



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

18 February 2009

Ms Nathalie Prouvez
Secretary of the Human Rights Committee
Human Rights Treaties Branch
Office of the High Commissioner for Human Rights
CH-1211 Geneva 10
Switzerland

Dear Ms Prouvez,

**Updated information from the Australian Human Rights Commission on
Australia's implementation of the ICCPR**

Thank you for the opportunity to provide the Human Rights Committee with some additional material in preparation for Australia's appearance before the Committee in March 2009.

Please find attached some updated information on some of the issues raised in our comments to the Committee in September 2008.

We also welcome your suggestion of an informal briefing session for available members of the Committee by the Australian Human Rights Commission (the Commission), prior to Australia's appearance. While we are unable to attend the scheduled appearance in New York, Elizabeth Broderick, the Australian Sex Discrimination Commissioner, and Cassandra Goldie, the Director of the Sex Discrimination Unit at the Commission will be attending the Commission on the Status of Women in New York. Commissioner Broderick will be attending from the 1st to the 6th March 2009. Dr Goldie will be attending from the 1st to the 14th March. They would be available for an informal meeting with the Committee members during this period, should this be convenient.

Australian Human Rights Act

The Commission welcomes the Committee's question, in its List of Issues, on implementing the protection of human rights at the federal level in Australia

On 9 December, the Australian Government announced a National Human Rights Consultation, to be conducted by an independent Committee. The Committee is expected to report to the Australian Government by 31 August 2009. The Committee is asking for submissions from the public, and will also hold a series of forums across Australia. The Committee will ask 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?

Full details about the National Human Rights Consultation can be found on 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. However, the Commission notes that the consultation terms of reference exclude consideration of 'a constitutionally entrenched bill of rights'.

As discussed in our comments to the Committee in September 2008 (1.1), 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 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 on its website at <http://humanrights.gov.au/letstalkaboutrights/index.html>.

Immigration detention

The Commission has outlined its concerns with Australia's system of mandatory immigration detention in comments to the Committee in September (4.1). While the Commission welcomes the announcement by the Minister for Immigration in July 2008 of new directions in immigration detention policy, we are concerned that these changes have yet to be implemented and guaranteed in legislation.

The Commission wishes to draw to the Committee's attention its recently published annual report of visits for the previous year, *2008 Immigration Detention Report: Summary of observations following visits to Australia's immigration detention facilities*. The Committee's List of Issues refers to recommendations made by the Commission following inspections to immigration detention facilities in 2007 (issue 18). While many of these recommendations are still relevant, the 2008 Report provides more up-to-date and comprehensive observations and recommendations on conditions in immigration detention facilities and the system of immigration detention more generally. Major recommendations in the report include that:

- minimum standards for conditions and treatment of persons in immigration detention should be legislated

- the Migration Act should be amended so that immigration detention is the exception rather than the norm and the decision to detain a person is subject to prompt review by a court
- detention of people on Christmas Island should cease
- the recommendations of the national inquiry into children in immigration detention should be implemented by the government.

The 2008 Report is available on our website at http://humanrights.gov.au/about/media/media_releases/2009/2_09.html.

Paid maternity leave

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

The Commission has previously welcomed the Australian Government reference to the Productivity Commission (the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians) to investigate the introduction of Paid Maternity, Paternity and Parental Leave.

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). A final report will be released in February 2009.

However, 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.

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 41st in the world, behind the UK, New Zealand and Canada. Paid maternity leave is an important measure to improve the ability of women to participate in paid work.

Federal Age Discrimination Act

The Australian Government is to be congratulated for introducing into the Australian Parliament a proposed amendment to the *Age Discrimination Act 2004* (Cth) to remove the 'dominant reason' test from this equality law.

At the present time, this bill is before Parliament, with the Senate Legal and Constitutional Committee to report with its recommendations regarding the amendment by 23 February 2009.

Independent Reviewer of anti-terrorism laws

The Commission notes that in the List of Issues the Committee refers to the need for an Independent Reviewer of anti-terrorism laws.

In November 2008, the Clarke Inquiry into the case of Dr Mohamed Haneef recommended that the Australian Government give consideration to the appointment to an independent reviewer of anti-terrorism laws.¹ The Australian Government's response to this recommendation was to confirm its in-principle support for the appointment of an independent reviewer in the form of a National Security Legislation Monitor.²

However, an independent reviewer of anti-terrorism laws has not yet been appointed by the Australian Government.

National Indigenous Representative Body

In July 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner released an issues paper setting out key considerations for the establishment of a new National Indigenous Representative Body.³ Such a body is needed to overcome the problem of lack of participation of Indigenous peoples in decision making that affects their interests.⁴

The Australian government utilised this issues paper as the basis of national consultations commencing in July 2008 through to October 2008.⁵ These

¹ *Report of the Inquiry into the Case of Dr Mohamed Haneef, November 2008*, p xii. At [http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Volume+1+FINAL.pdf/\\$file/Volume+1+FINAL.pdf](http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf) (accessed 10 February 2009).

