

# **National Human Rights Action Plan**

## Baseline Study

2011

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## Introduction

In 2010 the Australian Government released Australia's Human Rights Framework. The framework re-affirms the Government's commitment to protecting human rights and highlights the guiding principles of education, engagement, protection and respect. As part of the 'engagement' principle, the Government is developing a new National Human Rights Action Plan.

The Baseline Study is the first step in the development of the National Action Plan. The purpose of the study is to survey the status of human rights in Australia. The results will help with identifying priority areas for the Action Plan. They will also guide future policy development in those areas that cannot at this stage be specifically addressed in the plan.

Australia has a strong human rights record, both internationally and domestically, and a long tradition of supporting human rights around the world and developing the international human rights system. The Baseline Study demonstrates that Australia measures well in comparison with many other countries. It also shows, however, that, while Australia continues to make progress in human rights, challenges remain. The study ensures that through specific recognition of these challenges Australia will continue to work to promote and protect human rights.

The Baseline Study considers existing and previous government programs, actions and commitments with reference to primary research that has already been conducted. It draws on the findings of the report of the National Human Rights Consultation, parliamentary inquiries, papers and reports prepared by the Australian Human Rights Commission and various United Nations treaty bodies, the report of Australia's Universal Periodic Review, and data sets maintained by the Australian Bureau of Statistics and other research institutions and non-government organisations.

The National Human Rights Consultation was conducted in 2009 by an independent committee appointed by the Federal Attorney-General, the Hon. Robert McClelland MP. This was the most extensive consultation on human rights in Australia's history. The committee received more than 35 000 written submissions from individuals, advocacy and religious groups, and industry and held 66 'community roundtables' throughout Australia. In its report the committee describes opinions about and

experiences of human rights on the part of a cross-section of Australian society and makes recommendations aimed at better protecting human rights in Australia. The substantial number and the diversity of opinions and experiences that emerged during the consultation, and the identification of vulnerable groups, make the National Consultation report a valuable source of information for the Baseline Study.

As noted, the Baseline Study also took into account the report of Australia's Universal Periodic Review.<sup>1</sup> The Baseline Study and Australia's response to the review will provide the foundation for developing actions in the National Human Rights Action Plan. The study also incorporates the relevant observations and recommendations of the UN human rights treaty bodies that have reviewed Australia's compliance with its international human rights commitments.

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<sup>1</sup> The UPR entails a process whereby all 192 members of the United Nations appear before the Human Rights Council once every four years for peer review. Australia's interactive dialogue under the UPR was held on 27 January 2011 before the UPR Working Group of the Human Rights Council, which is made up of the 47 members of the Human Rights Council. Australia responded formally to the recommendations made by the Working Group on 8 June 2011 at the 17th session of the Human Rights Council, where the report of the Working Group, which includes all the recommendations made to Australia, was formally adopted.

# 1 Protection and promotion of human rights in Australia

Australia is a party to seven of the core UN human rights treaties and has thus demonstrated to all Australians and the international community its commitment to the binding obligations in those treaties. Among these obligations is recognition of the competence of a number of accountability mechanisms under which Australia's compliance with its international human rights commitments is scrutinised by the United Nations. Australia is committed to engaging positively with the UN human rights system, including the Human Rights Council and the General Assembly Third Committee, and has supported a number of non-binding human rights instruments, such as the Universal Declaration on Human Rights and the Declaration on the Rights of Indigenous Peoples.<sup>2</sup> Australia also has commitments to regional human rights institutions aimed at strengthening the rule of law and the role of civil society and to the provision of technical assistance and capacity building in the Asia-Pacific region.

At the domestic level, human rights in Australia are protected by our constitutional system, strong democratic institutions and specific legal protections. Australia's Human Rights Framework, announced in April 2010, outlines a range of important measures designed to further protect and promote human rights in Australia.

This chapter provides a brief summary of the main institutional and legal protections for human rights in Australia.<sup>3</sup>

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<sup>2</sup> The Hon. J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples', Speech delivered at Parliament House, Canberra, 3 April 2009.

<sup>3</sup> For more information, see *Universal Periodic Review National Report—Australia*, UN HRCOR, 10th session, UN Doc A/HRC/WG.6/10/AUS/1, 2010, viewed 20 May 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Human\\_rights\\_and\\_anti-discriminationInternational\\_Human\\_Rights](http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationInternational_Human_Rights).

## 1.1 Australia’s international human rights commitments

Australia has a long tradition of supporting the protection and promotion of human rights at the international level and has been closely involved in developing the international human rights system.<sup>4</sup>

### 1.1.1 International human rights law obligations

As part of Australia’s Human Rights Framework, the Australian Government re-affirmed its commitment to respecting the seven core UN human rights treaties to which Australia is a party:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Rights of Persons with Disabilities (CRPD).

Australia is also a party to the Second Optional Protocol to the ICCPR, aimed at abolition of the death penalty<sup>5</sup>, the Optional Protocol to the CRC on the involvement of children in armed conflict<sup>6</sup> and the Optional Protocol to the CRC on the sale of children, child prostitution and child

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<sup>4</sup> For example, Dr HV Evatt, then Australia’s Minister for External Affairs, played a leading role in the adoption of the Universal Declaration on Human Rights and, as president of the UN General Assembly, chaired the session at which the Universal Declaration of Human Rights was adopted on 10 December 1948.

<sup>5</sup> The Second Optional Protocol opened for signature 19 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

<sup>6</sup> The Optional Protocol opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).



pornography.<sup>7</sup> Australia signed the Optional Protocol to the CAT in 2009; this allows a subcommittee of the CAT treaty body and a national preventive body to inspect places of detention.<sup>8</sup> Australia is proceeding towards ratification of the Optional Protocol to the CAT. It has also acceded to the Optional Protocols to the CEDAW and the CRPD.

If a treaty is to become part of domestic law in Australia, it must be implemented through domestic legislation. In this way, for example, Australia's obligations under the CERD are incorporated in the *Racial Discrimination Act 1975* (Cth).

There are under human rights treaties a number of mechanisms that provide for the review of Australia's compliance with its international human rights obligations. These include periodic reporting to the relevant treaty body under each of the treaties and the existence of individual complaints mechanisms under particular treaties.<sup>9</sup> Although the views of the UN human rights treaty bodies are not binding under international law, Australia considers that these views should be taken in good faith and be given significant weight by state parties in the interpretation and implementation of their treaty obligations. Australia has established a database of UN treaty recommendations that is accessible to the public.

Australia is also subject to mandatory periodic review under the Human Rights Council's Universal Periodic Review process and scrutiny on thematic matters (such as racial discrimination) by the 'Special Procedures' of the Human Rights Council.

At present the Australian Government is considering becoming a party to the Convention for the Protection of All Persons from Enforced Disappearance, but it does not intend to become a party to the International Convention on the Rights of Migrant Workers because it considers that the existing protections for migrant workers are adequate. The Government is also considering whether to ratify International Labour Organization Convention No. 169, which deals with the rights of indigenous peoples.<sup>10</sup> Australia is not currently a party to the Optional

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<sup>7</sup> The Optional Protocol opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002).

<sup>8</sup> The Optional Protocol opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

<sup>9</sup> These are the ICCPR (under the First Optional Protocol), the CERD, the CAT, the CEDAW (under the Optional Protocol) and the CRPD (under the Optional Protocol).

<sup>10</sup> See <http://www.ilo.org/Indigenous/Conventions/no169/lang--en/index.htm>.

Protocol to the International Convention on Economic, Social and Cultural Rights.

Australia has also made declarations or reservations in relation to certain obligations under the CERD<sup>11</sup>, the CRPD<sup>12</sup>, the ICCPR<sup>13</sup>, the CEDAW<sup>14</sup> and the CRC.<sup>15</sup> In addition, the Government has committed to establishing a systematic process for the review of Australia’s reservations relating to international human rights treaties.

### 1.1.2 Engagement with the UN human rights system

Australia engages actively with international human rights mechanisms, among them the UN General Assembly Third Committee, the UN Human Rights Council and its Special Procedures, the Commission on the Status of Women, and the Office of the UN High Commissioner for Human Rights. The Government has also issued to the Special Procedures mandate holders of the UN Human Rights Council a standing invitation to visit Australia. Over time, Australia has nominated and supported Australian candidates for prominent positions in the international human rights system.<sup>16</sup>

The Australian Government also works with the Australian Human Rights Commission, the Asia–Pacific Forum of National Human Rights Institutions, other governments, civil society and regional governmental

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<sup>11</sup> Regarding criminalising the dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination.

<sup>12</sup> Regarding fully supported or substituted decision-making arrangements, compulsory medical assistance or treatment and liberty of movement and freedom to choose residence and nationality.

<sup>13</sup> Regarding the segregation of prisoners, compensation for miscarriage of justice and prohibition of racial and religious hatred.

<sup>14</sup> Regarding the right to paid maternity leave and the exclusion of women from combat duties.

<sup>15</sup> Regarding the segregation of children in detention from adult detainees.

<sup>16</sup> For example, there are currently two Australians serving on international human rights bodies: Professor Ron McCallum AO is a member of the UN Committee on the Rights of Persons with Disabilities and has also been elected chair of that body; Dr Megan Davis serves as an expert member of the UN Permanent Forum on Indigenous Peoples. Previously, the Hon. Michael Kirby AC CMG was UN Special Representative for Human Rights in Cambodia; he is now a member of the UNAIDS Reference Group on HIV and Human Rights. The Hon. Elizabeth Evatt AC was a member of the UN Human Rights Committee and a member and chair of the UN Committee on the Elimination of Discrimination against Women. Emeritus Professor Ivan Shearer AM RFD was a member of the UN Human Rights Committee. Professor Philip Alston was the first rapporteur and later chair of the UN Committee on Economic, Social and Cultural Rights, special adviser to the UN High Commissioner for Human Rights on the Millennium Development Goals, and UN Special Rapporteur on extrajudicial, summary or arbitrary executions. Professor Mick Dodson AM is a former member of the UN Permanent Forum on Indigenous Issues.

organisations (including the Pacific Islands Forum) to create and build the capacity of national human rights institutions throughout the Asia–Pacific region. In October 2010 the Government announced its commitment to extending its work with the Australian Human Rights Commission to build the capacity of the ASEAN Intergovernmental Commission on Human Rights.

Australia also supports human rights through the provision of technical assistance and capacity building at multilateral, regional and grassroots levels. AusAID funds several specific human rights initiatives, among them the following:

- the Australia–Indonesia Partnership for Justice, a \$50 million five-year program focusing on human rights and anti-corruption activities in Indonesia
- a Human Rights Fund, entailing a Human Rights Grants Scheme that is providing \$6.5 million in funding in 2010–11 to non-government organisations and human rights institutions to promote and protect human rights in developing countries in direct and tangible ways. The scheme is supporting more than 30 NGOs and human rights institutions to improve human rights in a range of countries including Rwanda, Sierra Leone, Cambodia, Pakistan and Afghanistan.

Human rights are also promoted through high-level aid dialogues and program activities in individual countries.

Australia seeks to protect and promote human rights around the world through its official aid to help women, children and people with disability realise their rights, as set out in the Millennium Development Goals. The nation’s aid programs have been re-oriented to be more inclusive of people with disability and to promote an increased focus on disability rights internationally. For example, \$3.2 million has been provided since 2008 to the global Disability Rights Fund to support advocacy by organisations representing people with disability internationally.

Finally, Australia is a strong international advocate for gender equality and women’s empowerment. The Australian Government is a founding supporter of UN Security Council Resolution 1325, Women, Peace and Security. In 2010 the Government allocated significant resources to the establishment of UN Women, the UN organisation dedicated to gender equality and the empowerment of women.

## 1.2 Australia's constitutional system

The Australian Constitution is Australia's foundational law and establishes a federal system in which power is distributed between the Commonwealth and the six states. The Constitution also permits the Commonwealth Parliament to make laws in relation to territories. There are 10 territories, of which three are self-governing. All states and territories and the Commonwealth are subject to the Australian Constitution, which gives precedence to Commonwealth laws within the scope of Commonwealth constitutional power.<sup>17</sup> Each state has its own constitution that regulates, among other things, the legislature, the executive government and the courts of the particular state and empowers the state parliament to make laws on any subject of relevance to that state. The rule of law underpins Australia's legal system: the body that makes the laws, the parliament, accepts the courts' decisions about the meaning and application of those laws and decisions about the limits on the powers of the legislative and executive branches of government.

### 1.2.1 Constitutional rights and guarantees

The Australian Constitution provides certain guarantees that are considered to be 'express rights', in addition to several implied rights interpreted by the High Court of Australia. The express rights are as follows:

- Trial for offences tried on indictment under Commonwealth law must be by jury (s 80).
- The Commonwealth Government cannot make laws establishing a religion, imposing any religious observance or prohibiting the free exercise of any religion. The Constitution also prohibits the imposition of any religious test as a qualification for a Commonwealth office (s 116).
- State parliaments are prohibited from discriminating against residents of other states (s 117).
- The Commonwealth can acquire private property only if just compensation is provided (s 51(xxxi)).

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<sup>17</sup> Australian Constitution, s 109.

The High Court has also found protections<sup>18</sup> to be implied from ss 7 and 24 of the Constitution, which require freedom of communication on political matters, members of Parliament to be ‘directly chosen by the people’ and a guarantee of federal elections.<sup>19</sup> The *Commonwealth Electoral Act 1918* gives all Australian citizens who have reached the age of 18 years (with very limited exceptions) the right to vote.

The Constitution confers on the High Court of Australia jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction is sought against an officer of the Commonwealth. This constitutionally entrenched jurisdiction cannot be taken away by the parliament. It secures a basic element of the rule of law by enabling the High Court to compel the performance of duties or to prevent power being exceeded or to restrain unlawful behaviour by Commonwealth officials. The separation of judicial power (see Section 1.2.3) also strengthens the rule of law.

### 1.2.2 The Crown and representative and responsible government

Australia’s system of government requires that the federal government maintain the support of a majority of the House of Representatives, which represents and is accountable to the Australian people. Representative government is a fundamental principle underlying the Australian Constitution. Sections 7 and 24 of the Constitution require that regular elections be held for both houses of parliament and that members of parliament be directly chosen by the Australian people. These principles are also reflected in the systems of government at the state and territory level.

Australia is a constitutional monarchy, and the Australian Constitution embodies the principle of responsible government. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative. The Crown acts on the advice of ministers who are members of and responsible to the parliament. The parliament may delegate to the executive subordinate law-making power within the framework specified by the parliament.

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<sup>18</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

<sup>19</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* [2010] HCA 46.

### 1.2.3 Separation of judicial power

The Australian Constitution embodies a strict separation of federal judicial power from legislative and executive power. Federal courts may only exercise judicial power and power that is incidental to judicial power. The parliament and the executive government cannot exercise judicial power. This supports the rule of law and the independence of judges, helping to uphold public confidence in the administration of justice.

## 1.3 Democratic institutions

Robust democratic institutions play an important part in the promotion and protection of human rights in Australia. Among these institutions are the following:

- *Parliamentary committees.* Parliamentary committees have an important role in scrutinising government activity and proposed laws. For example, the Senate Standing Committee for the Scrutiny of Bills is empowered to scrutinise proposed laws for their effect on fundamental rights and liberties, and the Senate Standing Committee on Regulations and Ordinances scrutinises all disallowable instruments of delegated legislation to ensure that they comply with principles of personal rights and parliamentary propriety—that is, to ensure that parliament is acting within its powers.
- *A national human rights institution.* The Australian Human Rights Commission plays a central role in protecting and promoting human rights in Australia. It is an independent statutory authority and meets the criteria for human rights institutions set out in the UN Paris Principles.<sup>20</sup> In addition to handling complaints under anti-discrimination legislation, the commission has specific legislative requirements for the protection and promotion of human rights under the *Australian Human Rights Commission Act 1986* (Cth). In particular, s 11(1)(f) of the Act gives the commission a specific inquiry and reporting role. The commission can also intervene in court proceedings that involve human rights matters and examine laws relating to certain rights, often proposing improvements. Further, the commission conducts research and inquiries and provides human

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<sup>20</sup> *Principles relating to the Status of National Institutions (the Paris Principles)*, GA Res 48/134, UN GAOR, 48th session, 85th plenary meeting, UN Doc A/Res/48/134, 1993.

rights education. There are also state- and territory-based anti-discrimination and equal opportunity commissions.

- *A free media.* Australia has a free and independent press that is protected by the implied constitutional freedom of political communication.
- *Civil society.* A strong civil society, which includes a vibrant and innovative non-government sector, plays a central role in communities across Australia, supporting the most vulnerable in the community through a range of endeavours, including the advocacy of human rights standards. The Office for the Not-For-Profit Sector has been established in the Department of the Prime Minister and Cabinet to coordinate reforms that strengthen the sector, among them establishing a ‘one-stop shop’ national regulator for the sector, simplifying and harmonising legislation that applies to the sector across jurisdictions, reducing red-tape for government-funded non-government organisations, and promoting the National Compact: Working Together.

## 1.4 Legal protections

Australia’s strong democratic institutions are complemented by a number of legal protections for human rights:

- *Anti-discrimination legislation.* An extensive anti-discrimination legislative framework exists at the Commonwealth level—the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Complaints under these Acts are dealt with by the Australian Human Rights Commission, which seeks resolution by conciliation. The commission does not have the power to make enforceable determinations, and in recent times UN committees have recommended that the commission’s mandate be strengthened. If conciliation is unsuccessful, however, a complainant can take their matter to court. An anti-discrimination and equal opportunity legislative framework also exists in each state and territory.
- *Common law.* The recognition and protection of many basic rights and freedoms derive from centuries of interpretive guidance provided by judges. The common law’s development is itself influenced by

international human rights law and Australia’s human rights commitments.<sup>21</sup>

- *Administrative law.* Australia’s administrative law system protects individual rights by providing for merits and judicial review of government decisions and promoting transparency in government processes. The primary pieces of Commonwealth legislation are the *Judiciary Act 1903*, the *Administrative Appeals Tribunal Act 1975*, the *Administrative Decisions (Judicial Review) Act 1977* and the *Legislative Instruments Act 2003*. As part of Australia’s Human Rights Framework, the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 amends the *Administrative Appeals Tribunal Act 1975* to make the president of the Australian Human Rights Commission a member of the Administrative Review Council.
- *Statutory charters of rights.* The Australian Capital Territory and Victoria have introduced statutory charters of rights—the *Human Rights Act 2004* and the *Charter of Human Rights and Responsibilities Act 2006* respectively. Other jurisdictions, including the Commonwealth, do not have statutory charters or bills of rights.

## 1.5 Australia’s Human Rights Framework

In April 2010 the Australian Government launched Australia’s Human Rights Framework in response to the report of the National Human Rights Consultation. The framework outlines important measures as part of the Government’s continuing commitment to protecting and promoting human rights. The measures will be subject to a future review.

### 1.5.1 Greater parliamentary scrutiny

The National Human Rights Consultation revealed much community support for ensuring that human rights considerations are at the centre of policy development and law-making processes, including by parliament giving greater attention to human rights and incorporating human rights early in the development of laws and policies.

As a result, the Australian Government has recently overseen the passage of legislation requiring that each new Bill and disallowable legislative

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<sup>21</sup> See National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, pp 117–18.



instrument be accompanied by a statement of compatibility with the seven core UN human rights treaties to which Australia is a party. Some advocates have supported the inclusion of additional treaties in this list—for example, the Declaration on the Rights of Indigenous People. The new Acts will also establish a new Parliamentary Joint Committee on Human Rights, which will have specific responsibility for scrutinising Bills and disallowable legislative instruments for compliance with Australia’s human rights obligations.

### 1.5.2 Human rights education

Reflecting the National Human Rights Consultation Committee’s recommendation that human rights education be the highest priority, the Human Rights Framework commits the Australian Government to the following:

- enhance its support for human rights education in primary and secondary schools
- develop a Public Sector Human Rights Education Program that will raise awareness and understanding of human rights obligations and strengthen the capacity of public sector officials to develop policies, programs and legislation that are consistent with human rights
- fund an education grants program providing \$2 million over four years to non-government organisations so that they can deliver human rights education and engagement programs at the grassroots level
- allocate \$6.6 million over four years to the Australian Human Rights Commission so that it can expand its community education role and provide information and support for human rights education programs.

#### ***Primary and secondary schools***

The Australian Curriculum, Assessment and Reporting Authority is at present consulting in relation to development of the national school curriculum. The Australian Human Rights Commission is participating in consultations on the draft curriculum and recommending ways in which human rights content in the curriculum can be strengthened.

