

## **Attachment 1: References contained in the UPR submission by the Australian Human Rights Commission**

**1:** The Commission is also referred to as the AHRC in this submission. The Commission is established and operates under the *Australian Human Rights Commission Act 1986* (Cth) and exercises functions under the following legislation: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1983* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2005* (Cth) and *Native Title Act 1993* (Cth).

The Commission has been accredited as an ‘A status’ national human rights institution by the International Coordinating Committee of National Human Rights Institutions, and operates in conformity with the ‘Principles Relating to the Status and Functions of National Institutions for the Promotion and Protection of Human Rights’ in General Assembly Resolution 48/134, 1993.

Please note: The Commission was officially known as the Human Rights and Equal Opportunity Commission (HREOC) until 2009. All references to documents by HREOC should be read as documents of the Australian Human Rights Commission.

**2:** The Australian Council of Human Rights Agencies (ACHRA) is comprised of statutory human rights and anti-discrimination commissions established at the state, territory and national levels. The following members of ACHRA have endorsed this submission: Anti-Discrimination Commission (Northern Territory), Anti-Discrimination Commission (Queensland), Equal Opportunity Commission (South Australia), Equal Opportunity Commission (Western Australia), Human Rights Commission (A.C.T), Office of the Anti-Discrimination Commissioner (Tasmania), Victorian Equal Opportunity & Human Rights Commission. The Anti-Discrimination Board of NSW was also consulted who are in broad agreement with the principles espoused in this submission.

**3:** The Commission released a draft of its submission in May 2010 for public comment. This was distributed to state and territory equal opportunity commissions and Children commissioners; as well as to non-government organisations and publicly through the Commission’s internet list-serves and on our website. Approximately 50 submissions were received from organisations and individuals commenting on the Commission’s draft submission.

**4:** Australia is a party to the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention Against Torture and other Cruel, Inhuman or Degrading treatment or punishment (CAT), and Convention on the Rights of Persons with Disabilities (CRPD).

Australia is **not** a party to the International Convention on the Protection of the Rights of All Migrant Workers and members of their Families (MWC), International Convention for the Protection of All Persons from Enforced Disappearance, Optional

Protocol to the ICESCR, or International Labour Organisation Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).

**5:** National Human Rights Consultation Report, Canberra 2009, p127, Available online at:

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads#doc](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads#doc). The Committee made 31 recommendations for reform to better protect human rights in Australia, including through introducing a Human Rights Act to provide comprehensive protection at the federal level. The Committee also found the following (pp127-128):

Australia has agreed to ‘respect, protect and fulfil’ a range of human rights at the international level, but the current legal and institutional framework falls short of this commitment. The Committee notes the following limitations associated with the existing mechanisms for protecting human rights in Australia:

- *International human rights law.* Australia has committed itself to a variety of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented by domestic legislation. Although various mechanisms exist to hold Australia accountable at the international level, they are not legally binding.
- *The democratic system.* Australia has strong democratic institutions, but they do not always ensure that human rights—in particular, minority rights—receive sufficient consideration.
- *The Australian Constitution.* Australia’s Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts.
- *Legislative protections.* Federal, state and territory legislation protects some human rights, but it can always be amended or suspended to limit or remove that protection. The legislative framework is inconsistent across jurisdictions and difficult to understand and apply.
- *Administrative law.* Administrative law enables individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.
- *The common law.* The common law protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language.
- *Independent oversight mechanisms.* There are a number of oversight mechanisms—for example, the Australian Human Rights Commission—that can review government action. The powers of these bodies are, however, limited when it comes to human rights, and their recommendations are usually not enforceable.
- *Access to justice.* Access to justice is an overarching problem in connection with the adequacy of existing protections. Individuals who lack the knowledge or means to make use of Australia’s framework of human rights protections will ultimately be unable to enforce their rights.

**6:** The United Nations treaty bodies charged with monitoring implementation of the ICCPR, ICESCR, CRC and CAT have each expressed concern that those treaties have

not been adequately incorporated into Australia's legal system. See further: UN Human Rights Committee, *Concluding Observations: Australia* (2009), para 8; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), para 11; UN Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), paras 9 - 10; UN Committee against Torture, *Concluding Observations: Australia* (2008), para 9.

