the Bilingual education model. Dismantling Bilingual education potentially endangers some of the remaining Indigenous languages.

100 Human Rights and Equal Opportunity Commission, Education Access, National Inquiry into Rural and Remote Education, 2000, p. 70

Bilingual Education or Two-Way Learning is an example of Indigenous controlled education. Students are instructed in their first language, learning educational concepts in their own language and learning their first literacies in their mother-tongue. English language and literacies are gradually introduced in the primary years.

Evidence from an Australian study demonstrates marginally better English literacy outcomes for students from Bilingual schools at the end of primary school compared with students from non-Bilingual schools with similar languages, demography and contact histories.¹⁰¹

Bilingual schools operate in some of the most remote regions of Australia and therefore they lack the quality education resources such as information technology which is routinely available to urban schools. English is a foreign language in these regions so students do not hear it spoken in their day-to-day lives.

Bilingual schools have periodically been threatened with closure by governments because they do not achieve national English literacy and numeracy benchmark standards. Bilingual schools have been reducing in number over time because of the lack of fully trained teachers and the lack of capacity to sustain these resource-intensive programs.

Bilingual schools are resource intensive, they require 30 percent more staff than other schools. Bilingual schools have to be able to sustain a program that produces curricula in two languages. This means they need fully trained local Indigenous teachers as well as English literacy teacher specialists. Books and teaching materials need to be developed in both languages. These programs are threatened.

In remote regions of Australia Indigenous language and culture is endangered. An increase in the numbers of non-Indigenous people moving into remote regions and the influence of television is eroding languages. There are concerns about the ability of schools to reinforce Indigenous languages and culture because the numbers of trained Indigenous teachers is declining. It is difficult for remote Indigenous peoples to obtain teaching qualifications because of the lack of training facilities in remote areas and the fact that potential trainee teachers must leave family and ancestral lands to access formal education.

Mentor programs have been successful in assisting remote Indigenous teachers to become fully qualified, but they have been phased out by government departments in recent years. Remote mentor programs provided time release from teaching duties for fully qualified teachers so that could spend time each week mentoring Indigenous assistant teachers in teaching practice as well as providing support with their academic study. The mentor program was successful in increasing the numbers of Indigenous teachers in the Northern Territory in the 1980s and 1990s.

101 Department of Employment, Education and Training, Northern Territory Government, Indigenous Languages and Culture in Northern Territory Schools Report 2004 – 2005, pp. 34-37

11 Culture

11.1 Protection and promotion of Indigenous languages

Summary of Issue

A *National Indigenous Languages Survey* shows that of the original estimated 250 Indigenous languages, only about 145 of these exist today and the majority of these are critically endangered.¹⁰² The promotion and protection of Indigenous languages and cultures is not sufficiently prioritised by the Australian Government.

Relevance to Covenant: Article 15

The *National Indigenous Languages Survey Report 2005* provides a summary and analysis of Australia's Aboriginal and Torres Strait Islander languages, and assesses their status and supporting resources.

A major finding of the report is that Australia's Aboriginal and Torres Strait Islander languages are critically endangered and urgent action is required to preserve them for the future. Of over 250 known Australian Aboriginal and Torres Strait Islander languages, only about 145 Indigenous languages are still spoken or partially spoken and the vast majority of these, about 110, are in the severely and critically endangered categories. Less than 20 languages are strong and not currently on the endangered list.¹⁰³

Indigenous languages and cultures are closely intertwined. Safeguarding languages preserves Indigenous culture and identity.

Currently, the promotion and protection of Indigenous languages and cultures is not sufficiently prioritised by the Australian Government. If languages are to survive, genuine commitment and policies are required for language maintenance and language revitalisation programs at all levels of Australia's educational institutions. This means making schools culturally familiar and appropriate for Indigenous children and embedding Indigenous perspectives across the curriculum.

Additionally, the Commission is concerned that the protection of Indigenous cultural and intellectual property by the mainstream legal system is inadequate. Instruments such as the *Copyright Act 1986* (Cth) that provide legal protections for the life of the artist plus fifty years are not equipped to protect knowledge systems and artistic designs that are thousands of years old. Nor are they capable of recognising and

102 Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages Survey Report 2005*, Australian Government Publication, p. 4 At: http://www.arts.gov.au/__data/assets/pdf_file/0006/35637/NILS_Report_2005.pdf viewed 16 April 2009.

103 Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages Survey Report 2005*, Australian Government Publication, p. 4 At: http://www.arts.gov.au/__data/assets/pdf_file/0006/35637/NILS_Report_2005.pdf viewed 16 April 2009.

protecting collective ownership of artistic content and products, which is common in Indigenous cultures.¹⁰⁴

104 For further information, President of Australian Human Rights Commission, Presentation on the legal protection of Indigenous Cultural and artistic works. At: http://www.hreoc.gov.au/about_the_commission/speeches_president/20060901_Malaysia.html (viewed 23 September 2008).

12 Appendix: List of Australian Human Rights Commission documents provided to the Committee on Economic Social and Cultural Rights

Name of publication	Type of publication	No of Copies
<i>About Us – Australian Human Rights Commission (2009)</i>	Brochure	25 copies
<i>Social Justice Report 2007/ Native Title Report 2007</i>	CD-ROM	25 copies
<i>‘Communities confronting family Violence’ - Social Justice Report 2007 Community Guide</i>	Community Guide	25 copies
<i>Close the Gap – Campaign for Aboriginal and Torres Strait Islander health equality by 2030 (2009)</i>	Community Guide	25 copies
<i>Towards a new National Indigenous Representative Body (2008)</i>	Community Guide	1 copy
<i>Achieving Aboriginal and Torres Strait Islander health equality within a generation – a human rights based approach (2005)</i>	Report	1 copy
<i>Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues (2008)</i>	Report	1 copy
<i>Let’s Talk About Rights Toolkit (2009)</i>	Toolkit	1 copy
<i>Face the Facts 2008: Some Questions and Answers about Indigenous Peoples, Migrants and Refugees and Asylum Seekers (2008)</i>	Information booklet	1 copy