### ***The public sector***

On 7 September 2011 the Attorney-General launched the Public Sector Human Rights Education Program. The program consists of an introductory booklet on human rights, a dedicated web page providing guidance materials, general and advanced face-to-face training sessions, and a UN Human Rights Recommendations database.

### ***The community***

On 9 September 2011 the Attorney-General announced the successful projects under the 2011–12 Human Rights Education Grants. In all, \$459 663 was awarded to 15 projects. The projects cover a range of geographical locations, including remote communities in the Northern Territory and communities in Perth, Adelaide, New South Wales, Queensland and Victoria, and target a range of groups, among them Aboriginal and Torres Strait Islander children, people with disability, refugees and newly arrived immigrants, and the broader Australian community.

#### **1.5.3 Consolidation of anti-discrimination legislation**

As part of the Human Rights Framework, the Australian Government is consolidating Commonwealth anti-discrimination legislation into a single, comprehensive Act in order to make the system more accessible and to remove unnecessary regulatory overlap. The Government intends to include protections for sexual orientation and against gender identity discrimination in the consolidated legislation.

#### **1.5.4 Debate about a federal human rights Act**

One of the recommendations of the National Human Rights Consultation Committee was that Australia adopt a federal human rights Act based on the ‘dialogue’ model. A central feature of the Act would be to empower the judiciary to make ‘declarations of incompatibility’ if legislation is found to be inconsistent with human rights.<sup>22</sup> A number of submissions to the Baseline Study reiterated calls for such an Act.

The Human Rights Framework does not include a human rights Act or charter. There is overwhelming support for human rights in Australia, but

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<sup>22</sup> For a fuller description of the dialogue model, including in other jurisdictions, see National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, pp 241–62.

many Australians remain concerned about the possible consequences of such an Act. The Australian Government considers that, as far as is possible, human rights should be promoted and protected in a way that unites, rather than divides, the community. It seeks practical change, including greater parliamentary scrutiny of human rights. Advancing the cause of human rights would not be served by an approach that is divisive or creates uncertainty in the community.



## 2 The human rights concerns of the general community

The National Human Rights Consultation Committee identified a number of human rights concerns relevant to the general community. Among them are access to justice, Australia's counter-terrorism measures, use of force by police, people trafficking, workers' rights, climate change and poverty. These concerns have also been raised by UN human rights treaty bodies.

### 2.1 Access to justice

Access to justice is integral to the rule of law. The National Consultation report found that 'access to justice is limited for many Australians'.<sup>23</sup> Submissions to the National Consultation Committee primarily raised concerns about the increasing demand for legal assistance, including for Indigenous legal aid<sup>24</sup> and in community legal centres.<sup>25</sup>

#### 2.1.1 Legal assistance

The Commonwealth and State and Territory Governments provide funding for legal assistance services, and the private sector provides some pro bono assistance. Many of these services are provided to members of disadvantaged groups. In the 2010–11 Budget the Australian Government allowed for an increase of \$154 million for legal aid commissions, community legal centres and Aboriginal and Torres Strait Islander legal services. In addition, the Commonwealth and State and Territory Governments have agreed to the National Partnership Agreement on Legal Assistance Services (1 July 2010 to 30 June 2014), which takes a holistic approach to reforming the delivery of legal assistance services and aims to improve the targeting of such services for disadvantaged Australians.

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<sup>23</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General's Department, Canberra, 2009, p 203.

<sup>24</sup> *ibid.*, p 199.

<sup>25</sup> *ibid.*, p 200.

### 2.1.2 Access to justice principles

In 2009 the Australian Government released a report entitled *A Strategic Framework for Access to Justice in the Federal Civil Justice System*. The same year the Government adopted the report's central recommendation, for a strategic framework for access to justice to guide consideration of future justice reforms and introduce strategic discipline to ensure a more effective allocation of resources. These principles have also been endorsed by all state and territory attorneys-general.

In the Australian Government's view, courts should not be the primary means whereby people resolve disputes. Instead, early and low-cost resolution is encouraged when appropriate. The Government's Access to Justice website<sup>26</sup> is now a central source of information, connecting people with legal and other service providers in their area. It is important that people are equipped with the information and skills to deal with issues and resolve conflicts. Better information can lead to earlier action and better results for people from a range of social backgrounds.

High-quality, consistent data about the civil justice system remain scarce. This presents challenges for both identifying and acting on matters to do with access to justice. It also makes evaluating the performance of the civil justice system difficult.<sup>27</sup> The Government is exploring this with a view to developing a strong evidence base to underpin civil justice policy and program reforms in the future.

## 2.2 Counter-terrorism

The aim of Australia's national security legislation is to protect Australian people and interests from threats to security, including the threat of terrorism, without unnecessarily encroaching on the individual rights and liberties that are fundamental to our democratic system. The Australian Government considers that the safeguards built into Australia's counter-terrorism arrangements—especially the arrangements for regular monitoring and review—will ensure that its response properly balances national security interests with fundamental rights and freedoms.

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<sup>26</sup> Australian Government, *Access to Justice*, 2010, viewed 18 October 2011, [www.accesstojustice.gov.au](http://www.accesstojustice.gov.au).

<sup>27</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Attorney-General's Department, Canberra, 2009, p 72.

Some participants in the National Human Rights Consultation expressed concern that the balance between liberty (particularly the presumption of innocence) and security is not being met.<sup>28</sup> Concern also centres on the perception that the counter-terrorism arrangements impinge on rights to freedom from arbitrary arrest, liberty, movement, a fair trial and freedom to demonstrate lawfully. This concern was also raised by the Human Rights Committee in its 2009 concluding observations.<sup>29</sup> A number of recommendations made during the Universal Periodic Review process called for a review of Australia’s counter-terrorism legislation to ensure that it complied with international human rights commitments.<sup>30</sup>

### 2.2.1 The legal definition of ‘terrorist act’

Submissions to the Baseline Study expressed concern that Australia’s counter-terrorism legislation is inconsistent with the presumption of innocence. They argued that the legislative definition of ‘terrorist act’ is too vague and that the terrorism offences target a broad range of preliminary and/or ancillary conduct that might be carried out well before an intent is formed to commit any particular terrorist act.

The definition of ‘terrorist act’ is carefully set out in s 100(1) of the *Criminal Code Act 1995* (Cth). The section provides that actions or threats of action must be made with the intention of advancing a political, religious or ideological cause and with the intention of coercing or intimidating an Australian or foreign government or the public. The definition refers to actions or threats of action involving serious harm to people, damage to property, endangerment of life, serious risk to the public’s health or safety, or serious interference with an electronic system including telecommunications, financial and essential government services systems, essential public utilities and transport providers. Action that is advocacy, protest, dissent or industrial action and is not intended to cause serious harm or death, endangerment of life or serious risk to the health or safety of the public is expressly excluded from being a ‘terrorist act’. This ensures that the definition is properly targeted at terrorist activity.

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<sup>28</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, p 42–3.

<sup>29</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee—Australia*, CCPR/C/AUS/CO/5, 7 May 2009, [11].

<sup>30</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.137 (Russian Federation)], [86.138 (Belgium)], [86.139 (Republic of Moldova)] and [86.140 (Switzerland)].

A high level of rigour is required if the components of the definition are to be satisfied. The prosecution must satisfy, beyond reasonable doubt, two levels of ‘intention’ in relation to the definition of ‘terrorist act’—that there was an intention to advance a political, religious or ideological cause by the action or threat of action and that there was an intention to coerce or intimidate a government or to intimidate the public.

Division 101 of the Criminal Code creates offences in relation to terrorist acts and Division 102 creates offences in relation to terrorist organisations. The fault elements of the terrorist act and terrorist organisation offences ensure that only conduct associated with a terrorist motive is criminalised. Some of the offences in the Criminal Code are designed to target conduct before a terrorist act occurs. Effective counter-terrorism laws must be preventative, to deter terrorists and prevent the extreme harm caused by acts of terrorism; for example, it is an offence to receive training from a terrorist organisation or to act in preparation for a terrorist act.

There are also numerous safeguards to ensure that Australia’s counter-terrorism legislation is effective but does not encroach on individuals’ rights and freedoms.

### **2.2.2 Listing terrorist organisations**

An organisation is a ‘terrorist organisation’ if it is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs) or if it is specified a ‘terrorist organisation’ by the Criminal Code Regulations 2002 (Cth). Some submissions to the Baseline Study expressed concern that the listing of terrorist organisations under the regulations might unnecessarily impinge on freedom of association and freedom of expression.

Safeguards are built into the legislation. Before a terrorist organisation can be listed under the Criminal Code Regulations the Attorney-General must be satisfied on reasonable grounds that the organisation in question is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). By November 2010, 19 organisations had been officially listed. In addition, the Criminal Code provides that the Parliamentary Joint Committee on Intelligence and Security may review a terrorist listing regulation. The committee regularly reviews all terrorist listings, which allows for further parliamentary scrutiny.



### 2.2.3 Police and ASIO powers

Stakeholders also raised concerns about the breadth of police and Australian Security Intelligence Organisation powers under Australia's counter-terrorism arrangements. The Australian Government has stressed that these powers are measures of absolute last resort<sup>31</sup> and has ensured that important safeguards, which must be strictly complied with for the protection of individual rights, exist.

Under the *Australian Security Intelligence Organisation Act 1979* (Cth) ASIO may seek a warrant to question, and in very limited circumstances detain, a person for up to seven days to question them about intelligence that is important in relation to a terrorism offence. Such a warrant may only be sought with the consent of the Attorney-General and must be issued by a judge or federal magistrate.

During the National Human Rights Consultation a particular concern raised in relation to the ASIO questioning powers was the provision that a person could be questioned without a lawyer being present.<sup>32</sup> A person may be questioned in the absence of a lawyer of their choice if access to their chosen lawyer has been denied and the person refuses to have any other lawyer present. Access to a lawyer of choice can be denied only if the 'Prescribed Authority' (an independent person with judicial experience who presides over the questioning) is satisfied that, on the basis of the circumstances relating to that particular lawyer, there is a risk that a person allegedly involved in a terrorism offence may be alerted about the investigation or evidence the person is required to produce under warrant may be destroyed, damaged or altered.

### 2.2.4 Control orders and preventative detention orders

National Human Rights Consultation participants also expressed concern about control orders and preventative detention orders. Both types of orders are measures of last resort for law enforcement agencies. To date, only two control orders have been issued, and no preventative detention orders have been issued.

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<sup>31</sup> Australian Government, *Australian Government Response: follow-up to the concluding observations of the UN Committee against Torture*, 2009, viewed 28 February 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_Humanrights](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrights).

<sup>32</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General's Department, Canberra, 2009, pp 42–3; see also the *Australian Security Intelligence Organisation Act 1979* (Cth), Division 3, Part III.

Control orders allow controls to be placed on the movements and activities of people deemed to pose a terrorist risk to the community. An application for a control order can be initiated by the Australian Federal Police but requires the consent of the Attorney-General. The order can be issued only by a court. Legislation requires that every one of the obligations, prohibitions and restrictions to be imposed on a person by an order must be reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act. The court must take into account the order's impact on the person's circumstances, including their financial and personal circumstances. A number of protective safeguards relating to the issuing of a control order also apply. For example, people subject to such an order are entitled to notice and judicial review. Each year the Attorney-General must report to parliament on the orders' operation.

In very rare situations preventative detention orders may be issued if there has been a terrorist act or a terrorist act is imminent. A person may be preventatively detained for a maximum of 48 hours. Again, a number of safeguards are built into the legislation. For example, there must be reasonable grounds to suspect the person will engage in a terrorist act or has done an act in preparation for a terrorist act and the preventative detention order would substantially assist in preventing this occurring. Questioning of the person in preventative detention is prohibited. They must be treated with humanity and dignity and not be subjected to cruel, inhuman or degrading treatment; they must be given an opportunity to contact a lawyer; and they are entitled to contact a family member and employer solely for the purpose of letting them know they are safe but cannot be contacted for the time being. An interpreter is to be provided if the person has difficulty with English. The person is also to be advised of any right he or she has to make a complaint to the Commonwealth Ombudsman. The ombudsman is notified of the making of the order, given a copy of the initial preventative detention order, and notified when the person is taken into custody. Offences apply for breaching certain safeguards.

### **2.2.5 Monitoring counter-terrorism legislation**

Australia's national security legislation is regularly reviewed in order to ensure that the laws remain appropriate and are being complied with. The Inspector-General of Intelligence and Security, an independent statutory office holder, reviews the activities of the agencies that collectively make up the 'Australian intelligence community'. The inspector-general has the

power to conduct regular inspections of intelligence agencies and to conduct inquiries. Additionally, in 2011 an Independent National Security Legislation Monitor was appointed. The monitor will review the practical operation of the counter-terrorism legislation annually to ensure that it is operating effectively and appropriately.

The Parliamentary Joint Committee on Intelligence and Security is responsible for reviewing the administration and expenditure of Australia's intelligence agencies, including any matters relating to these agencies referred by the responsible minister or the parliament. In 2006 the PJCIS reviewed the operation and effectiveness of the *Border Security Legislation Amendment Act 2002* (Cth), the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), the *Suppression of the Financing of Terrorism Act 2002* (Cth) and the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

The Criminal Code also provides that the PJCIS may review a terrorist listing regulation. The PJCIS regularly reviews all terrorist listings, which affords additional parliamentary scrutiny. It also conducted an inquiry into the terrorist organisation listing provisions under the Criminal Code in 2007 and a review of the ASIO questioning and detention powers in 2005. The PJCIS will review the ASIO questioning and detention powers before the powers sunset in 2016.

The Australian Government has a record of responding positively to reviews of its counter-terrorism arrangements. In November 2010 the parliament passed the *National Security Legislation Amendment Act 2010* (Cth), implementing the recommendations of several independent and bipartisan parliamentary committee and other reviews of Australian national security and counter-terrorism legislation, such as the following:

- the Review of Security and Counter-Terrorism Legislation by the PJCIS (December 2006)
- the Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006)
- the PJCIS inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code (September 2007)
- the Hon. John Clarke QC's inquiry into the case of Dr Mohamed Haneef (November 2008).

The Council of Australian Governments is shortly to begin an independent review of counter-terrorism laws relating to preventative detention, control orders and certain emergency police powers.

### 2.3 The use of force by police

A joint NGO submission to Australia's Universal Periodic Review raised concern about a lack of regulation relating to the use of force by police.<sup>33</sup> A number of recommendations made during the UPR called on Australia to improve its regulation of police use of force.<sup>34</sup> Each Australian jurisdiction has its own use of force guidelines, and these are consistent with the Australia New Zealand Policing Advisory Agency's national guidelines for incident management, conflict resolution and use of force. The guidelines promote police use of the minimum amount of force appropriate for the safe and effective performance of police duties and proportional to the level of risk involved.<sup>35</sup>

The Commonwealth Ombudsman is also the Law Enforcement Ombudsman and can investigate complaints about actions of Australian Federal Police members and about the policies, practices and procedures of the Australian Federal Police as an agency.<sup>36</sup> The ombudsman has responsibility for reporting on the comprehensiveness and adequacy of Australian Federal Police complaint handling. State and territory ombudsmen have a similar role in connection with complaints about police in their jurisdictions.

There are limited data on use of force by police. Data on deaths in police custody are, however, indicators of governments' objective to provide safe custody for alleged offenders and ensure fair and equitable treatment for both victims and alleged offenders. The number of deaths in police custody has fluctuated during the past decade. The number of Category 1 deaths (those occurring in institutional settings or as a result of raids and shootings) has declined since the 1990s, while the number of

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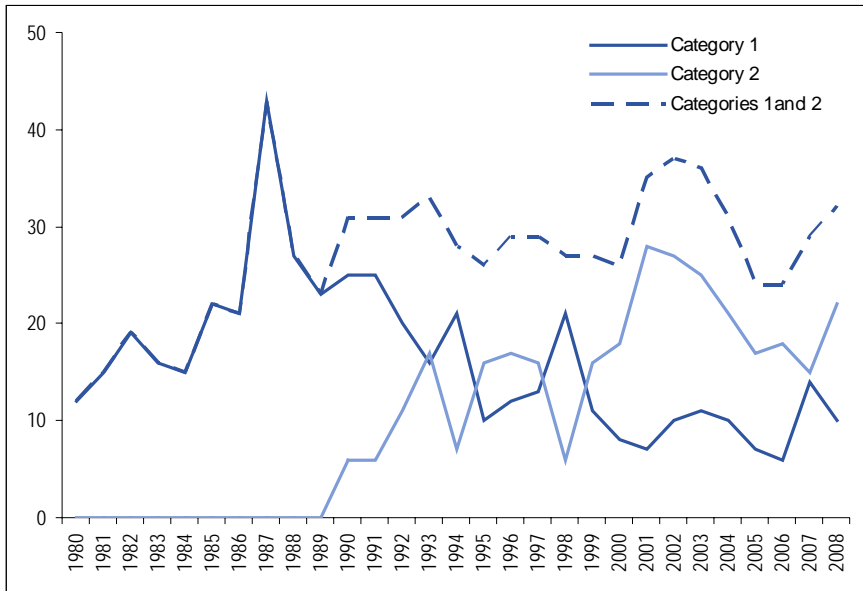
<sup>33</sup> Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights in accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1*, UN HRCOR, 10th session, UN Doc A/HRC/WG.6/10/AUS/3, 2010, [25].

<sup>34</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.89 (Malaysia)], [86.88 (Islamic Republic of Iran)] and [86.96 (United States)].

<sup>35</sup> Australasian Centre for Policing Research, *National Guidelines for Incident Management, Conflict Resolution and Use of Force: 2004*, ACPR, Canberra. 2004, p v.

<sup>36</sup> Commonwealth Ombudsman, viewed 16 June 2011, <http://www.ombudsman.gov.au>.

Category 2 deaths (police sieges and motor vehicle pursuits) has increased (see Figure 2.1). Because of data limitations, the rates cannot be determined. It is known, though, that the proportion of Indigenous to non-Indigenous deaths in police custody in 2008 was the lowest since 2001.



**Figure 2.1** Number of deaths in police custody and custody-related operations, 1980–2008<sup>37</sup>

### 2.3.1 TASERS

TASERS are a less-than-lethal-force option available to police. In its 2009 concluding observations, the Human Rights Committee expressed concern about reports of excessive use of TASERS by police forces in some Australian jurisdictions.<sup>38</sup> There was one reported death following TASER use by New South Wales Police in 2010; in Queensland a man who was TASERed by police in 2009 died; one person received substantial injuries as a result of TASER use by Western Australia Police in 2010; and in the

<sup>37</sup> M Lyneham, J Joudo-Larsen & L Beacroft, *Deaths in Custody in Australia: National Deaths in Custody Program 2008*, Australian Institute of Criminology, Canberra, 2010, p 65.

<sup>38</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee—Australia*, UN Doc CCPR/C/AUS/CO/5, 2009, [21].

Northern Territory seven minor injuries were caused by TASERs used in 2010.

Use and monitoring arrangements for TASERs vary according to the jurisdiction:

- The Australian Federal Police issues TASERs to members of the Specialist Response and Security Tactical Response teams and frontline sergeants in ACT Policing, as well as to members of the Operational Response Group within the International Deployment Group.
- New South Wales Police officers may use TASERs only to protect human life and avoid violent confrontation. A TASER must not be used on individuals who are already compliant or passive. TASER incidents are reviewed by senior management and can be investigated by Professional Standards Command.
- Victoria Police has trialled TASERs on a limited basis since 2004. TASERs can be used as an alternative to firearms only when it is safe to do so. Each instance of TASER use is subject to review by managers and can be investigated by the Ethical Standards Department and the Office of Police Integrity.
- The Queensland Crime and Misconduct Commission reported on policy and practices relating to TASERs following a TASER death in 2009. The evaluation found the revised policy has had some positive effects, notably a considerable decrease in the frequency of TASER use and no evidence of widespread misuse. Some aspects of TASER use did, however, continue to concern the commission—for example, the likelihood of TASERs being used against people with a mental health condition or Aboriginal and Torres Strait Islander peoples.<sup>39</sup>
- In 2010 Western Australia Police implemented a new use of force reporting and monitoring regime, and all use of force reports are now reviewed by the Corporate Use of Force Coordinator. Use of force is also subject to independent review by the Corruption and Crime Commission of Western Australia.

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<sup>39</sup> Queensland Crime and Misconduct Commission, *Evaluating Taser Reforms: a review of Queensland Police Service policy and practice*, CMC, Brisbane, 2011, p xvii.