At present, there is also no formal institutional process in Australia for responding to and implementing the concluding observations of human rights treaty committees, or to the recommendations of other special procedures. As noted in paragraph 6, the Australian Government has recently established a Joint Parliamentary Committee on Human Rights which could fulfil this role.

**7:** The Australian Constitution provides safeguards for the following individual rights and freedoms:

- the right to compensation on just terms in the event of a compulsory acquisition of property by the Commonwealth (section 51(xxxi));
- the right to trial by jury for a federal indictable offence (section 80);
- the right to challenge the lawfulness of decisions of the Australian Government in the High Court (section 75(v));
- a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion (section 116); and
- a prohibition on making federal laws that discriminate against a person because of the state in which they live (section 117).

The High Court has found that a right of freedom of expression in relation to public and political affairs is implied in the text of the Constitution: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579. This right is directed at ensuring that people are free to discover and debate matters which enable them to exercise a free and informed choice as voters.

The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution. The High Court has also not supported the proposition that, in cases of ambiguity, the Constitution should be interpreted consistently with human rights: See, for example, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 - 225 (Heydon J) and the authorities cited therein.

**8:** The UN Committee on the Elimination of Racial Discrimination has expressed this concern on several occasions. See further: UN Committee on the Elimination of Racial Discrimination: *Concluding observations: Australia* (2005), para 9; UN Committee on the Elimination of Racial Discrimination: *Concluding observations: Australia* (2000), paras 6-10.

A further concern is the limited protection of the right to freedom of religion and belief. The Commission's 1998 report, *Article 18*, thoroughly reviewed the protection of the right to freedom of religion and belief under Australian Commonwealth, State and Territory law. It found that the Commonwealth Constitution does not provide a

complete guarantee of protection for the right to freedom of religion and belief. Section 116 restricts only the legislative powers of the Commonwealth and falls far short of providing positive protection to the rights of the individual to freedom of religion and belief. The report also noted that:

Some Australians are protected from discrimination on the basis of religion and belief by State and Territory laws but many others are not. Laws providing protection from discrimination on the basis of religion and belief are patchwork across Australia (p 105).

In a submission to the Commission for the UPR, the Australian Bahá'í Community note that:

While members of our own community report only occasional and isolated incidents of religious discrimination in Australia, we recognise that for some other communities, such discrimination has become more frequent and widespread in recent years, despite the changes in some State and Territory legislation that have occurred in the past decade. Accordingly, we support the Commission's previous conclusion (in the Article 18 report) that "to comply with international human rights commitments Australia should enact federal legislation to make unlawful in Australia discrimination on the basis of religion and belief" (p 105).

The Article 18 report is available online at:

[http://www.humanrights.gov.au/human\\_rights/religion/index.html](http://www.humanrights.gov.au/human_rights/religion/index.html).

In a submission to the Commission for the UPR, the Australian Christian Lobby notes that: the Commission should bring to the attention of the United Nations Human Rights Council's Working Group on the UPR breaches of this fundamental right (to freedom of thought, conscience and religion), and attempts to stifle it, by state jurisdictions in particular.

**9:** Australia has four federal anti-discrimination laws, as identified in note 1 above. The particular grounds of unlawful discrimination covered under federal anti-discrimination law are: race, colour, descent or national or ethnic origin; sex; marital status; pregnancy or potential pregnancy; family responsibilities; disability; people with disabilities in possession of palliative or therapeutic devices or auxiliary aids; people with disabilities accompanied by an interpreter, reader, assistant or carer; a person with a disability accompanied by a guide dog or an 'assistance animal'; and age. Also falling within the definition of 'unlawful discrimination' is: offensive behaviour based on racial hatred; sexual harassment; harassment of people with disabilities; and victimisation and several criminal offences relating to discrimination.

Federal human rights and anti-discrimination law provides for the Commission to investigate and resolve complaints of discrimination and breaches of human rights. Over the past five years the number of complaints the Commission has received has increased by 81 percent.