² *Australian Government Response to the Clarke Inquiry into the case of Dr Mohamed Haneef*, 23 December 2008. At

http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008 (accessed 10 February 2009).

³ Available online at: http://humanrights.gov.au/social_justice/repbod/index.html.

⁴ The Social Justice Commissioner has extensively reported on this problem in annual reports to the Australian Parliament. See further; *Social Justice Report 2006*, chapters 2 and 3. Available online at: http://humanrights.gov.au/social_justice/sj_report/index.html.

⁵ Information about this process is available online at:

http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/advertisement_indig_rep_body.htm.

consultations found agreement among Indigenous peoples on the need for a national representative body to be created.

In December 2008, the Minister for Families, Housing, Community Affairs and Indigenous Affairs, the Hon Jenny Macklin, wrote to the Social Justice Commissioner requesting that he establish an independent Steering Committee to convene a second stage of consultations for the establishment of a new national Indigenous representative body.

The Steering Committee is required to:

- convene an Indigenous Peoples Workshop in March 2009, with a possible second workshop in June 2009
- develop a preferred model for a new National Indigenous Representative Body for presentation to the Australian Government in July 2009
- make recommendations in regards to the establishment of an interim body from July 2009 which would operate until the finalised body takes effect, and
- ensure strong community support for such a representative model.

The Steering Committee is now finalising preparations for the first workshop to be held on 11-13 March 2009.

The Steering Committee will make a recommendation to the Australian Government in July 2009 on the model for a new national Indigenous representative body. In the Commission's view, the participatory nature of this process is to be commended and contributes to the realisation of Indigenous Peoples rights consistent with articles 1, 2, 26 and 27 of the ICCPR.

Northern Territory Emergency Intervention

The *Social Justice Report 2007* to the Australian Parliament provides a detailed analysis of the Northern Territory Emergency Response (NTER or NT intervention).⁶ This includes identification of how the NTER is **inconsistent** with Australia's human rights obligations under the ICCPR, CERD and other instruments.'

Since this report was released:

- The Australian Government has established the National Council to Reduce Violence against Women and their Children (the 'Council') on 26 May 2008, with responsibility to oversee the Government's commitment to establish and implement the *National Plan to Reduce Violence against Women and their Children* (the 'Plan').
- The Minister for Families, Housing, Community Services and Indigenous Affairs introduced a Bill in federal Parliament in February 2008⁷ to reinstate

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007)

⁷ Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008.

aspects of the permit systems for entry onto Aboriginal land that had been removed under the NT Intervention. The Bill proposes to remove the provisions enacted by the former Government under the NTER legislation, but retain the capacity of the Commonwealth Minister to permit selected individuals or classes of individuals to enter any specified Indigenous land without a permit. However, the Senate did not pass the Bill and voted in support of retaining the existing measures that are not compliant with the *Racial Discrimination Act 1975* (Cth) (RDA).⁸

- The Australian Government has confirmed it will maintain the mandatory income management scheme under the NT Intervention, but that it will look to revise the scheme to ensure it will conform with the RDA and will not involve suspension of the RDA in the long term.⁹ It stated that legislation to effect this would be introduced in the sittings of Parliament in September 2009. Until such time, the RDA continues to be inoperative in relation to communities in the Northern Territory subject to the NT intervention legislation, in breach of Australia's obligations under the ICCPR and CERD.

In addition, the government has also introduced the following new income management schemes under the NT Intervention legislation:¹⁰

- The Family Responsibilities Commission (FRC) commenced in Queensland on 1 July 2008.¹¹ The FRC has the power to recommend Indigenous and non-Indigenous individuals who have lived in the designated areas of Hope Vale, Aurukun, Mossman Gorge, and Coen for three months, who are recipients of a welfare payment *or* are CDEP participants, and who aren't meeting parental and community responsibilities,¹² for income management. Although the majority of people subject to the FRC are Indigenous, the application of Part II of the RDA is suspended for the FRC, which includes the operative provisions prohibiting racial discrimination. However, unlike the mandatory income management scheme in the Northern Territory, under the FRC, income management is a measure of last resort and only applies to identified individuals, rather than automatically applying to everyone within the designated areas.
- Trial income management scheme - Kununurra and Cannington - commenced in Western Australia (WA) on 24 November 2008.¹³ Under the scheme up to 70% of welfare payments and 100% of lump sum payments can be

⁸ See *Social Justice Report 2007*, p 263.

⁹ Commonwealth Government, Statement: 'Australian Government Initial Response to the NTER Review' (23 October 2008).

¹⁰ *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*

¹¹ The Family Responsibilities Commission was established by legislation (*Family Responsibilities Act 2008* (QLD)) that is authorised by the same legislative provisions as the income management regime of the Northern Territory Intervention.