- In South Australia TASERs are issued only to trained police who are operational personnel. TASERs may be used if a person is armed with a weapon and if the use is necessary to prevent serious injury or death to a person.
- In Tasmania the issuing of TASERs is limited to specialist officers who are members of the Special Operations Group. The devices are to be used only as part of a tactical response to a specific incident and not as part of general duties.
- ACT Policing monitors the effectiveness of TASERs as a less-than-lethal-force option in the ACT and in other jurisdictions. The ACT is currently reviewing police criminal investigative powers, including for consistency with the *Human Rights Act 2004*.
- In the Northern Territory the threshold for TASER use by NT Police is the imminent risk of serious injury or harm.<sup>40</sup> Use of TASERs is monitored by the TASER Review Committee and by review of use of force case note entries.

Work is currently being done across jurisdictions to examine options for improving consistency in policy for police use of less-than-lethal-force options such as TASERs.

## 2.4 People trafficking

People trafficking is the physical movement, recruitment, harbouring or receipt of people across and within borders through deceptive means, coercion or force for some kind of exploitative purpose. Globally, men, women and children are trafficked for a wide range of purposes—sexual servitude, forced labour, forced recruitment into militia or the armed forces, the harvesting of body organs, and so on.

Although acknowledging Australia’s efforts to combat people trafficking, in 2009 the UN Committee on Economic, Social and Cultural Rights expressed concern at the persistence of trafficking—in particular, of women—in our region. The committee encouraged Australia to continue its efforts and recommended the adoption of a national human rights-based strategy to combat people trafficking and respond to the

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<sup>40</sup> *ibid.*, p xviii.

consequent exploitation.<sup>41</sup> In 2010 the UN Committee for the Elimination of Discrimination against Women praised Australia’s implementation of the Trafficking Protocol through its anti–people trafficking strategy and its adoption of a more humanitarian response through the Support for Victims of People Trafficking Program and the People Trafficking Visa Framework. The committee did, however, recommend that Australia ‘adopt a human rights framework in its revised action plan and consider complementary approaches to the current criminal justice approach’.<sup>42</sup>

During Australia’s Universal Periodic Review several countries recommended that Australia strengthen its efforts to combat people trafficking. Among other things, the recommendations covered the following:

- increasing efforts to criminally prosecute trafficking offenders—including employers and labour recruiters who subject migrant workers to debt bondage and involuntary servitude<sup>43</sup>
- using the Office of the UN High Commissioner for Human Rights’ principles and guidelines as a guide to Australia’s anti-trafficking measures.<sup>44</sup>

#### 2.4.1 The nature and extent of people trafficking in Australia

There is only limited reliable data about the nature and extent of people trafficking in Australia. There is, however, general consensus that people trafficking affects almost every country in the world. In its annual *Trafficking in Persons Report* for 2007 the US State Department estimates that up to 800 000 people are trafficked across borders each year.<sup>45</sup> The International Labour Organization estimates that at least 12.3 million people are trapped in forced labour and that 2.45 million of them have

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<sup>41</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 12 June 2009, E/C.12/AUS/CO/4, 42nd Session, 4–22 May 2009, p 6.

<sup>42</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, 20 July 2010, CEDAW/C/AUL/CO/7, 46th Session, 12–30 July 2010, p 6.

<sup>43</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendation [86.87 (United States)].

<sup>44</sup> *ibid.*, recommendation [86.85 (Philippines)].

<sup>45</sup> US Department of State, *Trafficking in Persons Report June 2007*, p 8. Subsequent reports do not nominate a figure.



been trafficked; of these, 1.36 million are thought to be in the Asia–Pacific region.<sup>46</sup>

Although opportunities for trafficking people into Australia are limited because of our strong migration controls and geographic isolation, Australia is nevertheless a destination country for victims of trafficking, mainly from Asia. To date, most victims Australian authorities have identified have been women found working in the sex industry. Submissions to the National Human Rights Consultation suggested that the demand for prostitution and digital images of child sex abuse creates markets for people trafficking and exploitation. One submission to the Baseline Study argued that a potential reason for finding women trafficked into the sex industry is that investigations tend to focus on the sex industry, and particularly on Asian women—potentially skewing the data. Authorities are, however, becoming increasingly aware of victims who have been trafficked for exploitation in industries such as agriculture, construction, hospitality and domestic services.

#### 2.4.2 Australia’s response to people trafficking

Australia’s response to people trafficking reflects its obligations as a party to the UN Convention against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which, together with the body of international human rights and labour treaties, form the international legal framework for combating trafficking. Under the convention and the protocol, each state party is required to establish criminal offences for trafficking in people.<sup>47</sup>

Australia has taken a comprehensive, whole-of-government approach to combating people trafficking. It also works with other governments internationally and with non-government organisations to respond to the full cycle of trafficking, from recruitment to re-integration. Since the establishment of Australia’s anti-people trafficking strategy in 2003, the Australian Government has provided more than \$100 million (\$50 million

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<sup>46</sup> International Labour Organization, *A Global Alliance against Forced Labour: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, ILO, Geneva, 2005, pp 10–15, viewed 19 July 2011, [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_081882/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_081882/lang--en/index.htm).

<sup>47</sup> UN Convention against Transnational Organized Crime, opened for signature 12 December 2000, 2225 UNTS 209, arts 5, 6, 8 and 10 (entered into force 29 September 2003); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, opened for signature 12 December 2000, 2237 UNTS 319, art 5 (entered into force 25 December 2003).

of this from AusAID) to support domestic, regional and international anti-people trafficking measures such as the following:

- specialist teams in the Australian Federal Police to investigate trafficking and sexual exploitation offences
- legislation to criminalise people trafficking and trafficking-related activities
- a victim support program that provides individual, case-managed assistance to eligible victims of trafficking—including access to accommodation, financial assistance, legal advice, training and social support
- research into national and regional trafficking activities by the Australian Institute of Criminology
- the Australian Policing Strategy to Combat Trafficking in Persons
- visa arrangements to enable suspected victims and witnesses of trafficking to remain in Australia to support the investigation and prosecution of trafficking offences
- specialist immigration officers posted in Thailand, China and the Philippines who focus on people trafficking and aim to prevent trafficking in source countries
- regional activities aimed at deterring trafficking, training law enforcement officials and helping the victims of trafficking under Australia’s overseas aid program.

These initiatives reflect the four central pillars of Australia’s anti-people trafficking strategy: prevention; detection and investigation; criminal prosecution; and victim support and rehabilitation.

### 2.4.3 Support for victims

Australia offers a variety of support services for suspected victims of trafficking under the Support for Victims of People Trafficking Program. The program is administered by the Department of Families, Housing, Community Services and Indigenous Affairs on behalf of the Australian Government and is delivered by the Australian Red Cross. It provides case-managed assistance for victims and their dependent children. The assistance includes income support, secure accommodation, medical

treatment, migration and legal advice, counselling, training and social support. Under the program people trafficked into Australia for both sexual servitude and labour exploitation have been helped. Victims receive an initial 45 days of intensive support, regardless of their willingness and ability to help with investigation and prosecution of a people trafficking offence.

Since 2004, 186 suspected victims of people trafficking have received assistance under the Support Program.<sup>48</sup> Of these, 151 were women trafficked into the sex industry, and 35 (19 men and 16 women) were allegedly trafficked into other forms of labour exploitation. In 2010–11 the Australian Federal Police identified 29 people (21 women and 8 men) as suspected victims of trafficking and referred them to the Support Program. The second report of the Anti–People Trafficking Interdepartmental Committee acknowledged that in delivering the Support Program there were challenges associated with providing access to safe, suitable and affordable accommodation, employment assistance, education and other services.

#### **2.4.4 The people trafficking visa framework**

Australia’s visa framework allows suspected victims of trafficking to remain lawfully in Australia if they do not already hold a valid visa. There are three types of visa for people who are suspected trafficking victims and need to remain in Australia for various purposes: the Bridging Visa F, the Criminal Justice Stay visa, and the Witness Protection (Trafficking) (Permanent) visa. In 2010–11, 24 Bridging Visa Fs and 29 Criminal Justice Stay visas were granted to suspected victims and their immediate family members (in some cases more than one to the same person); 42 Witness Protection (Trafficking) (Permanent) visas were granted, 28 to suspected victims and 14 to their immediate family members.

#### **2.4.5 Investigations and prosecutions**

Since 2004 specialist investigative teams in the Australian Federal Police have undertaken more than 300 investigations into and assessments of trafficking-related offences. By October 2011, 14 people had been convicted—nine for slavery offences, three for sexual servitude, and two for people trafficking. At that time, six people trafficking matters involving seven defendants were before the courts—three matters where trials

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<sup>48</sup> Current as at June 2011.

were pending, one case awaiting sentencing, and two cases involving three people awaiting the outcome of their appeals.

Australia's slavery and people trafficking offences are set out in Divisions 270 ('Slavery, sexual servitude and deceptive recruiting') and 271 ('Trafficking in persons and debt bondage') of the Criminal Code. The offences are not limited to trafficking that involves sexual slavery or sexual servitude. With the exception of offences related to domestic trafficking, Australia's people trafficking offence provisions have extended geographical jurisdiction and can cover circumstances in which either the crime takes place in both Australia and overseas or the crime has been committed outside Australia by an Australian citizen, resident or company. Maximum penalties for offences range up to 25 years' imprisonment for slavery and for trafficking in children.

The *Migration Act 1958* (Cth) makes it an offence to knowingly or recklessly employ or refer for work a person who does not have a valid visa or is working in breach of visa conditions. The legislation includes aggravated offences in which a person is being exploited through forced labour, sexual servitude or slavery.

The Australian Government is currently reviewing its criminal justice response to people trafficking and slavery in order to determine whether the Criminal Code covers all forms of exploitation when dealing with practices similar to slavery, such as forced labour and deceptive recruiting for labour services. The purpose is to ensure that law enforcement has the best means available for investigating and prosecuting perpetrators. The discussion paper released for public consultation also sought views about reparation, victims' compensation and improved protections for vulnerable and disadvantaged witnesses. Submissions in response to the discussion paper closed on 25 February 2011, and the submissions are now being considered by government.

An Australian Institute of Criminology report on labour trafficking cited research pointing to a lack of clarity in some aspects of Australia's anti-trafficking laws, particularly in relation to labour trafficking, and suggested

targeting precursors to trafficking in order to cover the spectrum of exploitative behaviour.<sup>49</sup>

#### 2.4.6 Partnerships with the community

The Australian Government seeks to build strong partnerships with the not-for-profit sector. The Minister for Home Affairs established the annual National Roundtable on People Trafficking in 2008 as a consultative mechanism between the Government, non-government organisations, trade unions and industry peak bodies. The Government has committed \$2.4 million (\$1 million in 2008 to 2011 and \$1.4 million in 2011 to 2014) from confiscated criminal assets under the *Proceeds of Crime Act 2002* (Cth) to support four Australian NGOs working to combat people trafficking. It has also granted almost \$500 000 to five organisations to raise awareness of labour trafficking in Australia. In 2011–12 the Attorney-General's Department is reviewing its Communications and Awareness Strategy to ensure that the strategy takes account of emerging trends and to improve information on trafficking.

#### 2.4.7 Partnerships in our region and beyond

Through its aid program and as co-chair of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, Australia plays a prominent role in countering people trafficking in the Asia–Pacific region. Australia and Indonesia co-founded and co-chair the Bali Process, under which cooperation on people trafficking entails capacity-building initiatives to improve the criminal justice response in the region to this crime, to promote the importance of victim assistance and protection, and to strengthen efforts to prevent people trafficking.<sup>50</sup>

Australia is also involved in continuing diplomatic engagement on the question of people trafficking through UN mechanisms such as the Human Rights Council, the General Assembly, the Conference of Parties to the UN Convention against Transnational Organized Crime, the Universal Periodic

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<sup>49</sup> Fiona David, *Labour Trafficking*, Australian Institute of Criminology, Research and Public Policy Series Report 108, AIC, Canberra, 2010, pp 47–50, <http://www.aic.gov.au/publications/currentper cent20series/rpp/100-120/rpp108.aspx>.

<sup>50</sup> 'Final Co-Chairs' Statement', Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, 29–30 March 2011, viewed 19 July 2011, [http://www.baliprocess.net/files/110330\\_FINAL\\_Ministerial\\_Co-chairsper cent20statementper cent20BRMCper cent20IV.doc](http://www.baliprocess.net/files/110330_FINAL_Ministerial_Co-chairsper cent20statementper cent20BRMCper cent20IV.doc).

Review<sup>51</sup> and the UN Commission on Criminal Justice and Crime Prevention.

Addressing factors that make people vulnerable to trafficking is an important part of Australia's national and international strategies to prevent trafficking. Australia's development assistance program, worth \$4.8 billion in 2011–12, deals with violence against women and children in the region and provides funding for action designed to combat people trafficking (including labour exploitation and child sexual exploitation), reduce poverty and promote sustainable development.

Our efforts to combat human trafficking through the aid program focus on strengthening criminal justice systems and law enforcement, increasing protection from labour exploitation, and preventing child sex trafficking through education and awareness raising. This includes the five-year Asia Regional Trafficking in Persons project, which focused on strengthening criminal justice systems, primarily through training and capacity building for law enforcement officers, judges and prosecutors, and increasing regional cooperation. The current phase of the project ended in August 2011. A 12-month transition phase is now in operation, and planning to develop the next phase of anti-trafficking work in the criminal justice sector in the region is under way.

In addition, Project Childhood aims to prevent commercial sexual exploitation of children in the Mekong sub-region. AusAID is also funding the International Labour Organization to prevent labour exploitation and develop non-exploitative livelihood options under TRIANGLE, the Tripartite Action to Protect Migrants in the Greater Mekong Sub-region from Labour Exploitation project. The Department of Immigration and Citizenship has established three specialist compliance positions to focus on preventative work in relation to people trafficking; they are located in Bangkok, Manila and Guangzhou. Finally, the Australian Federal Police is involved in a wide range of cooperative activities with other countries with the aim of reducing opportunities for people traffickers to operate in the region.

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<sup>51</sup> *ibid.*, <http://www.geneva.mission.gov.au/gene/statements.html>.

## 2.5 Workers' rights

A number of Universal Periodic Review recommendations for Australia raised the general question of workers' rights and employment matters that specifically affect people from disadvantaged groups.<sup>52</sup> Efforts to secure the right to work and to ensure just and favourable working conditions have played an important part in Australia's history. Today, a national system of workplace relations, established under the *Fair Work Act 2009* (Cth), covers the majority of businesses. The system establishes a set of 10 minimum national employment standards (including maximum weekly hours and annual leave entitlements), modern industrial awards that apply nationally to specific industries and occupations, a national minimum wage order (where it applies) and protection from unfair dismissal.

The Fair Work Act established Fair Work Australia, an independent national tribunal that has a range of functions, among them providing a safety net of minimum conditions in awards, regulating the taking of industrial action, and resolving workplace disputes through conciliation, mediation and arbitration. The Act also established the Fair Work Ombudsman, who can investigate complaints or suspected contraventions of workplace laws, awards and agreements and litigate to enforce workplace laws.

## 2.6 Climate change

Several submissions to the National Human Rights Consultation dealt with the right to a clean and healthy environment and our responsibility to pass on to future generations a sustainable environment. One Universal Periodic Review recommendation suggested that Australia adopt a rights-based approach to climate change policy at home and abroad.<sup>53</sup>

The Australian Government is mindful that Australia is highly vulnerable to the impacts of climate change. A range of steps are being taken by state and territory and Commonwealth agencies to address the effects of climate change. For example, action plans to promote environmentally

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<sup>52</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10. See, for example, recommendations [86.56 (Botswana)] and [86.100 (Israel)].

<sup>53</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendation [86.31 (Maldives)].

sustainable development and respond to the threat of the spread of infectious diseases are being prepared.

The impacts of climate change might be more severe for individuals and communities that are already at risk of social or economic disadvantage. There could, for example, be significant impacts on the social and cultural cohesion of Aboriginal and Torres Strait Islander communities.

The Parliament has passed legislation designed to put a price on carbon emissions. This could have minor equity effects that should be dealt with. For example, some carbon pollution costs might flow through the economy and affect the prices of electricity and a range of other goods and services. The Government intends to direct to households more than half the revenue raised from the carbon price to help mitigate price effects. The revenue will be delivered by means of a comprehensive package of assistance delivered through increases in pensions, allowances and family benefits, as well as personal tax cuts; most of the assistance will go to households on low incomes (including pensioners and carers) because they have budgets that are most vulnerable to cost increases.

## 2.7 Poverty

Submissions to the Baseline Study noted that poverty remains an issue for many Australians. The Australian Council of Social Services has estimated that approximately 2.2 million Australians, or 11.1 per cent of the population, live in poverty.<sup>54</sup> Some groups are at higher risk of income poverty than others. The submissions noted that poverty remains a concern in specific regions of Australia. The question of poverty has also been raised in the Universal Periodic Review recommendations for Australia and by various UN committees.

Australia operates a broad range of programs designed to address this socio-economic disadvantage. In particular, it has a broad-based, highly progressive and targeted social security system based on means testing. As a result, the greatest level of support is directed to those most in need.

In addition to the main pensions and allowances, there are a number of supplementary benefits for low-income earners, including concessions for health, utility and transport costs, concessional treatment of the family

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<sup>54</sup> Australian Council of Social Services, *Poverty Report—October 2010*, viewed 19 July 2011, [http://acoss.org.au/images/uploads/ACOSS\\_poverty\\_report\\_October\\_2010.pdf](http://acoss.org.au/images/uploads/ACOSS_poverty_report_October_2010.pdf).



home in the means test, additional payments for renters, and free or concessional access to services. Benefit payments are provided to people who meet the eligibility criteria on a continuing basis. As a result, net benefits to the poorest 20 per cent of the population in Australia are among the highest of OECD countries. Compared with income-tested benefits in other OECD countries, most Australian benefits are relatively generous—in the top six of OECD countries. The OECD also acknowledges, ‘In Australia, publicly provided services in the health, education and social housing sectors reduce overall income inequality by more than in most other countries’.<sup>55</sup>

As well as providing targeted social security, the Australian Government continues to develop and implement policies and programs consistent with its Social Inclusion Agenda, which promotes economic, social and cultural rights, including by reducing disadvantage and increasing social, civic and economic participation. The gap between the rich and the poor in Australia is below the OECD average: the richest 10 per cent of Australians have incomes about seven times higher than those of the poorest 10 per cent, whereas the OECD average is 8.9 times. Additionally, Australia is one of the most socially mobile countries in the OECD: research findings show that in Australia what a child’s parents earned has very little effect on the person’s earnings in adulthood.<sup>56</sup>

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<sup>55</sup> OECD, *Growing Unequal? Income Distribution and Poverty in OECD Countries. Country Note: Australia*, OECD, Paris, 2008, viewed 5 October 2011, <http://www.oecd.org/dataoecd/44/47/41525263.pdf>.

<sup>56</sup> *ibid.*



### 3 The human rights experience of specific groups in Australia

The National Human Rights Consultation report demonstrated that for the majority of Australians the human rights experience is generally very positive: most people feel that ‘the system is not broken, and they do not foresee their human rights ever being curtailed’.<sup>57</sup> Although most Australians do not face human rights issues, the National Consultation found that members of some groups do have negative experiences.

This chapter explores the human rights experiences of specific groups in Australia. It summarises the groups’ main concerns, using as its basis submissions to the Baseline Study, the National Consultation report, recommendations of the UN Human Rights Council and UN human rights treaty bodies, and work of the Australian Human Rights Commission and other social research organisations and advocacy groups.

Submissions to the Baseline Study consistently highlighted the importance of ‘intersectionality’; that is, a person can experience discrimination or disadvantage as a result of a combination of factors—such as race, ethnicity, gender, disability, age and sexuality—rather than just one factor. In the Baseline Study it has not always been possible to deal specifically with all the ways in which domains of disadvantage or discrimination can intersect. In examining the human rights experience of specific groups in this chapter, however, it is acknowledged that intersectionality adds much complexity to the task of protecting human rights, particularly in tailoring services to people’s needs.

Importantly, the Australian Government is at present considering intersectional discrimination under the proposed consolidation of federal anti-discrimination laws.<sup>58</sup> Intersectionality will also be a central feature of a new project aimed at determining what data are necessary if we are to properly measure human rights indicators and the impact of government policies and projects.

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<sup>57</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, p 16.

<sup>58</sup> Australian Government, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, Australian Government, Canberra, 2011, p 24.