Unlike equivalent legislation in Australia's states and territories, federal anti-discrimination laws do not provide enforceable protection against discrimination on

the basis of attributes such as religion, political beliefs, sexual orientation/ preference, sexuality/transgender, trade union activities, nationality, occupation, medical record and criminal record.

In 2009, the UN Human Rights Committee stated that it was ‘concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law’ and recommended that Australia ‘adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection for the rights to equality and discrimination’: UN Human Rights Committee, *Concluding Observations: Australia* (2009), para 12. Similar concerns have been raised by the UN Committee on Economic, Social and Cultural Rights, which recommended in 2009 that Australia ‘enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds’: UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), para 14.

There are also gaps in the protections that are provided by the existing federal anti-discrimination laws. For example, the Sex Discrimination Act falls well short of achieving comprehensive protection in CEDAW. The protection provided to men and women varies, and protection against discrimination on the grounds of family responsibilities (being limited to direct discrimination that results in dismissal from employment) is minimal when compared to other areas of discrimination. Similarly, the Racial Discrimination Act does not provide protection against discrimination and other unlawful conduct on the ground of religion.

A number of practical obstacles further limit the effectiveness of current federal anti-discrimination laws. For example, the various tests for direct discrimination incorporate a requirement that an applicant establish less favourable treatment compared with a hypothetical ‘comparator’. The practical application of the comparator, however, has proved problematic due to difficulties in constructing the same or similar circumstances for carrying out the comparison. Practical difficulties also arise in relation to proving indirect discrimination. Under the Disability Discrimination Act, for example, applicants must establish that they have been required to comply with an unreasonable requirement or condition with which they cannot comply, but with which a substantially higher proportion of persons without their disability can comply. This has raised difficulties and uncertainties where, for example, an applicant can technically comply with the relevant requirement, but with additional hardships not experienced by other persons without their disability.

In addition, despite widely recognised difficulties in proving discrimination, current federal laws generally require the applicant to carry the onus of proof in relation to all elements of discrimination. This is despite the reality that information relating to causation (such as the respondent’s basis for treating the applicant in a particular way) is typically within the control of the respondent, not the applicant.

Further, each of the laws establishes a proscriptive, negative-based standard. Discriminatory conduct is *prohibited*, rather than non-discriminatory or other positive conduct being *required*. Federal anti-discrimination laws lack positive obligations to promote equality.

**10:** The Commission notes, however, that the Australian Capital Territory and Victoria have a Human Rights Act that provides more comprehensive consideration of civil and political rights than the other states and territories or at the federal level.

**11:** The *Racial Discrimination Act*, *Disability Discrimination Act* and *Sex Discrimination Act* each provide for a statutory Commissioner to lead the work of the Australian Human Rights Commission under these acts. The *Age Discrimination Act 2005* does not provide for an Age Discrimination Commissioner, instead conferring functions on the Commission generally.

At present, the positions of Race Discrimination Commissioner and Disability Discrimination Commissioner are filled by one person. There is significant community support for both positions to be funded and appointed on a full time basis.

At present, the Sex Discrimination Commissioner has also been designated as the commissioner responsible for age discrimination. There is also significant community support for a fully funded and full time Age Discrimination Commissioner.

**12:** For further information on the long term funding issues that the Commission has faced over the past decade see: Australian Human Rights Commission, Submission to the Joint Committee of Public Accounts and Audit Inquiry on the Effects of the ongoing Efficiency Dividend on Smaller Public Sector Agencies, 29 July 2008, online at:

[http://humanrights.gov.au/legal/submissions/2008/20080729\\_efficiency\\_dividend.html](http://humanrights.gov.au/legal/submissions/2008/20080729_efficiency_dividend.html).

**13:** Compliance will be considered in relation to the seven core human rights treaties to which Australia is a party.

**14:** The Australian Government's framework is available online at: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_TheAustralianHumanRightsFramework](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_TheAustralianHumanRightsFramework). The Framework responds to the National Human rights Consultation, held in 2009.