¹² For instance in situations where: a child has three unexplained absences from school; a person is subject to a child safety notification or report; or is convicted of an offence; or breaches a public housing tenancy agreement.

¹³ The WA Welfare trials were introduced under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

quarantined from parents whose children are considered at risk. Like the Queensland scheme, the WA trial is a measure of last resort and only applies to identified individuals, rather than to everyone within the trial site. However, it differs from the other schemes identified above in that at least one of the trial sites is not predominantly populated by Indigenous peoples and it is subject to the protections of the RDA.

The Australian Government has indicated that it will be drawing on the findings of each of the three income management models to implement broader welfare reforms, possibly within 12 months. It is hoped that the further welfare reforms will ensure they are consistent with human rights standards.

A formal, independent review of the NTER legislation and its operation has been conducted by a Review Board. The Review Board's report, released in October 2008, found that the NT Intervention had made some positive changes in the Northern Territory, for instance in terms of increased police presence in communities, measures to reduce alcohol-related violence, improving quality and availability of housing, health and wellbeing of communities and education. However, the Review Board noted that the NT Intervention had in many respects not succeeded because it had failed to engage with the very people it was intended to help. The Review Board noted that local communities saw the significant government investment under the NT Intervention as 'an historic opportunity wasted because of its failure to galvanise the partnership potential of the Aboriginal community'.¹⁴ The inclusion of racially discriminatory measures in the NTER was also seen as a significant failure that contributed to a lack of faith and trust from Indigenous peoples in the Australian Government's approach.

The three overarching recommendations made by the Review Board were:

- The Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory.
- In addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.
- Government actions affecting Aboriginal communities respect Australia's human rights obligations and conform to the RDA.¹⁵

In addition the Review Board made recommendations in relation to: welfare reform, employment, law and order, education, family support, health, housing, land reform, coordination, re-engagement, funding, governance, data and evaluation.

¹⁴ Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 10.

¹⁵ Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 12.

On 23 October 2008, the federal government issued an Initial Response to the Review Board's report,¹⁶ outlining the Australian Government's intention to continue the current stabilisation phase of the NTER for the next twelve months before transitioning to a long-term, development phase. The Australian Government stated that it agreed with the Report's three overarching recommendations and will act on them in progressing towards the development phase of the Intervention.

The key elements of the stabilisation phase identified in the Minister's statement included:

- maintaining compulsory income management, the five-year leases, and alcohol and pornography controls
- legislating in the first half of 2009 to ensure people subject to the NT income management regime have access to the full range of appeal mechanisms afforded to other Australians, including through the Social Security Appeals Tribunal and the Administrative Appeals Tribunal
- asking the NT Valuer-General to determine a reasonable rent for all existing five-year leases and payment commencing automatically; and examining the scope to reduce the current boundaries of five-year leases
- negotiating with traditional owners for long term leases to continue. This is to ensure that beneficial activities already under way, in particular, the Australian Government's \$547 million investment in new housing, housing upgrades and reformed tenancy arrangements, can be progressed.

The elements of the transition period between the stabilisation phase and the development phase are:

- the ongoing development and implementation of our policies to close the gap on Indigenous disadvantage
- an immediate, renewed emphasis on community engagement and development to build the foundations for more lasting change
- the Australian Government designs and consults on a new compulsory income management policy which does not involve the suspension of the RDA. These consultations will acknowledge that not all welfare recipients are unable to manage their finances in the interests of dependent women and children.

The commencement of the development phase will be marked by the introduction of legislation to lift the suspension of the RDA in the Spring 2009 sittings of the Parliament.

However, beyond this initial commitment made in October 2008, the Australian Government has issued no further detailed response addressing the majority of recommendations of the report. The NTER legislation remains inconsistent with Australia's human rights obligations and protection against racial discrimination remains suspended indefinitely.

¹⁶ Commonwealth Government, Statement: 'Australian Government Initial Response to the NTER Review' (23 October 2008).

Removal of laws which discriminate against same-sex couples

In its 2006 report 'Same-Sex: Same Entitlements,' the Commission recommended that the Australian Government amend 58 laws which discriminate against same-sex couples and their children in the area of financial and work-related entitlements and benefits. In the week of 24 November 2008, the Australian Parliament passed the two remaining bills to remove discrimination against same-sex couples in most Commonwealth laws:

- Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008
- and the omnibus bill, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Reform) Bill 2008.

The Commission welcomes the reforms.

However, the Commission draws to the Committee's attention 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.

I hope that this updated information is useful for the Committee's consideration of Australia's 5th periodic report to the Committee. Please do not hesitate to contact Susan Newell, Acting Director, Human Rights Unit at Susan.Newell@humanrights.gov.au should you require further detail.

Yours sincerely,



Graeme Innes AM
Human Rights Commissioner

T (02) 9284 9692
E graeme.innes@humanrights.gov.au