### 3.1 Aboriginal and Torres Strait Islander peoples

Many Aboriginal and Torres Strait Islander peoples<sup>59</sup> experience significant disadvantage, as measured by a range of human rights indicators. The Aboriginal and Torres Strait Islander population makes up about 2.5 per cent of the Australian population; in 2006 it had a median age of 21 years, compared with 37 years for the non-Indigenous population. The majority of Aboriginal and Torres Strait Islander peoples live in urban and regional areas; a far smaller number live in remote or very remote areas.<sup>60</sup>

Although many Aboriginal and Torres Strait Islander peoples have access to life opportunities and a good standard of living, too many experience unacceptable levels of disadvantage in living standards, life expectancy, education, health and employment. The current data show a significant gap in these critical areas between Aboriginal and Torres Strait Islander peoples and the non-Indigenous population. Numerous reports<sup>61</sup> have catalogued the complex historical and social factors that contribute to Aboriginal and Torres Strait Islander peoples' disadvantage and have recommended areas for action in relation to a broad range of human rights concerns. Submissions to the Baseline Study emphasised that the deeply entrenched inequalities Aboriginal and Torres Strait Islander peoples experience represent one of the most pressing human rights concerns for contemporary Australian society. This sentiment was also expressed in a large number of submissions to the National Human Rights Consultation that focused on the need for greater protection and promotion of the rights of Aboriginal and Torres Strait Islander peoples.

Access to employment opportunities, markets, services, infrastructure and education, and therefore the ability to participate in the broader economy, is influenced by where Aboriginal and Torres Strait Islander peoples live. Only 25 per cent of Aboriginal and Torres Strait Islander peoples live in remote Australia, but the level of economic disadvantage they experience is acute.

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<sup>59</sup> The term 'Aboriginal and Torres Strait Islander peoples' is used throughout this document. References to Aboriginal and Torres Strait Islander peoples might differ where other materials are cited; for example, there might sometimes be reference to 'Indigenous' Australians.

<sup>60</sup> Australian Bureau of Statistics, *Australian Social Trends*, ABS, Canberra, 2010.

<sup>61</sup> See, for example, the report of the Royal Commission into Aboriginal Deaths in Custody (1991); *Bringing Them Home*, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997); *Seen and Heard: priority for children in the legal process*, the report of the National Inquiry into Children and the Legal Process (1997); *Little Children are Sacred*, the report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007); and *Doing Time—Time for Doing: Indigenous youth in the criminal justice system*, the report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011).

Because opportunities and challenges for Aboriginal and Torres Strait Islander peoples' economic development differ between urban, regional and remote areas, there is a need for flexible initiatives that can adapt to place and context.

In 2007–08 the Council of Australian Governments announced the National Integrated Strategy for Closing the Gap in Indigenous Disadvantage and agreed to six targets to address Aboriginal and Torres Strait Islander disadvantage:

- Close the life expectancy gap between Aboriginal and Torres Strait Islander and non-Indigenous peoples within a generation (by 2031).
- Halve the gap in mortality rates between Aboriginal and Torres Strait Islander children and non-Indigenous children under 5 years within a decade (by 2018).
- Ensure access to early childhood education for all 4-year-old Aboriginal and Torres Strait Islander children in remote communities within five years (by 2013).
- Halve the gap in reading, writing and numeracy achievements between Aboriginal and Torres Strait Islander and non-Indigenous children within a decade (by 2018).
- Halve the gap between Aboriginal and Torres Strait Islander and non-Indigenous students completing Year 12 or equivalent within 12 years (by 2020).
- Halve the gap in employment outcomes between Aboriginal and Torres Strait Islander and non-Indigenous Australians within a decade (by 2018).

Closing the Gap is the leading initiative designed to address social disadvantage for Aboriginal and Torres Strait Islander peoples. Progress against the Closing the Gap targets will improve the human rights situation of these peoples. A range of other initiatives are also being progressed: for example, the National Indigenous Law and Justice Framework and the 2010 Indigenous Family Safety Agenda<sup>62</sup> set out the Australian Government's priorities for responding to family violence and law and justice issues in Aboriginal and Torres Strait Islander communities.

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<sup>62</sup> Department of Families, Housing, Community Services and Indigenous Affairs 2011, *Indigenous Family Safety Agenda, 2010—future actions*, viewed 16 June 2011, [http://www.fahcsia.gov.au/sa/Indigenous/pubs/families/Pages/indig\\_fam\\_safety\\_agenda.aspx#future4](http://www.fahcsia.gov.au/sa/Indigenous/pubs/families/Pages/indig_fam_safety_agenda.aspx#future4).

The National Human Rights Consultation noted that the UN Declaration on the Rights of Indigenous Peoples is of great importance to Aboriginal and Torres Strait Islander peoples. On 3 April 2009 the Australian Government announced its support for the declaration. Although the declaration is non-binding and does not affect existing Australian law, it does set important international principles for nations to aspire to, and many of its provisions are grounded in the core human rights treaties to which Australia is a party.

### 3.1.1 Self-determination and consultation

The National Human Rights Consultation and the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2010* highlighted the right to self-determination and to be consulted as primary concerns for Aboriginal and Torres Strait Islander peoples.<sup>63</sup> The main concerns include greater emphasis on strengthening Aboriginal and Torres Strait Islander peoples' governance structures and leadership at all levels<sup>64</sup>; a need for greater representation of Aboriginal and Torres Strait Islander peoples in legislative, executive and judicial institutions at all levels<sup>65</sup>; and the requirement for free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in the development of policy that directly affects their communities.<sup>66</sup>

During the Universal Periodic Review process a number of countries made recommendations relating to the importance of self-determination and consultation with Aboriginal and Torres Strait Islander peoples. They called on Australia to continue its efforts to increase the representation of Aboriginal and Torres Strait Islander women in decision-making positions and engage with Aboriginal and Torres Strait Islander peoples to ensure protection of their fundamental rights.<sup>67</sup>

The Australian Government recognises the right to self-determination in conformity with the principles territorial integrity and political sovereignty. Understanding self-determination as the right of peoples to freely determine

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<sup>63</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, ATSIJIC, Sydney, 2010.

<sup>64</sup> James Anaya, 'Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples', UN HRCOR, 15th session, UN doc A/HRC/15/37/Add.4 (2010).

<sup>65</sup> *ibid.*

<sup>66</sup> Aboriginal and Torres Strait Islander Legal Services, *Joint Submission to the United Nations Human Rights Council on the Universal Periodic Review (UPR) of Australia*, ATSIJIC, Queensland, July 2010.

<sup>67</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10. See, for example, recommendation [86.106 (Bolivia)] and related recommendations [86.105 (Ghana, Hungary and Denmark)], [86.105 (Columbia)], [86.107 (Guatemala)], [86.109 (Bolivia)], [86.120 (Morocco)], [86.111 (Mexico)], [86.112 (Indonesia)] and [86.110 (Bosnia and Herzegovina)].

their political status and pursue their economic, social and cultural development, the Government has taken a number of steps, including the following:

- issuing a statement of support for the Declaration on the Rights of Indigenous Peoples on 3 April 2009
- consulting on constitutional recognition for Australia's Indigenous peoples in the Australian Constitution
- introducing legislation to improve the operation of the native title system
- establishing the National Congress of Australia's First Peoples.

The Government is committed to pursuing recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. In December 2010 it established an expert panel to consult with Australians; the panel is due to report back to the Government by the end of 2011, with options for proceeding with this matter. The Government is also committed to holding a national referendum on the matter during its current term or at the next federal election.

The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2010 report on native title noted significant barriers to reaching just and equitable native title agreements and the Australian Government's efforts in this regard, including legislative reform and increased funding, which have now led to more effective native title processes. For instance, in 2010–11 the number of native title determinations was more than double the previous annual average. In August 2009 Commonwealth, state and territory native title ministers endorsed the Guidelines for Best Practice in Sustainable Agreement Making. This was the first time Commonwealth and State Governments have made a joint commitment to facilitate broader regional native title settlements.

Support for the establishment of the National Congress of Australia's First Peoples underpins the Australian Government's commitment to self-determination and to strengthening the relationship and ensuring genuine engagement with Indigenous Australians. The congress is a national leadership forum that advocates for recognition of the status and rights of Aboriginal and Torres Strait Islander peoples as Australia's First Nation peoples. Consistent with calls from a number of countries during the Universal Periodic Review process to increase the representation of Aboriginal and Torres Strait Islander women in decision-making positions, the National Congress is committed to gender equity and has balanced the chairperson role with a male and a female

co-chair. It provides a voice for Indigenous Australians and the opportunity to engage with governments and industry to secure the economic, social, cultural and environmental futures of Aboriginal and Torres Strait Islander peoples. As a company, the National Congress is owned and controlled by its membership and is independent of government; its first elected board took office in July 2011. The Australian Government and the National Congress are currently agreeing on priorities and finalising an engagement framework within which the Government and the congress can effectively work together on matters of importance to Indigenous peoples.

In 2011 the Australian Government introduced a new engagement framework to guide engagement between Commonwealth agencies and Aboriginal and Torres Strait Islander peoples—Engaging Today, Building Tomorrow. The framework also supports Australia’s commitment to the Declaration on the Rights of Indigenous Peoples and complements the Government’s investments in the context of Closing the Gap in Indigenous disadvantage.

In relation to strengthening a partnership approach and identifying priorities for responding to disadvantage, the Australian Government has recently concluded the wide-ranging Stronger Futures in the Northern Territory consultations with Aboriginal peoples in more than 100 towns and communities. These consultations are part of a continuing dialogue that began in 2008 with the appointment of the independent review of the Northern Territory Emergency Response and was followed in 2009 with the Northern Territory Emergency Response Redesign consultations. The latter consultations culminated in re-instatement of the *Racial Discrimination Act 1975* (Cth) to the Emergency Response measures. The Stronger Futures consultations are another important step in forging a real partnership between the Australian Government and Aboriginal peoples in the Northern Territory.

### 3.1.2 Health and housing

Health and housing for Aboriginal and Torres Strait Islander peoples are areas of particular focus under the Closing the Gap initiative.

Compared with non-Indigenous Australians, Aboriginal and Torres Strait Islander peoples are at greater risk of poor health. Among the factors contributing to this are high rates of smoking, poor diet, lower socio-economic



status, and limited housing and infrastructure support.<sup>68</sup> The health inequities that are experienced by Aboriginal and Torres Strait Islander Peoples are shaped by the social and economic conditions in which they live. Education, income and employment have been acknowledged as the primary social determinants of health<sup>69</sup>, and it is widely recognised that ‘health and illness follow a social gradient: the lower the socio-economic position, the worse the health’.<sup>70</sup>

Barriers to access to appropriate health services—including mental health services—continue to pose issues in all geographic locations. Despite the appearance of equitable or high access to primary health care, Aboriginal and Torres Strait Islander peoples do not use services at a level in keeping with their need.<sup>71</sup> Their use of Medicare and pharmaceutical benefits falls far behind that in the non-Indigenous population.<sup>72</sup> Data gaps and quality shortcomings also have a significant impact on a range of health indicators for Aboriginal and Torres Strait Islander peoples.

Among the continuing concerns about housing are housing quality, size and overcrowding. In 2008 the National Aboriginal and Torres Strait Islander Social Survey found that more than 50 per cent of Aboriginal and Torres Strait Islander children in remote areas lived in dwellings that required additional bedrooms and 13 per cent of Aboriginal and Torres Strait Islander peoples aged 15 years and over lived in households where one or more basic facilities (such as those for washing, safely removing waste and safely storing and cooking food) were not available or did not work. The proportion varied and was much higher in remote areas than in regional areas or major cities.<sup>73</sup> Participants in Human Rights Law Centre workshops also highlighted the need for Aboriginal

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<sup>68</sup> National Indigenous Health Equality Council, *National Indigenous Health Equality Council Recommendations*, 2010, viewed 8 February 2011, [http://www.nihec.gov.au/internet/nihec/publishing.nsf/Content/childmortality\\_nihec-recommendations](http://www.nihec.gov.au/internet/nihec/publishing.nsf/Content/childmortality_nihec-recommendations).

<sup>69</sup> Department of Health and Ageing, *New National Women’s Health Policy*, Consultation discussion paper, DOHA, Canberra, 2009, p 14.

<sup>70</sup> World Health Organization, *Closing the Gap in a Generation: health equity through action on the social determinants of health*. Final report of the Commission on the Social Determinants of Health, WHO, Geneva, 2008.

<sup>71</sup> Australian Medical Association, *2010–11 Indigenous Health Report Card—best practice in primary healthcare for Aboriginal peoples and Torres Strait Islanders*, 2011, viewed 29 September 2011, <http://ama.com.au/node/6629#anchorone>.

<sup>72</sup> Australian Institute of Health and Welfare, *Expenditure on Health for Aboriginal and Torres Strait Islander Peoples, 2006–07*, Cat. no. HWE 48, AIHW, Canberra, 2009.

<sup>73</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey*, ABS, Canberra, 2008.

and Torres Strait Islander peoples to receive better information about tenancy and property obligations.<sup>74</sup>

Access to safe and affordable housing is crucial to Closing the Gap in Indigenous disadvantage, and this is being addressed in partnership with the Northern Territory and State Governments under the \$5.5 billion National Partnership Agreement on Remote Indigenous Housing and through the Social Housing Initiative and the National Partnership Agreement on Social Housing.

The National Partnership Agreement on Remote Indigenous Housing will deliver up to 4200 new houses and rebuild or refurbish about 4800 existing houses to address overcrowding and poor housing conditions in Indigenous communities. Under the agreement jurisdictions are required to ensure that rents are collected, a regular repairs and maintenance program operates to extend the life of houses, and tenants of new houses receive living skills support programs to help them understand their rights and responsibilities and how to care for their new home.

The Social Housing Initiative provides for new construction over three-and-a-half years. From the available tenant data<sup>75</sup>, over 1900 dwellings—14 per cent of the over 13 900 dwellings—went to Aboriginal and Torres Strait Islander peoples. The National Partnership Agreement on Social Housing provided an increased supply of housing, contributing to reducing homelessness and improving outcomes for Aboriginal and Torres Strait Islander people experiencing homelessness. From the available tenant data, over 100 dwellings—7 per cent of the over 1470 dwellings—went to Aboriginal and Torres Strait Islander peoples.

In 2005 to 2007 Aboriginal and Torres Strait Islander peoples' life expectancy was estimated to be 11.5 years lower for males and 9.7 years lower for females when compared with the non-Indigenous population. Aboriginal and Torres Strait Islander peoples are also more likely than non-Indigenous Australians to have asthma, heart disease, kidney disease, diabetes and high blood sugar levels.<sup>76</sup> In 2008, 47 per cent of all Aboriginal and Torres Strait Islander people surveyed in the National Aboriginal and Torres Strait Islander Social Survey were smokers—more than double the proportion among non-Indigenous

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<sup>74</sup> Human Rights Law Centre, *Aboriginal and Torres Strait Islander Workshop on the National Human Rights Action Plan*, HRLC, Darwin, 6 September 2011.

<sup>75</sup> As at 30 September 2011.

<sup>76</sup> Australian Bureau of Statistics, *Experimental Life Tables for Aboriginal and Torres Strait Islander Australians 2005–2007*, ABS, Canberra, 2009.

Australians. The Government has committed \$100.6 million over four years to tackling Aboriginal and Torres Strait Islander peoples' smoking through the National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes.

In 2008, 29 per cent of Aboriginal and Torres Strait Islander people did not consume any alcohol in the previous 12 months, almost double the rate for non-Indigenous Australians. Aboriginal and Torres Strait Islander peoples were, however, more than twice as likely as non-Indigenous Australians to binge drink, and they died from alcohol-related causes at five times the rate of non-Indigenous people.<sup>77</sup>

Suicide rates are also higher for Aboriginal and Torres Strait Islander peoples than for other Australians.<sup>78</sup> Victoria has recently released the Victorian Aboriginal Suicide Prevention and Response Action Plan 2010–2015, which describes the Victorian Government's strategy for preventing and reducing the incidence and impacts of Aboriginal and Torres Strait Islander peoples' suicide and self-harm. The plan sets out strategies for further action in four priority areas:

- prevention through building resilience
- improving access to care and support for those at risk
- improving the response to crisis and communities post-suicide
- improving the evidence base, data collection and analysis.

The high disability prevalence rates experienced by Aboriginal and Torres Strait Islander peoples occur for a range of reasons, including poor health care, poor nutrition, exposure to violence and psychological trauma, substance abuse, and the breakdown of traditional community structures in some areas. The National Disability Strategy acknowledges that the high prevalence of disability among Aboriginal and Torres Strait Islander peoples—approximately twice the rate experienced by non-Indigenous Australians—compounds the disadvantage they experience.

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<sup>77</sup> Australian Institute of Health and Welfare, *Slight reduction in Indigenous smoking, but binge drinking a worry*, Media Release, 8 February 2011, viewed 1 March 2011, <http://www.aihw.gov.au/media-release-detail/?id=10737418259>.

<sup>78</sup> Australian Productivity Commission, *Overcoming Indigenous Disadvantage Report*, Productivity Commission, Canberra, 2011, p 53.

The National Disability Agreement came into operation on 1 January 2009 and provides a framework for the provision of government support for people with disability. One area identified as a priority is increased access to specialist disability services for Aboriginal and Torres Strait Islander peoples: the National Indigenous Access Framework will be developed to ensure that the needs of Aboriginal and Torres Strait Islander peoples with disability are addressed through appropriate service delivery arrangements.

A number of recommendations made during Australia's Universal Periodic Review referred to improving Aboriginal and Torres Strait Islander peoples' health outcomes and called on Australia to intensify its efforts to close the gap in opportunities and life outcomes for Aboriginal and Torres Strait Islander peoples.<sup>79</sup> The 2010 report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples noted that 'the [Australian] Government has taken important steps to improve Indigenous health' but recommended that 'it ... strengthen efforts to ensure that Indigenous Australians have equal access to primary health care and that the basic health needs of Indigenous communities are met, especially in remote areas'.<sup>80</sup>

In its *Close the Gap Shadow Report* of February 2010, the Close the Gap Steering Committee for Indigenous Health Equality<sup>81</sup> highlighted a number of important matters as essential to Aboriginal and Torres Strait Islander peoples' health equality, among them the following:

- a comprehensive, long-term plan of action that is targeted to need, evidence-based and capable of addressing the existing inequalities in Aboriginal and Torres Strait Islander peoples' health
- a five-year Capacity Building Plan for Aboriginal Community Controlled Health Services
- a genuine and inclusive approach to partnership with Aboriginal and Torres Strait Islander peoples and their representatives

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<sup>79</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10. See, for example, recommendations [86.101 (Malaysia)], [86.113 (Austria)], [86.114 (France)], [86.115 (Singapore)], [86.116 (Thailand)], [86.117 (Jordan)], [86.118 (Belgium)] and [86.119 (Islamic Republic of Iran)].

<sup>80</sup> James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, UN HRCOR, 15th session, UN doc A/HRC/15/37/Add.4 (2010), p 34.

<sup>81</sup> The Steering Committee is led by the Aboriginal and Torres Strait Islander Social Justice Commissioner and includes a number of representatives of non-government organisations.

- improvements to the accuracy, coverage and availability of health data in relation to fixing longstanding data gaps.

Two Closing the Gap targets are significant to the right to health:

- Close the life expectancy gap between Aboriginal and Torres Strait Islander and non-Indigenous peoples within a generation (by 2031).
- Halve the gap in mortality rates between Aboriginal and Torres Strait Islander children and non-Indigenous children under the age of 5 years within a decade (by 2018).

Governments throughout Australia are making a substantial effort to achieve these targets and are working to ensure that the social determinants underpinning Aboriginal and Torres Strait Islander peoples' health concerns are addressed. Estimated expenditure in 2008–09 was \$40 228 per person for Aboriginal and Torres Strait Islander peoples compared with \$18 351 per person for non-Indigenous Australians.<sup>82</sup> This difference is largely a consequence of the more intensive use of mainstream services.

In the third annual report on the Closing the Gap initiative the Prime Minister reported that there had been significant progress towards meeting the Aboriginal and Torres Strait Islander child mortality target.<sup>83</sup> Progress against the target to close the gap in life expectancy in a generation is more difficult to assess at this early stage: improved health outcomes at a population level are difficult to measure in the short term and rely on sustained effort in the long term from a range of agencies across all levels of government, as well as service providers, communities and individuals. The next five years will provide a clearer picture of progress against this target.

The Government recently announced the development of the National Aboriginal and Torres Strait Islander Health Plan in order to further the work it is doing to close the gap in life expectancy and infant mortality. The plan will be developed with the advice of the National Aboriginal and Torres Strait Islander Health Equality Council and an advisory group co-chaired by the Department of Health and Ageing and the National Congress of Australia's First Peoples.

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<sup>82</sup> Indigenous Expenditure Report Steering Committee, *2010 Indigenous Expenditure Report: overview*, Productivity Commission, Canberra, 2010.

<sup>83</sup> Commonwealth of Australia, *Closing the Gap—Prime Minister's report 2011*, Commonwealth of Australia, Canberra, 2011, p 2.