**15:** The Commission has incorporated its comments on the 'Identification of achievements, best practices, challenges, and limitations' of human rights into this section of the submission.

**16:** See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia', Appendix 2 in *Social Justice Report 2008*, at [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport08/app2.html](http://humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html).

**17:** See Prime Minister, *Closing the gap – Prime Minister's Report 2010*, Available online at: <http://proxy.paradise.aust:8080/ProgressMessages/closingthegap2010.doc?proxy=10.1.1.248&action=complete&index=45&id=23813340&filename=closingthegap2010.doc>.

**18:** The Commission notes that the Australian Parliament has apologised for the practices of past forced removal policies and the Australian Government has established a National Healing Foundation to support Indigenous community initiatives for healing, to address the impacts of removal.

**19:** See; Committee on the Elimination of Racial Discrimination, *Concluding observations: Australia* (2005), paras 16-18; See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Australian Human Rights Commission, 2006.

**20:** The Commission has welcomed amendments to the legislation passed by parliament in June 2010, while also noting ongoing concerns on some issues. See further:  
[http://www.humanrights.gov.au/about/media/media\\_releases/2010/61\\_10.html](http://www.humanrights.gov.au/about/media/media_releases/2010/61_10.html) and  
[http://www.humanrights.gov.au/legal/submissions/sj\\_submissions/2010\\_welfare\\_reform.html](http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html)

For an overview of the full package of measures introduced in 2007 see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Chapter 3, online at:  
[http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html). The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has also expressed concern that the NTER legislation is not consistent with human rights:  
<http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>.

**21:** Australian Human Rights Commission, *Sexual harassment: Serious business Results of the 2008 Sexual Harassment National Telephone Survey* (2008)

**22:** Australian Bureau of Statistics, *Personal Safety, Australia, 2005* (Reissue), Catalogue No. 4906.0 (2006), p7.

**23:** For further details, see Australian Human Rights Commission, *Gender equality: What matters to Australian women and men – The Listening Tour Community Report* (2008): Online at  
[http://www.humanrights.gov.au/sex\\_discrimination/listeningtour/index.html](http://www.humanrights.gov.au/sex_discrimination/listeningtour/index.html).

**24:** See S Kelly, *Entering Retirement: the Financial Aspects* (Paper for the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes Conference, Perth, 12 - 13 December 2006). See also: Australian Human Rights Commission, *Accumulation Poverty Women's experiences of inequality over the lifecycle: An issues paper examining the gender gap in retirement savings* (2009).

**25:** The proportion of people 65 and over is likely to double between 2004 (13%) and 2051 (27%) and the proportion of people 85 and over is likely to quadruple between 2004 (1.5%) and 2051(7%): Australian Bureau of Statistics, *Population Projections, Australia, 2004 to 2101*, Catalogue No.3222.0 (2006). Online at:

www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3222.0Main+Features12004%20to%202101?OpenDocument.

**26:** For example, unpaid or temporary work.

**27:** In a submission to the Commission for the UPR, the AIDS Council of New South Wales (ACON) note that “the experiences of discrimination and violence have a significant impact on the ability of the GLBT community to realise important human rights such as the right to the highest attainable standard of physical and mental health, the right to just and favourable conditions of work and the right to education. See further: Pitts, M, Smith, A, Mitchell, A *et. al.*, *Private Lives: A report on the health and wellbeing of GLBTI Australians*, Australian Research Centre in Sex, health and Society, La Trobe University, 2006, p50.

**28:** A number of submissions to the Commission for the UPR expressed concern about discrimination against GLBTI couples in recognising parental relationships. For example:

- ACON noted that in New South Wales a ban remains in place on same-sex couples adopting, despite a NSW Parliamentary report recommending that this ban be lifted: see further, NSW Legislative Council Standing Committee on Law and Justice, *Adoption by same-sex Couples*, 2009.
- The Gay and Lesbian Rights Lobby notes that the “Australian Capital Territory, Western Australia and Tasmania (in specific circumstances) are the only jurisdictions within Australia that permit same-sex couple adoption. With over 4,300 children living in same-sex families across Australia, disallowing access to adoption denies children the rights, benefits and entitlements conferred by legal parentage, such as access to a parent’s superannuation benefits or worker’s compensation if a parent is injured at work.”
- The Gay and Lesbian Rights Lobby also note concerns about the lack of clarity in the law in relation to surrogacy.

**29:** For further detail on equality of marriage recognition, see the Commission’s submission to an Australian Parliamentary Committee on this issue, available online at:

[http://www.humanrights.gov.au/legal/submissions/2009/20090910\\_marriage\\_equality.html](http://www.humanrights.gov.au/legal/submissions/2009/20090910_marriage_equality.html).

**30:** In a submission to the Commission for the UPR, Sex And Gender Education (SAGE (Australia) note that:

At least 1% of the population in some form has an intersex, sex and/or gender diverse manifestation. There is much confusion in the public’s mind... about the dividing line between gay, lesbian and bisexual (GLB) issues and those of Inter-sex, Sex and/or Gender Diverse people (ISGD). SAGE categorically wishes to emphasise that ISGD issues are not GLB associated. SAGE wishes the AHRC to separate GLB issues from ISGD issues as one is mainly



sexuality, the other is mainly about sex and/or gender identity, which are different things that requires different legal criteria.

**31:** For further discussion of these issues, see Human Rights and Equal Opportunity Commission, *Stories of discrimination experienced by the gay, lesbian, bisexual, transgender and intersex community* (2007), at [http://humanrights.gov.au/human\\_rights/gay\\_lesbian/stories.html](http://humanrights.gov.au/human_rights/gay_lesbian/stories.html); Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, Concluding Paper of the sex and gender diversity project (2009), at [http://humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://humanrights.gov.au/genderdiversity/sex_files2009.html).

**32:** See, for example, Kevin Rudd MP, Prime Minister, Address to the National Disability Awards Ceremony, Great Hall, Parliament House Canberra, 23 November 2009, at <http://www.pm.gov.au/node/6349>.

**33:** See, for example, Human Rights and Equal Opportunity Commission, *Not for service: Experiences of injustice and despair in mental health care in Australia* (2005). At [http://www.humanrights.gov.au/disability\\_rights/notforservice/report/index.html](http://www.humanrights.gov.au/disability_rights/notforservice/report/index.html).

**34:** See C Evans, *New Directions in Detention – Restoring Integrity to Australia’s Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

**35:** Under the Migration Act, it is mandatory for any non-citizen in Australia (other than in an excised offshore place) without a valid visa to be detained. These persons, called ‘unlawful non-citizens’, may only be released from detention if they are granted a visa or removed from Australia. See *Migration Act 1958* (Cth), ss 189 (1), 189(2), 196(1). Under sections 189(3) and 189 (4) of the Migration Act, unlawful non-citizens in excised offshore places may be detained. The current policy of the Australian Government is that all unauthorised boat arrivals in excised offshore places will be subject to mandatory detention.

**36:** For further details, see Australian Human Rights Commission, *Information provided to the OHCHR study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration* (2010), at [http://humanrights.gov.au/legal/submissions/2010/201004\\_OHCHR\\_child\\_migration.html](http://humanrights.gov.au/legal/submissions/2010/201004_OHCHR_child_migration.html).

**37:** Many people are held on very remote Christmas Island. Increasingly, people are also being held in remote locations such as Curtin detention centre. For further details, see Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), at [http://humanrights.gov.au/human\\_rights/immigration/idc2009\\_xmas\\_island.html](http://humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.html).

**38:** Instead they are processed under a ‘non-statutory’ process. For further details, see Australian Human Rights Commission, *2009 Immigration detention and offshore processing on Christmas Island* (2009), above.

**39:** See Minister for Immigration and Citizenship, 'Changes to Australia's Immigration Processing System' (Joint Media Release with Minister for Foreign Affairs and Minister for Home Affairs, 9 April 2010). At <http://www.minister.immi.gov.au/media/media-releases/2010/ce10029.htm>.

**40:** Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At [http://www.humanrights.gov.au/human\\_rights/children\\_detention\\_report/index.html](http://www.humanrights.gov.au/human_rights/children_detention_report/index.html).