### 3.1.3 Work and education

In 2008–09 the gap in employment between Indigenous and non-Indigenous Australians was 21.2 per cent: 53.8 per cent of workforce-age Aboriginal and Torres Strait Islander peoples were employed compared with 75 per cent of non-Indigenous workforce-age persons. Australian Governments have committed to halving the gap in employment outcomes between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians within a decade—by 2018. An additional 100 000 Aboriginal and Torres Strait Islander people need to be in some form of employment by 2018–19 in order to reach this target. That represents a total increase of nearly 60 per cent over the 10-year period.

With a view to increasing the participation of Aboriginal and Torres Strait Islander peoples in the economy, the Government released its Indigenous Economic Development Strategy 2011–2018 on 19 October 2011. The strategy provides a whole-of-government framework for future actions, programs and policies for Indigenous economic development and aims to uphold the right of Aboriginal and Torres Strait Islander peoples to participate in Australia’s strong economy and benefit financially and socially from work. This will be achieved through the five identified priorities:

- strengthening foundations to create an environment that supports economic development
- investing in education
- encouraging participation and improved access to skills development and jobs
- supporting the growth of Indigenous business and entrepreneurship
- assisting individuals and communities to achieve financial security and independence by increasing their ability to identify, build and make the most of economic assets.

The Government is also assisting Aboriginal and Torres Strait Islander peoples to move into paid employment through a range of services, among them Job Services Australia, the Indigenous Employment Program and the Community Development Employment Projects. From 1 July 2013 the Government will introduce new employment and participation arrangements in remote Australia; the arrangements will be simpler, more flexible and tailored to the needs of individual communities and regions. The Australian Government and

the State and Territory Governments are also providing \$228.9 million over five years for the National Partnership Agreement on Indigenous Economic Participation, which will significantly improve opportunities for Aboriginal and Torres Strait Islander peoples to engage in private and public sector jobs.

Additionally, the Government is providing \$4.1 million to establish a pilot Indigenous Ranger Cadetship program to encourage Aboriginal and Torres Strait Islander students to remain in and complete school. It is providing \$50.7 million to extend school-based traineeships for Aboriginal and Torres Strait Islander students in targeted schools through a new Indigenous Youth Careers Pathways Program.

All Australian Governments have made a commitment to improving the literacy skills of Aboriginal and Torres Strait Islander children by setting the goal of halving the gap in literacy and numeracy achievement between Aboriginal and Torres Strait Islander and non-Indigenous students within a decade.

Overall, the Australian Government is investing \$65.6 billion in Australian schools from 2009 to 2012 to ensure that all Australian school students acquire the knowledge and skills needed to participate effectively in society and in a globalised economy. Aboriginal and Torres Strait Islander students are further supported through \$56.4 million in national funding over four years under the Closing the Gap—Expansion of Intensive Literacy and Numeracy Programs for Indigenous Students and Personalised Learning Plans measure. The Australian Government has also joined with other governments to develop the Aboriginal and Torres Strait Islander Education Action Plan.

The National Agreement for Skills and Workforce Development commits the Australian Government and State and Territory Governments to address the issue of social inclusion. Important outcomes of this agreement are increased numbers of course completions by Aboriginal and Torres Strait Islander peoples in vocational education and training, and increased enrolment of Aboriginal and Torres Strait Islander peoples in higher level vocational education and training courses.

The Closing the Gap initiative has set a target of 69 per cent of Aboriginal and Torres Strait Islander 20–24 year olds achieving a Year 12 or equivalent qualification by 2020. Although there have been improvements in Year 12 attainment, faster progress is necessary for the Closing the Gap target to be met. Current trends and new investments through education sector reforms provide some confidence that the gap between Aboriginal and Torres Strait Islander and non-Indigenous students completing Year 12 will narrow by the

next census, in 2116. To achieve this target, there are Aboriginal and Torres Strait Islander-specific initiatives aimed at promoting good practice, improving access and facilitating partnerships in the community.

#### **3.1.4 The Stolen Generations and stolen wages**

The Australian Government recognises the damaging effects of past policies of removing Aboriginal and Torres Strait Islander children from their families. On 13 February 2008 the former Prime Minister, the Hon. Kevin Rudd MP, took the important symbolic step of apologising to Australia's Aboriginal and Torres Strait Islander peoples—in particular, to members of the Stolen Generations—on behalf of the Government. In 2009 the Government funded Reconciliation Australia to help all Australians move forward with a better understanding of the past and of how the past affects the lives of Aboriginal and Torres Strait Islander peoples today in a society that values equality, diversity and the contribution of all.

Submissions to the Baseline Study emphasised a desire for a national compensation scheme for the Stolen Generations. Although it does not support a national reparations scheme, the Government is committed to meeting the immediate needs of members of the Stolen Generations through the Stolen Generations Working Partnership. It has also established a Healing Foundation to provide services to respond to trauma in Aboriginal and Torres Strait Islander communities, with a strong focus on the unique needs of the Stolen Generations and their families. More broadly, the unprecedented government investment in Closing the Gap in Indigenous disadvantage will also help reduce the impact of past policies of removal.

Tasmania has a scheme for providing compensation to members of the Stolen Generations. Other states—for example, Western Australia and Queensland—have introduced compensation or redress schemes for children abused while in state care.

Several submissions to the Baseline Study also called for a national compensation scheme for stolen wages. Compensation or reparation schemes for Aboriginal and Torres Strait Islander peoples' stolen wages and funds previously held in trust are the responsibility of individual jurisdictions and are not managed at the national level. Compensation schemes for certain Aboriginal and Torres Strait Islander workers have been instituted in New South Wales and Queensland, and the Western Australian Government has recently completed a report on the matter.



### 3.1.5 Identity and culture

The Australian Government recognises the importance of culture to Aboriginal and Torres Strait Islander peoples. It funds a number of Aboriginal and Torres Strait Islander cultural programs that support the development of arts, culture, languages and broadcasting. These programs also support the Government's broader Indigenous reform agenda of Closing the Gap in Indigenous disadvantage by contributing to the improved wellbeing of Aboriginal and Torres Strait Islander peoples. They are as follows:

- the Indigenous Broadcasting Program, which supports Aboriginal and Torres Strait Islander community radio
- the National Arts and Crafts Industry, which supports Aboriginal and Torres Strait Islander art and culture
- the Maintenance of Indigenous Languages and Records program, which supports the maintenance and reclamation of Aboriginal and Torres Strait Islander languages.

The Government is committed to language education in Australian schools and recognises the important role Aboriginal and Torres Strait Islander language learning plays. The teaching of languages and culture is important to Aboriginal and Torres Strait Islander peoples' wellbeing and their children's understanding of their culture and identity. The National Indigenous Languages Policy, announced on 9 August 2009, aims to keep Aboriginal and Torres Strait Islander languages alive by supporting Aboriginal and Torres Strait Islander peoples to connect with their language, culture and country. It also aims to improve coordination between governments and Aboriginal and Torres Strait Islander language organisations and cultural institutions, including education and research bodies.

### 3.1.6 Freedom from discrimination

Discrimination against Aboriginal and Torres Strait Islander peoples is part of a complex colonial history, the impact of which is still felt by many. The *Racial Discrimination Act 1975* (Cth) offers protection from discrimination on the grounds of race, colour, descent, national or ethnic origin, and immigrant status. It gives effect to Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination. Australia appeared for its periodic review before the Committee on the Elimination of Racial Discrimination on 10 and 11 August 2010. The Australian states and territories have racial discrimination legislation similar to the national legislation.

Stakeholder organisations have, however, noted that some important challenges remain:

- structural, or institutional, discrimination—that is, when organisations, institutions or governments discriminate, either directly or indirectly, against Aboriginal and Torres Strait Islander peoples<sup>84</sup>
- racist violence<sup>85</sup>
- multiple disadvantage suffered by Aboriginal and Torres Strait Islander women because of the intersection of racial and gender discrimination and as a consequence lowered socio-economic status<sup>86</sup>
- concerns with the Northern Territory Emergency Response.

The need to guarantee racial equality was a matter of concern for many participants in the National Human Rights Consultation. Concerns were expressed about how the special measures component of the Racial Discrimination Act has been interpreted in Australian law, particularly in relation to the Northern Territory Emergency Response.<sup>87</sup> In addition, during its Universal Periodic Review appearance, Australia was called on to:

- make the Racial Discrimination Act compatible with the Declaration on the Rights of Indigenous Peoples
- consult with Aboriginal and Torres Strait Islander peoples and take into consideration guidelines proposed by the Australian Human Rights Commission before considering suspension of the Racial Discrimination Act for any future intervention affecting Aboriginal and Torres Strait Islander peoples.<sup>88</sup>

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<sup>84</sup> See for example, VicHealth, *Ethnic and Race-based Discrimination as a Determinant of Mental Health and Wellbeing*, Research Summary 3, VicHealth, Melbourne, 2007.

<sup>85</sup> Race Discrimination Commissioner, *Human Rights and Equal Opportunity Commission Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Australian Government, Canberra, 1991.

<sup>86</sup> Australian Human Rights Commission, *Beyond Tolerance: National Conference on Racism*, 2002, viewed 8 February 2011, [http://www.hreoc.gov.au/racial\\_discrimination/conferences/beyond\\_tolerance/speeches/dasvarma.html](http://www.hreoc.gov.au/racial_discrimination/conferences/beyond_tolerance/speeches/dasvarma.html).

<sup>87</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Committee Report*, Attorney-General's Department, Canberra, 2009, pp 214–15.

<sup>88</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.24 (Norway)], [86.25 (Canada)] and [86.26 (Slovenia)].

The Australian Government introduced into parliament legislation, passed on 21 June 2010, repealing all the provisions in the Northern Territory Emergency Response legislation that suspended the operation of the Racial Discrimination Act. In addition, all the provisions in the Northern Territory Emergency Response legislation that deemed certain measures to be ‘special measures’—such as income management, five-year leases, and alcohol and pornography restrictions—have been repealed.

It is the Government’s strong belief that racial discrimination is a serious issue that warrants the attention of a dedicated, full-time Race Discrimination Commissioner. Accordingly, in July 2011 the Government appointed Dr Helen Szoke as Australia’s first full-time Race Discrimination Commissioner in 13 years. The appointment of a full-time Race Discrimination Commissioner had been recommended by the CERD Committee.

### 3.1.7 Community safety and the justice system

Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system, both as victims and as offenders.<sup>89</sup> Aboriginal and Torres Strait Islander peoples have complex legal issues, affected by factors such as language barriers, cultural differences and social disadvantage. Aboriginal and Torres Strait Islander women, men and children are more likely to enter the criminal justice system at younger ages than non-Indigenous people and are incarcerated at higher rates than non-Indigenous people.

Aboriginal and Torres Strait Islander peoples are significantly over-represented in prisons, accounting for 26 per cent of the full-time prison population. The imprisonment rate for Aboriginal and Torres Strait Islander prisoners was 14 times higher than that for non-Indigenous prisoners at 30 June 2010<sup>90</sup>, and Aboriginal and Torres Strait Islander juveniles were 22.7 times more likely to be detained than non-Indigenous juveniles at June 2009. Aboriginal and Torres Strait Islander peoples also experience higher rates of recidivism: in 2010, 74 per cent of Aboriginal and Torres Strait Islander prisoners had previously been imprisoned, compared with 49 per cent of non-Indigenous prisoners.<sup>91</sup> Between 2000 and 2010 the imprisonment rate increased by 59 per cent for

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<sup>89</sup> Australian Human Rights Commission, ‘Submission to the Senate Legal and Constitutional Affairs Committee—Inquiry into Access to Justice, 2009, viewed 11 February 2011, [http://www.hreoc.gov.au/legal/submissions/2009/20091020\\_access\\_justice.html](http://www.hreoc.gov.au/legal/submissions/2009/20091020_access_justice.html).

<sup>90</sup> Australian Bureau of Statistics, *Prisoners in Australia*, ABS, Canberra, 2010.

<sup>91</sup> Australian Productivity Commission, *Overcoming Indigenous Disadvantage Report*, Productivity Commission, Canberra, 2011.

Aboriginal and Torres Strait Islander women and by 35 per cent for Aboriginal and Torres Strait Islander men.<sup>92</sup>

A number of submissions to the National Human Rights Consultation argued that fundamental civil and political rights—such as the right to a fair trial—are not fully enjoyed by Aboriginal and Torres Strait Islander peoples. Submissions to the Baseline Study noted concerns about the disproportionate effect of mandatory sentencing on Aboriginal and Torres Strait Islander peoples. (At present mandatory sentencing and mandatory minimum sentences apply only to specified offences in Western Australia and the Northern Territory.) The Australian Government considers that State and Territory Governments are best placed to deal with the issues associated with repeat offending and detention through their own legislatures and court systems.

Submissions to the National Human Rights Consultation also suggested that a contributing factor to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is the lack of ‘accredited professional-level interpreters for Aboriginal and Torres Strait Islander people who do not speak English as a first language’.<sup>93</sup> Access to interpreters was also raised in a joint submission by Aboriginal and Torres Strait Islander Legal Services.<sup>94</sup> In response to these concerns, the Australian Government is developing a National Framework for the Effective Use of Indigenous Translators and Interpreters in remote service delivery locations. The purpose of the framework is to improve the quality of engagement with Aboriginal and Torres Strait Islander communities by government and service providers.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recently held an inquiry into the high level of involvement in the criminal justice system on the part of Aboriginal and Torres Strait Islander juveniles and young adults. The committee made 40 recommendations in relation to Aboriginal and Torres Strait Islander juveniles’ and young adults’

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<sup>92</sup> *ibid.*

<sup>93</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, p 208.

<sup>94</sup> Aboriginal and Torres Strait Islander Legal Services, Joint submission to the National Human Rights Consultation, 2009, pp 16–19.

disadvantage and their disproportionate levels of incarceration, and the Government's response was tabled in Parliament on 24 November 2011.<sup>95</sup>

In addition, a number of recommendations arising from Australia's Universal Periodic Review referred to criminal justice matters and called on Australia to do the following:

- take action on Aboriginal and Torres Strait Islander deaths in custody, including by requiring that all deaths in custody be reviewed and investigated by independent bodies, and implement the recommendations made by those bodies
- increase the provision of legal advice to Aboriginal and Torres Strait Islander peoples, particularly women living in remote areas
- implement measures to respond to the factors leading to over-representation of Aboriginal and Torres Strait Islander communities in the prison population
- improve communication between Aboriginal and Torres Strait Islander communities and law enforcement officials by, for example, introducing further cultural awareness training.<sup>96</sup>

On 17 July 2010 the Australian Government announced the Indigenous Family Safety Agenda to address high rates of family violence in Indigenous communities.<sup>97</sup> The Indigenous Family Safety program focuses on two agenda priorities—to strengthen social norms against violence and to improve coordination of support services to aid the recovery of people who experience violence. New guidelines have been developed under the Family Support Program to guide implementation of Indigenous Family Safety funding. Further initiatives in support of community safety are an increased focus on alcohol restrictions, the provision of safe places, an increased police presence, and further efforts to link child protection with compulsory income management.

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<sup>95</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System*, Australian Parliament, Canberra, <http://www.aph.gov.au/house/committee/atsia/sentencing/index.htm>.

<sup>96</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.90 (Russian Federation)], [86.91 (New Zealand)], [86.92 (Bolivia)], [86.93 (Austria)] and [86.95 (Austria)].

<sup>97</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Family Safety Agenda 2010*, viewed 16 November 2011, [http://www.fahcsia.gov.au/sa/indigenous/pubs/families/Pages/indig\\_fam\\_safety\\_agenda.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/families/Pages/indig_fam_safety_agenda.aspx).

In November 2009 the National Indigenous Law and Justice Framework was endorsed by all Australian Governments. The framework refers to the need to eliminate systemic racism where it exists in the justice system by delivering on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner. It represents the first nationally agreed approach to Aboriginal and Torres Strait Islander peoples' law and justice and, along with a number of Commonwealth- and state-funded programs, is an important step towards addressing Aboriginal and Torres Strait Islander peoples' law and justice issues.

In Victoria, for example, a number of 'good practice' initiatives in Aboriginal and Torres Strait Islander peoples' law and justice have been introduced—for example, Koori courts, the Koori Family Violence Court Support Project and the Koori Liaison Officer Program. The aim with Koori courts is to create an informal atmosphere that allows greater Aboriginal and Torres Strait Islander peoples' participation in the court and sentencing processes. In addition, the Koori Court Support Services Program assists the accused, providing access to a range of support services to help deal with their offending behaviour. The aim of the Koori Family Violence Court Support Project is to develop partnerships between the Melbourne Magistrates Court and local Aboriginal and/or Torres Strait Islander services and implement training on Aboriginal-specific family violence, to assist the courts to provide culturally appropriate responses for family violence cases in the Koori community. The Koori Liaison Officer Program is designed to increase the number of Koori offenders who participate in mainstream diversionary initiatives, such as those offered through the Criminal Justice Diversion Program.

Since February 2010 Northern Territory Correctional Services has partnered with Mission Australia and the Northern Australian Aboriginal Justice Agency to improve a person's capacity to re-integrate into society after their release from prison and with Centrelink to launch an information DVD for Aboriginal and Torres Strait Islander people who are preparing for their release from prison.

Submissions to the Baseline Study highlighted the success of The Clontarf Foundation. The foundation has created Clontarf Academies in partnership with local schools and has more than 2500 men involved in secondary education in academies in Western Australia, the Northern Territory and Victoria. AFL football is used as the vehicle for change and to attract boys to school. To remain in an academy, however, members must try to attend school regularly, apply themselves to the study of appropriate courses, and embrace the academy's requirements for behaviour and self-discipline. The foundation continues to have consistently good results:

- year-to-year retention—not less than 90 per cent
- school attendance—76 per cent as of August 2011
- graduates in full-time employment within one year of graduation—75 per cent.<sup>98</sup>

Although a number of important initiatives are under way at the local, state and territory and national levels, a great deal of work remains to be done in the law and justice sector for Aboriginal and Torres Strait Islander peoples. To facilitate this, the collection of data on Aboriginal and Torres Strait Islander offenders for all jurisdictions and all offence categories—they are currently published only for New South Wales, Queensland, South Australia and the Northern Territory for some categories of offence—as well as data on court appearances and prisoner reception has been suggested.

### 3.2 Women

The Australian Government is committed to protecting the human rights of all women. However, some historic inequalities between men and women continue to exist. The Convention on the Elimination of All Forms of Discrimination against Women promotes and protects the human rights of women on a basis equal to men.<sup>99</sup> Australia has enacted the following domestic legislation to give effect to its obligations under the convention:

- The *Sex Discrimination Act 1984* makes it unlawful to discriminate on the basis of sex, marital status, pregnancy or potential pregnancy, family responsibility or breastfeeding in a number of areas of public life.
- The *Equal Opportunity for Women in the Workplace Act 1999* plays a crucial role in promoting and improving gender equality in Australian workplaces.
- The *Fair Work Act 2009* includes improved equal remuneration provisions to help deliver better outcomes in terms of pay equity.

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<sup>98</sup> Clontarf Foundation, 2011 Information Brochure, viewed 1 Dec 2011, [http://www.clontarf.org.au/userfiles/files/Foundation/2011/Info Page/2011\\_07\\_CF Information Brochure.pdf](http://www.clontarf.org.au/userfiles/files/Foundation/2011/Info Page/2011_07_CF Information Brochure.pdf).

<sup>99</sup> Australia became party to the convention July 1983 and on 4 December 2008 acceded to its Optional Protocol, which provides a complaints mechanism for individuals and organisations.

- The *Paid Parental Leave Act 2010* provides for Australia’s first statutory paid parental leave scheme, allowing 18 weeks of government-funded parental leave pay at the national minimum wage for the primary carer.

Legislation in force in all states and territories also provides protection against discrimination on the basis of sex in the areas of employment, education, access to goods and services and accommodation.<sup>100</sup> Rape, including spousal rape, and sexual assault are criminal offences in all states and territories. The legislation in force also empowers courts to make apprehended violence orders to protect victims of domestic violence and, in some jurisdictions, people at risk of domestic violence.

Australia ranks relatively highly compared with other nations in its progress towards equality between women and men.<sup>101</sup> The National Human Rights Consultation Committee found, however, that not all women in Australia enjoy their right to gender equality and freedom from violence and discrimination. The Australian Government has also identified these concerns as a priority and notes that they are especially relevant for women of lower socio-economic status; women who are lesbian, bisexual, or sex and/or gender diverse<sup>102</sup>; older women; women with disability; Aboriginal and Torres Strait Islander women; women of culturally and linguistically diverse background; and women living in rural and remote communities.