**41:** See, for example, Human Rights and Equal Opportunity Commission, *Voices of Australia: 30 years of the Racial Discrimination Act: 1975-2005* (2005). At [http://www.humanrights.gov.au/racial\\_discrimination/voices/index.html](http://www.humanrights.gov.au/racial_discrimination/voices/index.html).

**42:** For information about cyber-racism in Australia see: Communiqué from Cyber-racism summit, online at: [http://www.humanrights.gov.au/about/media/media\\_releases/2010/38\\_10.html](http://www.humanrights.gov.au/about/media/media_releases/2010/38_10.html) . For information about violence against international students see: Australia and New Zealand Race Relations Roundtable, Communiqué: Human rights of international students is a major issue, at: [http://www.humanrights.gov.au/about/media/media\\_releases/2009/107\\_09.html](http://www.humanrights.gov.au/about/media/media_releases/2009/107_09.html) and outcomes of research forum on international students: [http://www.humanrights.gov.au/racial\\_discrimination/forum/20100412\\_racism\\_students.html](http://www.humanrights.gov.au/racial_discrimination/forum/20100412_racism_students.html)

**43:** See further: <http://www.immi.gov.au/about/stakeholder-engagement/national/advisory/amac/#a>.

**44:** For an overview of these laws as at 2008 see: [http://www.cla.asn.au/Article/070604\\_Alford\\_Report.pdf](http://www.cla.asn.au/Article/070604_Alford_Report.pdf). In a submission to the Commission for the UPR, the Human Rights Law Resource Centre notes the significant impact of counter-terrorism laws on particular communities such as Somalis, Tamils, Kurds and Muslim people more generally.

**45:** See Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws*, 2009, online at: [http://www.humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://www.humanrights.gov.au/legal/publications/counter_terrorism_laws.html).

**46:** The Hon John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November 2008). At: <http://www.haneefcaseinquiry.gov.au/> (viewed 5 May 2010).

**47:** The UN Human Rights Committee and the Committee against Torture have both raised concerns that some provisions of Australia's counter-terrorism laws are incompatible with fundamental rights. UN Human Rights Committee, *Concluding Observations: Australia* (2009), para 3 - 4. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006) at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenE>

[ement](#); UN Committee against Torture, *Concluding Observations: Australia* (2008), para 3.

The Law Council of Australia has also expressed concern at the enactment of non-association provisions in criminal legislation. These provisions, modelled on pre-existing provisions directed at terrorist organisations, seek to extend the traditional boundaries of criminal liability to capture conduct which is not linked to the commission or planned commission of any specific offence, but which is alleged to facilitate criminal activity on a broader level.

The Law Council of Australia notes:

In shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction.

These non-association provisions, recently incorporated into State and Territory criminal laws and the Commonwealth Criminal Code, have been justified by the need to address serious and organised crime, and in some jurisdictions, specifically directed at motorcycle gangs. Often the non-association provisions have been accompanied by powers for law enforcement officers or the courts to make 'control orders' restricting the liberty of persons who are members of or associated with criminal organisations.

**48:** A submission to the Commission for the UPR notes that "the Australian Government refuses to independently investigate the torture and ill treatment of both David Hicks and Mamdouh Habib whilst rendered and illegally detained in Guantanamo Bay. David Hicks is still living under a suspended sentence due to an unlawful conviction (the charges were retrospective and not even legitimate war crimes, not to mention the plea was signed under duress). David Hicks was placed on a gag order and provisions that are outlined in the plea agreement interfere directly with his freedom of expression. He was placed on a control order which severely impinged on his human rights (freedom of expression, movement, association etc)." It urges that "the Australian Government undertake an independent, thorough and binding investigation into the allegations of torture and ill treatment made by the Australians rendered and illegally detained at Guantanamo Bay, the Government's involvement in the treatment, and the subsequent legality of the conviction of David Hicks and their involvement in the process."

**49:** J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004), p 3. At <http://www.aic.gov.au/publications/rpp/56/RPP56.pdf>; and Women With Disabilities Australia, *Forgotten Sisters: A Global Review of Violence against Women with Disabilities* (2007).