Submissions to the Baseline Study supported actions set out in the CEDAW Action Plan for Australian Women. The 15-point plan:

... sets out what the Australian and State and Territory Governments should do to put into action the CEDAW Committee’s recommendations on women’s human rights in Australia. The Action Plan contains thematic sheets on anti-discrimination and human rights protection, participation in public and political life, violence against women, employment, education, Aboriginal and Torres Strait Islander women, women with disabilities, and culturally and linguistically diverse women.<sup>103</sup>

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<sup>100</sup> Australian Capital Territory *Discrimination Act 1991*; New South Wales *Anti-Discrimination Act 1977*; Northern Territory *Anti-Discrimination Act 1996*; Queensland *Anti-Discrimination Act 1991*; South Australian *Equal Opportunity Act 1984*; Tasmanian *Anti-Discrimination Act 1998*; Victorian *Equal Opportunity Act 1995*; and Western Australian *Equal Opportunity Act 1984*.

<sup>101</sup> UN Development Programme, ‘Gender Inequality Index’, *Human Development Report 2010*, UNDP, New York, 2010, p 156; World Economic Forum, *Global Gender Gap Report 2011*, WEF, Geneva, 2011, pp 8, 98.

<sup>102</sup> Noting that terminology is contested and that some groups prefer this term to the common term gay, lesbian, bisexual, and transgender or intersex.

<sup>103</sup> YWCA Australia, *Our United Nations Work*, viewed 29 September 2011, <http://www.ywca.org.au/advocacy-policy/our-united-nations-work>.



### 3.2.1 Freedom from violence

Physical and emotional abuse of women continues to be an issue. Research suggests that up to one in three Australian women have at some time in their lives since the age of 15 experienced physical violence.<sup>104</sup> Almost one in five have experienced sexual violence.<sup>105</sup>

Most people who experience domestic and family violence are women abused by men they know in the home environment.<sup>106</sup> Aboriginal and Torres Strait Islander women report higher levels of physical violence during their lifetime than non-Indigenous women and are much more likely to experience sexual violence or sustain injury as a result of violence.<sup>107</sup> Similarly, women with disability are more likely to experience partner or sexual violence or more severe violence and over a longer period compared with women without disability.<sup>108</sup> Women aged 45 to 54 years have reported experiencing family and domestic violence at significantly increasing rates (1995—15 per cent; 2005—25 per cent)<sup>109</sup>, as have women aged 55 years or older (1995—4 per cent; 2005—10 per cent).<sup>110</sup>

Research has shown that the immigration and resettlement experience and immigration status of some women of culturally and linguistically diverse background increases the complexities typically involved in domestic and family violence cases.<sup>111</sup> The prevalence and incidence of domestic and family

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<sup>104</sup> J Mouzos & T Makkai, *Women's Experiences of Male Violence: findings from the Australian component of the International Violence Against Women Survey (IVAWS), 2004*, Australian Institute of Criminology, cited in Australian Domestic & Family Violence Clearinghouse, General Intimate Partner Violence Statistics, Fast Facts, The University of New South Wales, Sydney, February 2011, p 1.

<sup>105</sup> *ibid.*

<sup>106</sup> Australian Bureau of Statistics, *Personal Safety Survey Australia*, Cat. no. 4906.0, ABS, Canberra, 2006.

<sup>107</sup> L Bartels, *Emerging Issues in Domestic/Family Violence Research*, Research in Practice Report no. 10, Australian Institute of Criminology, Canberra, 2010, pp 6, 10. In New South Wales Aboriginal women are nearly six times more likely to be victims of domestic violence-related assault compared with the general female population: NSW Department of Aboriginal Affairs, *Two Ways Together Report on Indicators*, DAA, Sydney, 2007, p 64.

<sup>108</sup> See Section 3.7.3 for further information.

<sup>109</sup> Australian Bureau of Statistics, *Personal Safety Survey Australia*, Cat. no. 4906.0, ABS, Canberra, 2006.

<sup>110</sup> L McFerran, *The Disappearing Age: a discussion paper on a strategy to address violence against older women*, Australian Domestic Violence Clearing House, The University of New South Wales, Sydney, cited in L Bartels, *Emerging Issues in Domestic/Family Violence Research*, Research in Practice Report no. 10, Australian Institute of Criminology, Canberra, 2010, p 4.

<sup>111</sup> M Dimopoulos, *Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities*, Australian Domestic & Family Violence Clearinghouse, The University of New South Wales, Sydney, 2010, pp 4–5; L Bartels, *Emerging Issues in Domestic/Family Violence Research*, Research in Practice Report no. 10, Australian Institute of Criminology, Canberra, 2010, p 5; B Pease & S Rees, 'Theorising men's violence towards women in refugee families: towards an intersectional feminist framework', *Just Policy*, vol. 47, 2008, pp 39–45.

violence in rural communities are unclear, the research results showing conflicting rates of prevalence.<sup>112</sup>

Submissions to the Baseline Study expressed concern about the funding of legal services aimed at preventing family violence, the ability of the family law system to respond to allegations of family violence, under-reporting of domestic and family violence, barriers to reporting violence and access to support services, and family violence specific to Aboriginal and Torres Strait Islander women and children, refugees, asylum seekers and immigrants. Submissions also recommended that there be an independent monitoring mechanism for the National Plan to Reduce Violence against Women and Children 2010–2022 and that governments take action to prevent violence against women and protect women from it. In particular, submissions noted the deaths resulting from domestic and family violence and suggested establishing death reviews in only those jurisdictions that collaborate and adhere to best-practice principles, including independence and the participation and involvement of advocates and experts in violence against women.

In February 2011 the Commonwealth and State and Territory Governments endorsed the National Plan to Reduce Violence against Women and their Children 2010–2022. The plan coordinates government efforts to reduce the prevalence of domestic violence and sexual assault in the 12 years of its coverage. In the first three years the plan focuses on primary prevention, particularly helping young people develop respectful relationships and building the coverage and quality of statistical data on violence against women. A number of recommendations made during Australia’s Universal Periodic Review<sup>113</sup> and the concluding observations of the CEDAW Committee<sup>114</sup> called for immediate implementation of the plan.

The Australian Government is working in partnership with Aboriginal and Torres Strait Islander communities and leaders, State and Territory Governments and non-government organisations to deal with domestic violence in Aboriginal and Torres Strait Islander communities. In July 2010 the

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<sup>112</sup> L Bartels, *Emerging Issues in Domestic/Family Violence Research*, Research in Practice Report no. 10, Australian Institute of Criminology, Canberra, 2010, p 3.

<sup>113</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.76 (Azerbaijan)], [86.77 (Canada)], [86.78 (Switzerland)], [86.79 (Norway)], [86.80 (Mexico)] and [86.81 (Philippines)].

<sup>114</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN CommEDAWOR, 46th session, UN Doc CEDAW/C/AUL/CO/7 (2010) [29].

Government released the Indigenous Family Safety Agenda, which aims to address alcohol abuse by reducing the supply of alcohol, improving police protection to reduce incidents of violence, changing attitudes and fostering respectful relationships by working with strong local leaders, and coordinating support services for people who have experienced domestic violence.

A number of other Australian Government initiatives are also aimed at reducing violence against Aboriginal and Torres Strait Islander women and children; among them are the Indigenous Children Program, the Indigenous Healing Foundation, Indigenous Parenting Support Services, Communities for Children Plus, Family Relationships Services and the Respectful Relationships Program. Further, in July 2010 the Australian Government provided funding to the Australian Domestic and Family Violence Clearinghouse for a project on domestic violence and workplace rights and entitlements. The main aim of the project is to improve the knowledge and capacity of unions and employer organisations so that, through the provision of training and resources, they can support employees experiencing domestic violence. A further aim is to examine ways of responding to domestic violence and workplace rights through collective bargaining.

A number of State and Territory initiatives focus on reducing the incidence of violence against women and ensuring that victims of violence receive adequate support.<sup>115</sup> These include specialist domestic violence court models, reforms to the management and prosecution of sexual assault cases, and funding services that provide assistance and counselling to survivors of domestic and family violence and sexual assault. Some counselling services are specifically directed at women in regional areas, Aboriginal and Torres Strait Islander women, and women from culturally and linguistically diverse communities.

In June 2010 the New South Wales Government launched its five-year Domestic and Family Violence Action Plan—Stop the Violence, End the Silence. The plan details 91 actions across five primary areas—prevention and early intervention; protection, safety and justice; provision of services and support; building capacity; and data collection and research. In addition, there are 28 Women’s Domestic Violence Court Advocacy Services in 108 courts across the state; these are designed to help women and children who are experiencing domestic violence obtain effective legal protection through applications for

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<sup>115</sup> For example, the ACT Government has endorsed the National Plan to Reduce Violence against Women and their Children 2010–2022. In accordance with the plan, the ACT is currently developing the ACT Prevention of Violence Against Women and Children Strategy, which includes the ACT strategy for implementation of the National Plan.

apprehended domestic violence orders. The Advocacy Services operate in conjunction with the Domestic Violence Practitioner Service, which provides legal advice to women involved in domestic violence–related matters at 32 courts in the state. A Domestic Violence Death Review Team is also being established within the Office of the NSW State Coroner; it will be an expert, multi-disciplinary team responsible for reviewing deaths occurring in the context of domestic violence and making recommendations for improving systems and services.

Similarly, in 2004 the Tasmanian Government introduced Safe At Home as the state’s integrated response to reducing family violence in the medium to long term, improving safety for adult and child victims of family violence, and changing the offending behaviour of those responsible for violence.

### 3.2.2 Gender equality in public life

#### ***Political and public life***

In Australia at present women hold the positions of Governor-General, Prime Minister, Premier of Queensland, Premier of Tasmania, Chief Minister of the Australian Capital Territory and President of the Australian Human Rights Commission. Despite this, there are notably fewer women than men in senior public and private leadership positions. Thirty per cent of Commonwealth parliamentarians are female, and females make up 37 per cent of the Senior Executive Service.<sup>116</sup> The representation of women on boards and at senior management levels in Australia’s top 200 ASX-listed companies lags behind that in the United Kingdom, Canada, New Zealand and the United States. In 2010 in Australia women held 8.4 per cent of board directorships, 3.0 per cent of chief executive officer positions and 2.5 per cent of chairperson roles.<sup>117</sup> Women are also significantly under-represented in important pathways to senior positions.<sup>118</sup>

During Australia’s interactive Universal Periodic Review dialogue it was recommended that Australia continue tackling gender inequality by adopting a target of 40 per cent representation of females on public and private boards.<sup>119</sup> The CEDAW Committee has also recommended that Australia consider

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<sup>116</sup> Australian Public Service Commission, *State of the Service 2008/09*, 2009, viewed 7 February 2011, <http://www.apsc.gov.au/stateoftheservice/index.html>.

<sup>117</sup> Equal Opportunity for Women in the Workplace Agency, *2010 EOWA Australian Census of Women in Leadership Key Findings*, EOWA, Sydney, 2010.

<sup>118</sup> *ibid.*

<sup>119</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.54 (Japan)], [86.55 (Norway)] and [86.56 (Botswana)].

adopting temporary special measures<sup>120</sup> to increase women’s participation in political and public life—particularly the participation of Aboriginal and Torres Strait Islander women and women from ethnic minorities in political and public bodies, to reflect the full diversity of the population.<sup>121</sup>

The Australian Government has set a 40 per cent female gender target for its boards and decision-making bodies by 2015. Most States and Territories have introduced a variety of measures to support efforts towards improving the gender balance of boards, and five jurisdictions have set a voluntary target of 50 per cent. At the federal level, the annual *Women on Australian Government Boards* publication reports on the gender balance on Australian Government boards to demonstrate accountability and transparency in government board appointments.

In the case of the private sector the Equal Opportunity for Women in the Workplace Agency’s Australian Census of Women in Leadership measures the representation of women in boardrooms and ‘key decision-maker’ roles in corporate Australia. Additionally, revised Australian Securities Exchange Corporate Governance Principles now require companies to implement and publish diversity policies and targets and to report the proportion of women on their staff, in senior ranks and on boards.

The Australian Government has also partnered with the peak private sector body, the Australian Institute of Company Directors, to award to 70 high-calibre women scholarships under the jointly funded Board Diversity Scholarship Program. Scholarship recipients are board-ready women and experienced female board members seeking chairperson positions and will attend the institute’s Company Directors or Mastering the Boardroom courses.

In March 2010 the Australian Government announced \$3.6 million over three years for six National Women’s Alliances to consult women from more than 100 national women’s representative organisations and ensure that women’s concerns are taken account of in decision making and policy outcomes. The alliances are made up of a mix of sector-based and issues-based women’s

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<sup>120</sup> In accordance with the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, 1249 UNTS 13, Article 4(1) (entered into force 3 September 1981).

<sup>121</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN CommEDAWOR, 34th session, UN Doc CEDAW/C/AUL/CO/5 (2010) [17].

groups, each with a distinct focus.<sup>122</sup> The following are among the alliances' programs at the state and territory level:

- the Australian Capital Territory Women's Plan 2010–2015, which commits ACT Government departments to looking at how gender is considered in their work and providing gender-sensitive data and reports to measure progress towards equity and participation for women and girls
- the Young Women's Workplace Rights Project run by the Victorian Equal Opportunity and Human Rights Commission to raise awareness among young women and employers about discrimination and sexual harassment in the workplace.

Submissions to the Baseline Study noted a desire for temporary special measures and an expansion of the mandate of the Sex Discrimination Commissioner to include currently unattended matters to do with gender equality. These matters will be considered when consolidating Commonwealth anti-discrimination legislation into a single, comprehensive Act.

### ***Gender segmentation in the workforce***

Women make up 45.5 per cent of Australia's workforce<sup>123</sup> and perform two-thirds of the unpaid caring and domestic work in Australian households.<sup>124</sup> In comparison with Australian men, Australian women spend less time in the paid workforce, work fewer hours when in the workforce, and have interrupted career patterns.<sup>125</sup>

Women's access to family-friendly employment conditions often comes at the expense of job quality, pay, satisfaction with hours worked and career progression.<sup>126</sup> The lack of suitable and affordable childcare is one of the main barriers to women returning to work after having children.<sup>127</sup> The situation is

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<sup>122</sup> The Alliances are Economic Security for Women, the Equality Rights Alliance, the Australian Women Against Violence Alliance, the National Rural Women's Coalition and Network, the National Aboriginal and Torres Strait Islander Women's Alliance, and the Australian Immigrant and Refugee Women's Alliance.

<sup>123</sup> Australian Bureau of Statistics, *Labour Force, Australia*, Cat. no. 6202.0, ABS, Canberra, March 2011.

<sup>124</sup> Australian Bureau of Statistics, *How Australians Use Their Time 2006*, Cat. no. 4153.0, ABS, Canberra, 2008.

<sup>125</sup> Government Office for Women, *Women in Australia 2009*, viewed 14 February 2011, <http://www.fahcsia.gov.au/sa/women/pubs/general/womeninaustralia/2009/Pages/default.aspx>.

<sup>126</sup> *ibid.*

<sup>127</sup> X Gong, R Breunig & A King, 'New estimates of the relationship between female labour supply and the cost, availability, and quality of child care', *Economic Roundup*, Department of the Treasury, Canberra, 2010; House of Representatives Standing Committee on Employment and Workplace Relations, *Making it Fair*, Australian Parliament, Canberra, 2009.

exacerbated by the lack of access to flexible work arrangements for male partners, which limits their capacity to assume a greater share of care and domestic labour responsibilities. As a consequence, inequitable gender roles tend to become entrenched because of financial necessity. The CEDAW Committee has urged Australia to develop a comprehensive policy to encourage the supply of accessible, affordable, quality childcare.<sup>128</sup> Submissions to the Baseline Study expressed concern about limitations in relation to carer's and parental leave and childcare.

The Fair Work Act contains provisions designed to help women and men negotiate flexible working arrangements. It also contains the National Employment Standards, under which eligible employees<sup>129</sup> with responsibility for the care of a child under school age or a child with disability under the age of 18 years have the right to seek flexible working arrangements, such as part-time work or flexible hours. Employers can refuse a request only on reasonable business grounds.

The Fair Work Act also allows for flexibility by providing for individual flexibility arrangements, which allow employers and employees to make flexible arrangements to vary agreements and certain award terms to suit their genuine needs. The Act requires the inclusion of a flexibility clause in all modern awards and agreements, and every individual flexibility arrangement must be genuinely agreed to and must make the employee better off overall than under the relevant modern award or enterprise agreement.

In addition, the Fair Work Act gives eligible working parents<sup>130</sup> the right to divide up to 12 months of unpaid leave associated with the birth of a child or the adoption of a child under 16 years of age and take them as separate periods of leave. If families<sup>131</sup> prefer one parent to take a longer period of

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<sup>128</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN CommEDAWOR, 46th session, UN Doc CEDAW/C/AUL/CO/7 (2010) [39].

<sup>129</sup> Permanent full-time and part-time employees who have completed 12 months' continuous service and long-term casual employees engaged on a regular and systematic basis for at least 12 months who have a reasonable expectation of continuing regular employment.

<sup>130</sup> Permanent full-time and part-time employees who have completed 12 months' continuous service with their employer immediately before the date (or expected date) of the birth or adoption. Long-term casual employees who have been engaged on a regular and systematic basis for at least 12 months immediately before the date (or expected date) of birth or adoption and who have a reasonable expectation of continuing regular and systematic employment are also eligible.

<sup>131</sup> The Act ensures that same-sex de facto relationships are recognised for unpaid parental leave entitlements.

leave, that parent is entitled to seek up to an additional 12 months of unpaid parental leave from their employer.

The Australian Government introduced Australia's first comprehensive Paid Parental Leave scheme in 2011. The scheme provides 18 weeks of parental leave pay at the national minimum wage (currently \$589.40 a week<sup>132</sup>) to eligible working parents who have a baby or adopt a child. The Government is also committed to providing to eligible working fathers and partners two weeks' dedicated 'Dad and Partner Pay' from 1 January 2013. The Australian Human Rights Commission is concerned that the Paid Parental Leave scheme does not include a superannuation component.<sup>133</sup> Submissions to the Baseline Study also suggested there was scope to improve the superannuation scheme. The Government has legislated to carry out a comprehensive review of the Paid Parental Leave scheme, starting in January 2013, to take into account evaluation findings, stakeholders' views about the scheme's future development, and economic circumstances at the time of the review. The review will consider a variety of matters, in keeping with s 307A of the *Paid Parental Leave Act 2010*, including whether employers should make superannuation contributions in relation to parental leave pay.

In addition to increasing the Superannuation Guarantee from 9 to 12 per cent, the Australian Government has introduced a further incentive to boost the superannuation savings of some of our lowest paid workers and improve the fairness of the superannuation system. From 1 July 2012 workers earning \$37 000 or less will receive up to \$500 a year through a refund of the 15 per cent contribution tax paid on their superannuation contributions. The annual tax refund will be paid directly into their superannuation savings and will boost the superannuation savings of 3.6 million low-paid workers, 60 per cent of whom are women.

The Australian Government has also announced a suite of reforms to the Equal Opportunity for Women in the Workplace Act and the Equal Opportunity for Women in the Workplace Agency. The reforms are intended to give the agency greater power to promote gender equality in Australian workplaces. This will be coupled with a doubling of the agency's funding during the next four years. The reforms will also require businesses to report on the gender composition

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<sup>132</sup> The 2010 national minimum wage order has been set at \$569.90 a week, calculated on the basis of a week of 38 ordinary hours, or \$15 an hour. Under the Paid Parental Leave scheme parental leave pay is calculated at the hourly rate of \$15.

<sup>133</sup> Australian Human Rights Commission, *Gender Equality Blueprint*, AHRC, Sydney, 2010, p 10.



of their organisations and boards, their business’s employment conditions, and the level of flexibility in work practices for both men and women.

In 2009 Australia’s Governments agreed to a new National Quality Framework to improve early childhood education and care in Australia through cooperation between the Commonwealth and State and Territory Governments.<sup>134</sup> The Australian Government has invested \$17.1 billion over four years in early childhood education and care to ensure that families have access to high-quality, affordable childcare.<sup>135</sup>

### **The gender pay gap**

Women in Australia currently earn about 83 cents in the male dollar (full-time adult ordinary-time earnings).<sup>136</sup> The gender pay gap is most pronounced for older women.<sup>137</sup> The Australian workforce is highly segregated by gender, and female-dominated industries have traditionally been undervalued. The gender pay gap is also pronounced among the key management personnel of ASX 200 companies, at 28.3 per cent—more than 10 per cent higher than the national average gender pay gap.<sup>138</sup>

During the Universal Periodic Review it was recommended that Australia develop a National Pay Strategy to monitor pay gaps.<sup>139</sup> This is supported by the CEDAW Committee, which has also suggested the establishment of a specialised unit in Fair Work Australia to develop and monitor pay gap mechanisms.<sup>140</sup> Submissions to the Baseline Study supported this.

A lifetime of gender inequality in pay and workplace participation means that older women, particularly single parents, are facing a much greater risk of living in poverty.<sup>141</sup> This is primarily because of the impact that unequal pay and

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<sup>134</sup> COAG Early Childhood Development Steering Committee, *National Quality Standards for Early Childhood Education and Care and School Age Care*, COAG, Canberra, December 2009, p 2.

<sup>135</sup> Office for Women, *Office for Women Budget 2010–11*, Office for Women, Canberra, 2010.

<sup>136</sup> Based on average weekly ordinary-time earnings for full-time adults; trend data sourced from Australian Bureau of Statistics *Average Weekly Earnings*, Cat. no. 6302.0, ABS, Canberra.

<sup>137</sup> AMP & National Centre for Social and Economic Modelling, *She Works Hard for the Money: Australian women and the gender divide*, AMP/NATSEM Income and Wealth Report Issue 22, April 2009, p 26.

<sup>138</sup> Equal Opportunity for Women in the Workplace Agency, *Power and Position: beyond the 2008 EOWA Australian Census of Women in Leadership*, EOWA, Sydney, 2009, p 6.

<sup>139</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendation [86.99 (Israel)].

<sup>140</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN CommEDAWOR, 46th session, UN Doc CEDAW/C/AUL/CO/7 (2010) [39].

<sup>141</sup> AMP & National Centre for Social and Economic Modelling, *She Works Hard for the Money: Australian women and the gender divide*, AMP/NATSEM Income and Wealth Report Issue 22, April 2009, pp 27–8.

workplace participation rates have on superannuation savings.<sup>142</sup> Submissions to the Baseline Study highlighted the gap in superannuation savings between men and women and noted that it is exacerbated by the fact that women tend to live longer than men. One submission argued that, since 70 per cent of carers are women, the low rates of carer payments and the reduction in working hours also have an impact on the gender pay gap and the accrual of superannuation.

Submissions to the Baseline Study expressed a desire for implementation of the Sex Discrimination Commissioner's Gender Equality Blueprint 2010 and the recommendations of the 2009 House of Representatives Employment and Workplace Relations Committee report on pay equality, *Making it Fair*. Submissions also discussed the social and community services equal remuneration test case, which found that social and community services workers in the not-for-profit sector are underpaid and that at least part of the reason for this is gender.

The Fair Work Act contains improved equal remuneration provisions that allow pay comparisons to be made between different but comparable work and that no longer require applicants to prove discrimination as a prerequisite to a pay equality claim. The Act also introduced provisions to facilitate enterprise bargaining for low-paid employees who have not previously had access to collective bargaining or who have faced substantial difficulties in bargaining. The low-paid bargaining stream allows Fair Work Australia to facilitate bargaining between employers and employees. If such bargaining does not lead to agreement between the parties, Fair Work Australia may make a determination.

### 3.2.3 Freedom from discrimination

In 2009–10, 88 per cent of complaints made to the Australian Human Rights Commission under the Sex Discrimination Act were from women and about employment.<sup>143</sup> Twenty-two per cent of women have experienced sexual harassment in the workplace, compared with 5 per cent of men.<sup>144</sup> The CEDAW

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<sup>142</sup> M Keegan, A Harding & S Kelly, 'The adequacy of a mature superannuation system', Paper presented to Australian Colloquium of Superannuation Researchers, 12–13 July 2010, p 12; Australian Human Rights Commission, *Accumulating Poverty? Women's experiences of inequality over the lifecycle*, AHRC, Sydney, 2009, pp 4–7.

<sup>143</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2009–2010*, HREOC, Canberra, 2010, p 50.

<sup>144</sup> Australian Human Rights Commission, *Sexual Harassment: serious business. Results of the 2008 Sexual Harassment National Telephone Survey*, AHRC, Sydney, 2008, p v.

Committee has recommended that Australia adopt legislative measures and a strategic plan to combat sexual harassment in the workplace.<sup>145</sup>

Submissions to the Baseline Study supported the recommendations in the Senate report entitled *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*. In particular, the recommendation that the Sex Discrimination Commissioner be able to initiate investigations into alleged breaches of the Act without the need for an individual complainant was supported. Submissions also supported a general prohibition on sex discrimination and sexual harassment in any area of public life.

In addition, submissions made suggestions for combating discrimination against women—including an onus on employers to reasonably accommodate requests by employees for flexible working arrangements, a general equality before the law provision, an express requirement that the Sex Discrimination Act be interpreted in accordance with the international conventions Australia has ratified, development of policies, plans and programs that take account of and are responsive to gender, and a targeted campaign to improve rates of reporting of sexual harassment in the workplace.

The Australian Government recently introduced measures to extend to women and men protection from discrimination on the grounds of family responsibilities, to improve protections from sexual harassment for students and workers, and to establish breastfeeding as a separate ground of discrimination.<sup>146</sup> Parliament passed the legislation on 24 May 2011.

### 3.2.4 Women in the Australian Defence Force

The Australian Human Rights Commission is conducting a review of the treatment of women in the Australian Defence Force.<sup>147</sup> Phase one of the review focused on treatment of women at the Australian Defence Force Academy.<sup>148</sup> In particular, the adequacy of measures for promoting gender

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<sup>145</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN CommEDAWOR, 46th session, UN Doc CEDAW/C/AUL/CO/7 (2010) [39].

<sup>146</sup> The *Sex and Age Discrimination Legislation Amendment Act 2011* implements the eight accepted recommendations of the Senate Standing Committee on Legal and Constitutional Affairs report entitled *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (December 2008).

<sup>147</sup> Australian Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force Academy and Australian Defence Force*, viewed 5 October 2011, <http://www.hreoc.gov.au/defencereview/about.html>.

<sup>148</sup> *ibid.*

equality, preventing sexual harassment, abuse and discrimination, and ensuring women's safety is being reviewed.<sup>149</sup> The phase one report was tabled in Parliament on 3 November 2011.

The commission is also reviewing the effectiveness of existing initiatives aimed at promoting cultural change in the treatment of women, such as approaches to training, education, mentoring and development.<sup>150</sup> Phase two will explore the measures necessary for improving leadership pathways for women in the ADF, so that there is increased representation of women in senior ranks and leadership.<sup>151</sup>

In September 2011 the Australian Government announced the removal of gender restrictions from the ADF in recognition of the fact that women have a long and proud history of serving in the force. Within five years women will be able to work in any position in the ADF, including combat roles, provided they can meet all the demands of the role.

### 3.3 Children and young people

In 2008 there were almost 4.1 million children aged 0–14 years in Australia, accounting for 19 per cent of the population.<sup>152</sup> In the same year there were almost 3 million young people aged 15–24 years in Australia, accounting for 14 per cent of the population.<sup>153</sup> Non-government organisations' submissions to the National Human Rights Consultation identified a number of human rights considerations relevant to children and young people, among them the right to freedom from violence, the rights of children in out-of-home care, suicide and self-harm among young people, and juvenile justice.

Submissions to the Baseline Study drew attention to a number of areas where there is a lack of available data—for example, the general health and wellbeing of children, the experience of children in employment, and the provision of services for children with disability in the education system. Submissions suggested that government strategies for children and young people should take into account diverse backgrounds and consider specific factors such as gender, disability, and cultural and linguistic background. A large number of submissions emphasised the impact of disadvantage on Aboriginal and Torres

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<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> Australian Institute of Health and Welfare, *Australia's Health 2010*, AIHW, Canberra, 2010, p 297.

<sup>153</sup> *ibid.*, p 304.

Strait Islander children, ranging from poor living standards in remote communities to non-registration at birth leading to later difficulty with proving identity.

The primary international instrument for the protection of children's rights is the Convention on the Rights of the Child. Various submissions to the Baseline Study emphasised the importance of the convention and its implementation in domestic law and practice. There was concern that there is no comprehensive policy for monitoring the convention's implementation and that protections against age-based discrimination for children are limited. Interested parties also indicated a desire for young people to be active participants in society and to have opportunities to be involved in decision making.

Children's Commissioners in each state and territory play an important role in advocating for the rights of Australian children. A large number of submissions to the Baseline Study recommended establishing a Commonwealth Commissioner for Children and Young People, to do advocacy work and monitor children's matters, including issues affecting unaccompanied children and children seeking asylum. In June 2011 the Australian Government's Universal Periodic Review response noted that the Government will explore the potential role of such a commissioner.

Consistent with Australia's obligations under Article 3 of the Convention on the Rights of the Child, the principle of the 'best interests of the child' underpins legislation and practices concerning children in all Australian jurisdictions.<sup>154</sup> There are two main national strategies that aim to protect and promote the best interests of Australia's children: the National Framework for Protecting Australia's Children 2009–2020 and the National Early Years Strategy. Both emphasise the crucial importance of early intervention in order to promote a safe, educated and self-determined development into adulthood. In keeping with Australia's commitments under the convention<sup>155</sup>, the National Framework identifies 12 priority projects for implementation under its first three-year action plan, 2009 to 2012.<sup>156</sup> These include the development of national standards for out-of-home care (including access to health, education and training), improved support for carers, and enhanced transition planning for all young people in care. The State and Territory Governments have developed similar whole-of-government plans; for example, the ACT's Young

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<sup>154</sup> Opened for signature 20 November 1989, 1577 UNTS 3, Article 3 (entered into force 2 September 1990).

<sup>155</sup> *ibid.* Articles 5, 9, 10, 19, 20, 21, 24, 25, 28, and 29 (entered into force 2 September 1990).

<sup>156</sup> The National Framework is supported by 3 three-year action plans.

People’s Plan 2009–2014 provides a whole-of-government policy framework guided by the *Human Rights Act 2004* and the Convention on the Rights of the Child.

### 3.3.1 Freedom from violence

Violence against children can take various forms, from bullying at school to child abuse. In 2009 one in four victims of sexual assault was a child aged between 10 and 14 years<sup>157</sup>, and in 2003 there were 12 400 children aged between 0 and 14 years who were victims of physical assault.<sup>158</sup> In 2009–10 Aboriginal and Torres Strait Islander children were 7.7 times more likely than non-Indigenous children to be the subject of a confirmed report of abuse or neglect.<sup>159</sup> Submissions to the Baseline Study expressed concern about the promotion of child sexual abuse through online material and pointed to the need for research into Australian consumer patterns. The Australian Institute of Health and Welfare has reported that being a victim of violence as a child could lead to lesser educational outcomes and social participation in early adulthood or to physical injury, suicidal thoughts or behaviour, depression or disability.<sup>160</sup>

Submissions also expressed concern about systems for investigating family violence and child abuse. Specific comments centred on the interaction between state child protection systems and the federal family law system. Another matter raised concerned corporal punishment being still allowed in Australia in some private schools and in the home.

Australia’s Governments have developed and supported a number of initiatives aimed at protecting children against violence. The Australian Government has introduced into parliament the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. The Bill is designed to achieve safer outcomes for children who are caught up in family law disputes by amending the *Family Law Act 1975* in order to give priority to the safety of children and to help families, family law professionals and courts better understand, disclose and act on family violence and child abuse.

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<sup>157</sup> Australian Bureau of Statistics, *Recorded Crime—victims, Australia 2009*, June 2010, viewed 27 April 2011, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/AB61EBD8AD725EEFCA2577360017A141?opendocument>.

<sup>158</sup> Australian Institute of Health and Welfare, *A Picture of Australia’s Children*, AIHW, Canberra, 2009, p 113.

<sup>159</sup> National Child Protection Clearinghouse, *Child Protection and Aboriginal and Torres Strait Islander Children*, April 2011, viewed 27 April 2011, <http://www.aifs.gov.au/nch/pubs/sheets/rs10/index.html>.

<sup>160</sup> Australian Institute of Health and Welfare, *A Picture of Australia’s Children*, AIHW, Canberra, 2009, p 112.

The Australian Government and all States and Territories have also endorsed the National Plan to Reduce Violence against Women and their Children, which is a comprehensive plan aiming to reduce the incidence and impact of violence against women and their children.

There are also a number of State and Territory initiatives. For example, in Queensland the Safe Havens initiative provides culturally appropriate, integrated services to respond to the safety needs of children, young people and their families experiencing or witnessing family violence in four Aboriginal and Torres Strait Islander communities. The Tasmanian Government's integrated response to family violence—Safe at Home—aims to provide support services to victims and change the behaviour of those responsible for the violence.

The Australian Covert Bullying Prevalence Study, commissioned by the Australian Government, found that 26.7 per cent of children in Years 4 to 9 in 2009 were being bullied.<sup>161</sup> Submissions to the Baseline Study expressed concern about there being insufficient data on whether young people from culturally and linguistically diverse backgrounds experience higher rates of bullying.

As part of a national approach to safe schools, the revised National Safe Schools Framework was endorsed by all ministers responsible for education through the Ministerial Council for Education, Early Childhood Development and Youth Affairs in December 2010 and was launched on the inaugural National Day of Action against Bullying and Violence, 18 March 2011. The framework provides a set of guiding principles for safe and supportive school communities, promoting student wellbeing and developing respectful relationships.

The National Day of Action against Bullying and Violence is an annual event organised by all Australian education authorities and the Australian Government through the Safe and Supportive School Communities working group, funded by the Ministerial Council. The working group also manages the Bullying No Way! website, which is currently being rebuilt and refreshed; it provides a broad range of resources for students, teachers and parents.

As part of its Cybersafety Plan, the Australian Government has also allocated more than \$125 million to a range of cybersafety programs designed to inform

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<sup>161</sup> Child Health Promotion Research Centre, *Australian Covert Bullying Prevalence Study*, CHPRC, Perth, May 2009, Table 5.7, p 182.

and educate young people. Under the plan the Australian Communications and Media Authority has developed Cybersmart, a national web-based education program that provides a range of practical and age-appropriate resources for students, education resources (including professional development for teachers) and information support for parents. The website provides access to the Cybersmart Online Helpline (provided through KidsHelpline), which offers free and confidential access to a trained counsellor for people up to the age of 25 years.

The Cybersafety Plan provides a comprehensive range of measures aimed at ensuring that young people use technology in positive and productive ways. This includes the Cybersafety Help Button, which provides for internet users, particularly children, a central access point for cybersafety advice and information, and a new online resource, the Easy Guide to Socialising Online, that provides cybersafety information for a number of social networking sites, search engines and online games, among them Facebook, YouTube and Xbox.

In 2009–10 the Australian Government provided funding to the Alannah and Madeline Foundation for a national pilot of its eSmart cybersafety initiative to combat cyberbullying in schools. The initiative is modelled on SunSmart, and eSmart schools vow to identify bullying behaviour, appoint complaints officers, institute procedures for handling bullying, and have a clear set of anti-bullying values understood by children. Ninety-eight per cent of eSmart schools said the program was appropriate for achieving cybersafety, and 96 per cent said they would recommend eSmart to other schools. Following the conclusion of the pilot program, the Victorian Government has funded a roll-out of the eSmart program in all Victorian schools and the Queensland Government has funded a roll-out to all government schools in partnership with the Alannah and Madeline Foundation.<sup>162</sup>

The Australian Human Rights Commission promotes a National Day of Action against Bullying and Violence, which is aimed at school-age children and young people. The commission is also collaborating with the Inspire Foundation to support young people in taking safe and effective action to address bullying through its ReachOut.com service.

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<sup>162</sup> The Alannah and Madeleine Foundation, *eSmart*, 2011, viewed 27 April 2011, [www.amf.org.au/eSmart](http://www.amf.org.au/eSmart).



### 3.3.2 Suicide and self-harm

Although the rate of young people aged 15 to 19 years committing suicide declined from 9.8 per 100 000 in 2000 to 6.5 per 100 000 in 2009<sup>163</sup>, youth suicide and self-harm remain a significant issue in Australia. In 2009 suicide accounted for 22.1 per cent of all deaths among males aged between 15 and 24 years.<sup>164</sup> Compared with non-Indigenous Australians, the suicide rate for 12–24 year olds in 2003 to 2005 was more than four times higher among Aboriginal and Torres Strait Islander young people (37 compared with eight deaths per 100 000) and more than three times higher in remote and very remote areas (31 compared with nine per 100 000).<sup>165</sup> In 2006–07 there were about 570 hospital separations for intentional self-harm among children aged 10 to 14 years<sup>166</sup>; this represents a 35 per cent increase since 1998–99, the increase being significantly greater for girls than for boys. Stakeholders expressed concern about the dearth of information available about suicide rates among young people from culturally and linguistically diverse backgrounds.

Over the next four years the Australian Government proposes to invest \$276.9 million in its Taking Action to Tackle Suicide Program. The program will increase clinical, non-clinical and carer support and direct intervention services to prevent suicide. This includes targeted services for men and the promotion of good mental health and resilience in young people.

Over the next five years the Australian Government proposes to invest \$419.7 million to expand mental health services for teenagers and young adults. The Government is providing more funding to the successful Headspace program and to the Early Psychosis Prevention and Intervention Centres pioneered by former Australian of the Year Professor Patrick McGorry. This funding will be used to provide greater resources to existing centres and create 30 new Headspace centres, bringing the total number throughout Australia to ninety. At full operation, the 90 centres will have the capacity to assist about 72 000 young people.

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<sup>163</sup> Australian Bureau of Statistics, *Causes of Death, Australia, 2007*, ABS, Canberra, 2009, Table 11.2.

<sup>164</sup> *ibid.* 2009, 2009, viewed 23 May 2011, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/DB1170E48B2B7A98CA25788400127CCC?opendocument>.

<sup>165</sup> Australian Institute of Health and Welfare, *Injury among Young Australians*, Bulletin 60, AIHW, Canberra, May 2008, pp 30–1.

<sup>166</sup> *ibid.*, *A Picture of Australia's Children 2009*, AIHW, Canberra, 2009, p 105.

Early Psychosis Prevention and Intervention Centres enable young people aged 16 to 25 years and their families to gain access to better detection, treatment and support services for early psychosis. The Government will provide funding and seek matching contributions from the States and Territories to establish 12 EPPIC centres. In addition to the four new centres accounted for in the 2010–11 Budget, this will deliver 16 new EPPIC centres around the country.

The Australian Government is also developing a national Social Engagement and Emotional Development Survey for children aged 8 to 14 years. The survey will focus on the social and emotional development of young people and the impact this has on their wellbeing.

State and Territory Governments have a number of programs aimed at youth suicide. For example, both Western Australia and New South Wales have Suicide Prevention Strategies, which focus on strengthening communities at risk, early intervention, and supporting people at transition points in their lives. Victoria runs four youth suicide prevention projects; these use community development and capacity-building strategies and early intervention responses focusing on Aboriginal and Torres Strait Islander and same-sex and gender-questioning young people.

### 3.3.3 Children in out-of-home care

At 30 June 2010 there were 35 895 children in out-of-home care in Australia (seven out of every 1000 children), representing a 5 per cent increase on the preceding year.<sup>167</sup> When compared with non-Indigenous children, Aboriginal and Torres Strait Islander children are over-represented in child protection and out-of-home care services and have been so since the Australian Institute of Health and Welfare's first data collation in 1990.<sup>168</sup> For Aboriginal and Torres Strait Islander children, separation from family can equate to a loss of cultural identity and community connections. In its submission to the National Human Rights Consultation, the Child Rights Coalition cited research indicating that out-of-home care contributes to poor long-term outcomes for children, particularly when the placements are not stable.<sup>169</sup> In 2005 the Committee on the Rights of a Child expressed concern about the increase in the number of children in out-of-home care and the conditions of their stay, including

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<sup>167</sup> *ibid.*, *Child Protection Australia 2009–10*, AIHW, Canberra, p 53.

<sup>168</sup> National Child Protection Clearinghouse, *Child Protection and Aboriginal and Torres Strait Islander Children*, June 2010, viewed 10 March 2011, <http://www.aifs.gov.au/nch/pubs/sheets/rs10/rs10.html>.

<sup>169</sup> Child Rights Coalition, 'Submission to the National Human Rights Consultation', 2009, p 8, citing the Australian Research Alliance for Children and Youth, *Inverting the Pyramid: enhancing systems for protecting children*, The Allen Consulting Group, Melbourne, 2009, p 2.

inadequate provision of medical care and difficulty in maintaining contact with their families.<sup>170</sup>

Submissions to the Baseline Study noted the limited data on the reasons for out-of-home care placement and the experience of children in out-of-home care. They also emphasised the need to respond to factors contributing to child protection substantiations and placements in out-of-home care. Further, it was argued that the Indigenous Child Placement Principle and Cultural Plans are not applied consistently and that contact with imprisoned parents is often limited. A number of submissions expressed concern that children leaving care might not be fully equipped for independence. One reason given for this was that leaving care plans could be difficult for a child to understand because of the plans' complexity. It was suggested that this could be resolved through closer consultation with children leaving care.