**50:** In a submission to the Commission for the UPR, Sex And Gender Education (SAGE (Australia) notes that violence, bullying and harassment is indeed one of the largest problems facing people who present in public as intersex, sex and/or gender

diverse. Sex and/or gender diverse people have one of the highest levels of unemployment in Australian society.

**51:** In a submission to the Commission on the UPR, the Law Council of Australia notes that access to justice is an issue for all Australians with ‘the legal assistance sector remaining grossly underfunded’:

The Law Council is of the view that the significant shortfall in funding for the legal assistance sector has placed in jeopardy the right for all Australians to access legal advice and services, regardless of their means. When individuals lack the knowledge or the means to identify and exercise existing legal protections, they will ultimately be unable to enforce their human rights.

This has implications for the realisation of each of the specific human rights Australia is obligated to protect and is relevant to each of the key issues raised by the AHRC in its (submission).

For example, access to legal services is essential to reducing the disproportionate rates of Indigenous people in care and protection, juvenile detention and adult prisons. Ensuring adequate access to legal advice and representation is a central component of ensuring Australia’s immigration detention policies adhere to international law.

Ensuring access to legal services in regional and remote communities in Australia is a particular focus of the Law Council’s advocacy in this area. These communities often experience inadequate public services and require particular attention from Governments to ensure that they have access to the legal assistance necessary to identify and enforce their human rights.

**52:** In a submission to the Commission, the Women’s Legal Services of New South Wales note that a range of recent government reviews have found that the family law system does not effectively respond to issues of family violence and recommends changes to improve the system and the law.

**53:** There have been positive developments in addressing these issues, such as recent changes to the *People Trafficking Visa Framework* and the *Support for Victims of People Trafficking Program* but the Commission is concerned that trafficking in person and related offences do not comprehensively reflect Australia’s international legal obligations in this area, or that there are always effective remedies available.

*See further:* Sex Discrimination Commissioner, Elizabeth Broderick, ‘For trafficked people, Government changes put human rights first’, media release (17 June 2009), [http://www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html) (viewed 21 April 2010).

The Commission also acknowledges the Government’s 2008 publication of ‘Guidelines for NGOs working with trafficked people’ and an accompanying two-page ‘Know Your Rights’ fact sheet. See: [http://www.hreoc.gov.au/sex\\_discrimination/publication/traffic\\_NGO/index.html](http://www.hreoc.gov.au/sex_discrimination/publication/traffic_NGO/index.html) (viewed 19 April 2010).

The Commission is only aware of one award of compensation to a person who was trafficked to Australia, see: 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; and E Broderick and B Byrnes, *Beyond Wei Tang: Do Australia's human trafficking laws fully reflect Australia's international human rights obligations?* (Speech delivered at Workshop on Legal and Criminal Justice Responses Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice, Monash University, 9 November 2009).

There have been limited legal actions to address trafficking in Australia. See further: A Scholenhardt, G Beirne and T Corsbie, 'Human Trafficking and Sexual Servitude in Australia' (2009), 32(1) *UNSW Law Journal*, 27.

**54:** The WA Equal Opportunity Commission notes that the state of Western Australia has a burgeoning prison population as a result of (a) tougher penalties (b) withdrawal of automatic parole with a dramatic escalation in the numbers of prisoners refused parole and (c) mandatory sentencing. State laws currently see significant numbers of people imprisoned for traffic offences ( particularly driving without a licence) which disproportionately affects Aboriginal people in remote communities (where there are insufficient number of people qualified to teach others to drive or supervise log book hours so that driving unlicensed is endemic); and failure to pay fines. This contributes to a situation where rates of serious crime are decreasing but prison numbers are ever increasing. This is also a particularly disturbing matter in relation to juveniles where between 70-80% of juveniles held in custody ( many on remand ) are indigenous.

**55:** Persons serving sentences of imprisonment of three years or more are not eligible to vote in federal elections. This restriction on the right to vote may have a disproportionate impact on groups who are overrepresented in the prison population, such as Indigenous peoples, people with a mental illness and people with an intellectual disability.

**56:** A very high proportion of women prisoners have previously been victims of violence. Women prisoners also face distinct human rights issues such as the impact of strip searches, especially for women who have suffered sexual abuse, and difficulties in maintaining family relationships.

The Commission notes that in paragraph 2 of this submission it recommends that Australia expedite ratifying the Optional Protocol to CAT and introduce a national preventive mechanism for places of detention. This is of relevance to the issues concerning prison conditions raised here. In a submission to the Commission for the UPR, Sisters Inside (a national organisation representing female prisoners) states that:

Sisters Inside particularly strongly supports the recommendation on page 1 that Australia should expedite ratification of the Optional Protocol to CAT and the establishment of a National Preventive Mechanism for places of detention.

We would prefer some mention of the particular importance of regular, unannounced, visits to women's prisons, and examination of specific human rights issues for women prisoners related to CAT including strip searching, use of isolation cells, use of instruments of restraint, and presence of male officers in women's prisons (particularly their role in undertaking strip searching and observing women in isolation cells).

**57:** Every night more than 100,000 people in Australia are homeless, with one in every two people requesting accommodation from a homeless service turned away: Australian Institute of Health and Welfare, *Demand for SAAP accommodation by homeless people 2007-2008 Australia* (2009). At <http://www.aihw.gov.au/publications/index.cfm/title/10772>.

More than 40% of people who are homeless in Australia are younger than 25: Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), p ix. At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/\\$File/20500-2008Reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/$File/20500-2008Reissue.pdf). See also Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children* (1989).

**58:** For government commitments to address homelessness see: Australian Government, *The Road Home: The Australian Government White Paper on homelessness*, December 2008, online at: <http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Pages/default.aspx>. For further discussion about homelessness as a human rights issue, see Human Rights and Equal Opportunity Commission, *Submission to the Green Paper on Homelessness - Which Way Home?* (4 July 2008) at [http://humanrights.gov.au/legal/submissions/2008/20080704\\_homelessness.html](http://humanrights.gov.au/legal/submissions/2008/20080704_homelessness.html); Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) at [http://humanrights.gov.au/human\\_rights/housing/homelessness\\_2008.html](http://humanrights.gov.au/human_rights/housing/homelessness_2008.html).

**59:** The national human rights consultation in 2009 found that 'in the case of health and other basic services, the gap between metropolitan and rural and remote areas is a reality for many who live outside our cities': National Human Rights Consultation Report, page 15. See further pp32-33. See also: Human Rights and Equal Opportunity Commission, *Emerging themes: Rural and remote education inquiry, 2000*, online at: [http://humanrights.gov.au/human\\_rights/rural\\_education/briefing/report/index.html](http://humanrights.gov.au/human_rights/rural_education/briefing/report/index.html); and Human Rights and Equal Opportunity Commission, *Bush Talks: Report of Community Consultations in Regional, Rural and Remote Australia*, 1999, online at: [http://humanrights.gov.au/human\\_rights/rural\\_australians/bushtalks/index.html](http://humanrights.gov.au/human_rights/rural_australians/bushtalks/index.html)

**60:** The Women's Legal Services of New South Wales note that there is a lack of qualified practitioners for sexual assault services in western NSW (such as Bourke, Brewarrina and Walgett) with sexual assault victims required to travel hundreds of kilometres to centres such as Orange, Dubbo and Bathurst for forensic examinations after a crime has been committed. Victims of sexual assaults are not able to shower, brush their teeth or change their clothes prior to being examined, and often feel uncomfortable travelling long distances with male police officers for such investigations. This can discourage people from participating in the forensic process

which then has implications for the rates of charging and conviction of sexual assaults.

**61:** See, for example, Human Rights and Equal Opportunity Commission, *Bush Talks: Report of Community Consultations in Regional, Rural and Remote Australia*, (1999). At [http://www.humanrights.gov.au/pdf/human\\_rights/bush\\_talks.pdf](http://www.humanrights.gov.au/pdf/human_rights/bush_talks.pdf).

**62:** The first phase of the World Programme focuses on primary and secondary level schooling.