The Australian Government, the States and Territories and the non-government sector have jointly developed national standards for out-of-home care that aim to safeguard the rights of children living in foster care and other formal out-of-home care.<sup>171</sup> Among other things, the standards focus on stability and security for children and meeting the health and educational needs of children in care.<sup>172</sup> They are to be implemented progressively from July 2011, and performance will be measured and reported annually. There will also be a new national survey of children and young people in care.

Although the Australian Government is providing national leadership through the National Framework for Protecting Australia's Children, primary responsibility for statutory child protection rests with the State and Territory Governments. In the past decade most States and Territories have done much to reform their child protection systems, placing a sharper focus on early intervention and identification and increased involvement of the non-government sector in child protection services or out-of-home care, or both. Since July 2008 every State and Territory has established either a Children's Commissioner or a Guardian of Children in Government Care, and most State and Territory Governments have developed a Charter of Rights for Children and Young People in Out of Home Care.<sup>173</sup> The Tasmanian Commissioner for

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<sup>170</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005) [37].

<sup>171</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *National Standards for Out-of-home Care*, viewed 4 April 2011, [http://www.fahcsia.gov.au/sa/families/pubs/nat\\_std\\_4\\_outofhomecare/Pages/default.aspx](http://www.fahcsia.gov.au/sa/families/pubs/nat_std_4_outofhomecare/Pages/default.aspx).

<sup>172</sup> *ibid.*, standards 1, 9, and 10.

<sup>173</sup> For example, Tasmania, NSW and the ACT.

Children, for example, is conducting a pilot children’s visitors program for about 20 children in care. Under the program, a children’s visitor visits each child once a month and as part of the visit conducts a survey of the child’s circumstances based on the Charter of Rights. The States and Territories also have their own out-of-home care standards and placement principles for Aboriginal and Torres Strait Islander children.

At a meeting of the Standing Council on Community, Housing and Disability Services in October 2011, ministers agreed to a nationally consistent approach to planning for young people leaving out-of-home care. It was agreed that all States and Territories would incorporate a best-practice approach—including housing, education, financial, employment and health support—in their leaving care planning processes. Progress is to be monitored and reported on through the National Standards for Out of Home Care, which came into operation on 1 July 2011.

#### 3.3.4 Juvenile justice

Since 1981 the number and rate of young people aged 10 to 17 years in juvenile detention have substantially declined.<sup>174</sup> There has, however, been a large increase in the proportion of juveniles in detention who are remanded—from 21 per cent to 59.6 per cent.<sup>175</sup> Young people remain over-represented in crime statistics. The *Juvenile Justice in Australia* report found that in 2008–09 about 7200 young people were under juvenile justice supervision on any given day and about 14 500 young people were under supervision at some time.<sup>176</sup> Another report found that more than half of the young people in New South Wales juvenile detention facilities were abused as children and more than a quarter had been bullied or placed in out-of-home care before the age of 16.<sup>177</sup> Young people with intellectual disability and mental health issues are also over-represented in the juvenile justice system.<sup>178</sup>

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<sup>174</sup> K Richards, *Trends in Juvenile Detention in Australia*, Australian Institute of Criminology, Canberra, 2011, p 1. Between 1981 and 2002 there was a 61 per cent decline in rates of juveniles in detention, although there has been a small increase in rates since 2004.

<sup>175</sup> *ibid.*, p 4.

<sup>176</sup> Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2008–09*, AIHW, Canberra, 2011, p 23.

<sup>177</sup> D Indig et al., *2009 NSW Young People in Custody Health Survey: full report*, Justice, Health and Juvenile Justice, Sydney, 2011.

<sup>178</sup> Department of Human Services, *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Law Reform Commission Papers 5–8, NSW Law Reform Commission, Sydney, 2010, p 1.

Young Aboriginal and Torres Strait Islander people are 24 times more likely to be detained when compared with non-Indigenous young people.<sup>179</sup> The risk factors that can contribute to the likelihood of children becoming involved in crime are much more prevalent among young Aboriginal and Torres Strait Islander people in custody.<sup>180</sup>

Submissions to the Baseline Study revealed concern about inconsistency between the criminal justice systems in the various states and territories. They also revealed concern about bail arrangements, claiming that children are detained more than is necessary and there is limited accommodation for children released on bail. Further, it was said that aspects of the justice system discriminate against young Aboriginal and Torres Strait Islander people. Some submissions claimed that Aboriginal and Torres Strait Islander children are being over-policed. There is, however, limited evidence available to quantitatively test such claims.

Submissions to the Baseline Study indicated concerns that in some jurisdictions 17-year-olds are treated as adults in the criminal justice system. Article 37(c) of the Convention on the Rights of the Child requires that children be detained separately from adults. Australia has entered a reservation to this article, stating it would comply only when the responsible authorities consider separate detention feasible and consistent with the obligation that children be able to maintain contact with their families.<sup>181</sup> In its 2005 concluding observations, the Committee on the Rights of the Child recommended that Australia remove its reservation, since Article 37(c) already provides for a similar exception in relation to the best interests of the child and provides for their right to maintain contact with their family.<sup>182</sup>

Although the states and territories might not have separate facilities for housing juvenile offenders, juveniles are usually housed separately from the adult prison population. In Queensland, for example, prisoners aged less than 18 years must be kept apart from prisoners who are 18 years or older unless it is in their best interest to not be housed separately.<sup>183</sup> Although young people aged 17 years who are charged with an offence are dealt with in the

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<sup>179</sup> Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2008–09*, AIHW, Canberra, 2011, p 7.

<sup>180</sup> D Indig et al., *2009 NSW Young People in Custody Health Survey: full report*, Justice, Health and Juvenile Justice, Sydney, 2011.

<sup>181</sup> See also Australia's reservation to Article 10 of the International Covenant on Civil and Political Rights.

<sup>182</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005) [7].

<sup>183</sup> *Corrective Services Act 2006* (Qld), s 18(2).

mainstream criminal justice system and, if found guilty, are supposed to be incarcerated in adult detention centres<sup>184</sup>, they are typically accommodated separately from the adult prison population where possible.

All Australian States and Territories have established separate children's courts to deal with criminal matters involving juveniles. In Victoria children have the right under the *Charter of Human Rights and Responsibilities Act 2006* to be separated from adults when detained without charge or, as an accused, to be brought to trial as quickly as possible and, if convicted, treated in a way that is appropriate to their age. Victoria also has a dual-track system, whereby offenders under the age of 21 years can be sentenced to custody in a youth detention centre rather than a prison. On entering custody, young people are guided through a booklet informing them of their rights, including complaint mechanisms such as the ombudsman. The decline in the rate of juveniles in detention in Victoria has been pronounced.<sup>185</sup>

Many submissions to the Baseline Study suggested that alternatives to detention—such as cautioning, conferencing and other diversionary programs—are not used as much as they should be. All jurisdictions make use of diversionary measures for young offenders. For example, in New South Wales a range of measures, such as warnings, cautions and youth justice conferences, are available, and young offenders who had access to these measures had lower rates of re-offending than young offenders who proceeded straight to court before these measures were available.<sup>186</sup> In Western Australia, Regional Youth Justice Services has been established to divert young people from the youth justice system and reduce the number of young people remanded in detention through the provision of a bail service.

The Committee on the Rights of a Child and the Human Rights Law Centre have argued that the age of criminal responsibility in Australia is too low.<sup>187</sup> Submissions to the Baseline Study echoed this sentiment. In all Australian criminal jurisdictions the age of criminal responsibility is 10 years, and there is a presumption that children between the ages of 10 and 14 years are not to be

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<sup>184</sup> *Youth Justice Act 1992* (Qld), Schedule 4—Dictionary.

<sup>185</sup> K Richards, *Trends in Juvenile Detention in Australia*, Australian Institute of Criminology, Canberra, 2011, p 2.

<sup>186</sup> Vignaendra & Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference', *Crime and Justice Bulletin*, no. 103, October 2006.

<sup>187</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005) [74]; Human Rights Law Centre, 'Submission on the National Human Rights Action Plan background paper', HRLC, Melbourne, 2011, p 73.

held criminally responsible.<sup>188</sup> Internationally, the age of criminal responsibility varies, from 7 to 18 years.

Article 40 of the Convention on the Rights of the Child provides that juvenile justice should promote the re-integration of child offenders into society. In each state and territory in Australia there is strong emphasis on rehabilitation and re-integration of young people who come into contact with the juvenile justice system. In Victoria, for example, if a young person is sentenced to a period of custody in a youth justice centre they will be assigned a case worker to offer support and develop a Client Services Plan to deal with the offending behaviour—including through counselling programs and TAFE courses that are designed to improve the chances of the young person gaining employment on release.<sup>189</sup>

The Committee on the Rights of a Child has expressed concern about mandatory sentencing for home burglary in Western Australia, where there is no distinction between children and adults in requiring a detention sentence for the third offence.<sup>190</sup> The Human Rights Law Centre submitted to the National Human Rights Consultation that the mandatory sentencing laws disproportionately affect young Aboriginal and Torres Strait Islander people.<sup>191</sup> However, the Western Australian Government considers the laws necessary in order to protect individual and community safety in homes.

### 3.4 Older people

Although there is no agreed definition of ‘older people’, this group is typically defined as people aged 65 years and over.<sup>192</sup> Concerns were raised about the experiences of some older people in relation to their standard of living, care services and age discrimination in workforce participation. In its submission to the National Human Rights Consultation, the Council on the Ageing (NSW) noted it was important to remember that older people as a group were not homogeneous and this diversity calls for ‘flexible and responsive policy

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<sup>188</sup> Australian Institute of Criminology, *The Age of Criminal Responsibility*, AIC, Canberra, November 2000, p 1.

<sup>189</sup> Victorian Department of Human Services, *Youth Justice Centre Order—information for young people*, viewed 7 February 2011, [http://www.cyf.vic.gov.au/youth-justice/library/pamphlets/training\\_centre\\_order](http://www.cyf.vic.gov.au/youth-justice/library/pamphlets/training_centre_order).

<sup>190</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005) [74].

<sup>191</sup> Human Rights Law Centre, ‘Submission to the National Human Rights Consultation’, 2009.

<sup>192</sup> Productivity Commission, *Caring for Older Australians—draft report*, Productivity Commission, Canberra, January 2011, p 6.

initiatives to meet their needs'.<sup>193</sup> Submissions to the Baseline Study noted that the percentage of older people from culturally and linguistically diverse backgrounds is rising. Older people from such backgrounds can have specific language, care and cultural needs in relation to health care and residential aged care.

Among Australia's many legislative protections for older people are the following:

- The *Social Security Act 1991* provides an income support safety net for people over pension age. The Age Pension is available to all Australians who meet the residence, means and age criteria. Pension age for men is currently 65 years and for women 64.5 years (rising gradually to age 65 by 1 July 2014).
- The *Age Discrimination Act 2004* prohibits age discrimination in many areas of public life, including employment and the provision of goods, services and facilities. State and territory anti-discrimination laws also prohibit discrimination on the basis of age.
- The *Aged Care Act 1997* enables access to aged care by those who need it, regardless of race, culture, language, gender, economic circumstance or geographic location, and protects the rights of those people. Aged care services funded under the Act must meet quality standards designed to protect the health and wellbeing of care recipients. The Act further protects and promotes the rights of care recipients and gives these people a voice through the Aged Care Complaints Scheme and the Aged Care Commissioner, advocacy services, the Community Visitors Scheme, the Charter of Residents' Rights and Responsibilities, and the Charter of Rights and Responsibilities for Community Care.
- The *National Health Act 1953* and the *Health Insurance Act 1973* provide for the protection of the right of older people to health through Australia's universal health care platform. Under this platform, free public hospital care and affordable medical services are subsidised through the Medicare Benefits Scheme; medicines are subsidised through the Pharmaceutical Benefits Scheme. A wide spectrum of services are delivered, ranging from preventive health and early intervention services to the treatment of illness, chronic disease management and acute care.

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<sup>193</sup> Council on the Ageing (NSW), 'Submission to the National Human Rights Consultation', 2009, p 1.



### 3.4.1 Aged care

The National Human Rights Consultation report noted that some submissions expressed concern about services for the ageing—for example, poor living conditions inside residential aged care facilities and the ‘general vulnerability of people who become invisible because they are elderly’.<sup>194</sup> Other submissions called for ‘greater awareness of the difficulties associated with ageing—including the physical, social, mental and financial circumstances that tend to deteriorate with age’.<sup>195</sup> The need for aged care is particularly characteristic of people aged 85 and more.<sup>196</sup>

Submissions to the Baseline Study emphasised the need for an aged care system to respect the right of older people to maintain their independence and control in residential aged care, consistent with their capacity to exercise this right. They also noted the particular challenges faced by older gay and lesbian couples, who are often unable to gain recognition as couples in aged care facilities.

In April 2010 the Australian Government commissioned the Productivity Commission to develop options for redesigning Australia’s aged care system. The Productivity Commission’s final report, *Caring for Older Australians*, was released on 8 August 2011. Among other things, it noted that, ‘while there are many positive attributes to Australia’s aged care system’<sup>197</sup>, the system is not functioning as well as it could in many areas. It highlighted several important weaknesses in the system—for example, excessively long waiting times, a limited choice of care providers, and insufficient funding for palliative and end-of-life care.<sup>198</sup> Older people were concerned about the difficulty of obtaining comprehensive and timely information about the aged care system, about their rights and responsibilities in respect of the services they could use, and about the level of co-contributions they were required to make. Another concern on the part of older people from special needs groups—particularly those from Aboriginal and Torres Strait Islander and non-English speaking backgrounds—was that information about the aged care system was not available in their native language.<sup>199</sup>

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<sup>194</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Attorney-General’s Department, Canberra, 2009, p 33.

<sup>195</sup> *ibid.*, p 34.

<sup>196</sup> Australian Productivity Commission, *Caring for Older Australians*, Productivity Commission, Canberra, August 2011, p 6.

<sup>197</sup> *ibid.*, p 93.

<sup>198</sup> *ibid.*, pp xxiii–xxiv.

<sup>199</sup> *ibid.*, pp 95–6.

The Productivity Commission outlined future challenges, among them a significant increase in the number of older people, rising expectations about the type and flexibility of care that is available, a relative decline in the number of informal carers, and community concerns about variability in the quality of care. The commission's proposals respond to these weaknesses and challenges and aim to deliver higher quality care. The focus is on the wellbeing of older Australians—promoting their independence, giving them choice and retaining their community engagement.<sup>200</sup> The Government is considering the commission's recommendations.

The Government's decisions about how to implement a National Disability Insurance Scheme to provide to all Australians insurance for the cost of support if they or a family member acquire a disability will also affect older people with disability.

The Aged Care Act is designed to encourage diverse, flexible and responsive aged care services by linking care and support services to the places where older people prefer to live. The Charter of Residents' Rights and Responsibilities includes the right for each resident to fully and effectively use their personal, civil, legal and consumer rights and the right to maintain social and personal relationships. The Australian Government funds programs aimed at assisting recipients of aged care services to participate in decisions relating to their care and lifestyle and to minimise the risk of social isolation.

The National Aged Care Advocacy Program provides free and confidential advocacy services to people receiving Australian Government-funded aged care services. The NACAP-funded services support aged care recipients through the delivery of information and education. The Government also provides support to residents of aged care homes through the Community Visitors Scheme, which is designed to improve the quality of life of residents of aged care facilities who have limited family and social contact and might be at risk of isolation from the general community for social or cultural reasons or through disability.

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<sup>200</sup> *ibid.*, p xxxiii.

### 3.4.2 Elder abuse

The World Health Organization defines ‘elder abuse’ as ‘a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.<sup>201</sup>

The Victorian Elder Abuse Prevention Project has described elder abuse as a complex issue that can occur in institutional care such as aged care residential facilities or hospitals but is more likely to occur in the community. Victoria’s Elder Abuse Prevention Strategy includes With Respect to Age 2009 practice guidelines for health services and community agencies.

Since 1 July 2007 all Australian Government–subsidised residential aged care services have been obliged to report all incidents or allegations of sexual or serious physical assault. Reports must be made to the police and the Office of Aged Care Quality and Compliance, within the Australian Government Department of Health and Ageing. Almost 4000 incidents were reported between July 2007 and June 2010. In 2009–10 the department received notification of 1488 alleged reportable assaults; this compares with 1411 notifications in 2008–09.<sup>202</sup> The increase in notifications since the introduction of the reporting requirement is thought to be a result of approved providers having a clearer understanding of what they should be reporting, rather than an increase in the incidence of reportable assaults.

In addition to the compulsory reporting of assaults, the Australian Government manages the Aged Care Complaints Scheme, which is a free service that examines complaints about the health, safety and wellbeing of people receiving aged care services under the Aged Care Act. Under the scheme, officers work with complainants to resolve their concerns using a variety of resolution options (including investigation) and can require the service provider to take action if necessary. They can also refer matters that might be more suitably dealt with by others—for example, the police and the Australian Health Practitioner Regulation Agency. Complaints activity is reported in detail each year in the *Report on the Operation of the Aged Care Act 1997*. In 2009–10 ‘abuse’ was the second most commonly reported matter, there being 1981 reports (down from 2034 in 2008–09). ‘Abuse’, as reported, mostly concerned alleged reportable assaults but also other types of abuse such as physical, verbal, psychological or emotional abuse and neglect. As a result, there is

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<sup>201</sup> World Health Organization, *Elder Abuse*, viewed 15 February 2011, [http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/).

<sup>202</sup> Department of Health and Ageing, *Report on the Operation of the Aged Care Act 1997*, DOHA, Canberra, 2010, pp 72, 79.

considerable overlap in the data on complaints and those on alleged reportable assaults.

Financial elder abuse is also increasingly cited as an area of concern for older people. It is defined as the ‘illegal or improper exploitation or use of funds or other resources of the older person’<sup>203</sup>; this includes taking or misusing funds or property without permission, abusing joint signatory authorities or forging signatures, and getting an older person to ‘go guarantor’ without that person having sufficient knowledge to make an informed decision. An examination of calls to the Queensland Elder Abuse Prevention Unit Helpline in 2006–07 found that financial and psychological abuse were the most commonly occurring issues. The study concluded that the data available on the prevalence of elder abuse in Victoria (and Australia) are very limited.<sup>204</sup>

In its *Older People and the Law*<sup>205</sup> report, which was tabled on 26 November 2009, the House of Representatives Standing Committee on Legal and Constitutional Affairs made several recommendations relating to financial elder abuse, among them the following:

- working with the banking and financial sector to develop national industry-wide protocols for reporting alleged financial abuse
- a national awareness campaign dealing with financial abuse of older Australians and the bodies responsible for investigating such abuse.

The Australian Securities and Investments Commission’s website for consumers and investors (MoneySmart) has a section specifically devoted to superannuation and retirement and provides advice on home equity release and reverse mortgages. The Australian Government is continuing to encourage cooperation within the banking and financial sector to develop national voluntary guidelines and protocols for considering and reporting alleged financial elder abuse. Australian consumers are already protected in their interactions with providers of banking services by legislation, industry codes and standards of best practice. The major banks are subject to the Australian Bankers’ Association’s Code of Banking Practice, and all Australian credit unions

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<sup>203</sup> World Health Organization, *World Report on Violence and Health 2002*, WHO, Geneva, 2002, p 127.

<sup>204</sup> J Wainer et al, *Prevalence of Financial Elder Abuse in Victoria: Protecting Elder Assets Study*, Monash University, Melbourne, 2010, p 29.

<sup>205</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, Australian Parliament, Canberra, <http://www.aph.gov.au/house/committee/LACA/olderpeople/report/front.pdf>.

and building societies are subject to the Mutual Code of Practice administered by ABACUS, the Australian Building Societies and Credit Union Association.

In Western Australia the Alliance for the Prevention of Elder Abuse was established in 2005; it includes officials from WA Police, the Public Advocate, the Public Trustee, the Department of Health and the Western Australian Local Government Association. Members of the alliance work collaboratively to raise awareness of elder abuse and to influence attitudes, policies and practices in relation to such abuse. In April 2011 a report entitled *Examination of the Extent of Elder Abuse in Western Australia* was completed. Financial abuse was found to be the most prevalent type of abuse<sup>206</sup>, and the report noted:

... elder abuse research, policy and practice is about thirty years behind research, policy and practice in child abuse and domestic violence. As a result, it tends to lack conceptual clarity and be poorly defined and measured. While a problematic concept, elder abuse is an issue of deepening concern in our ageing society and the challenge for government and welfare agencies is to ensure that there are adequate resources available to respond to it effectively.<sup>207</sup>

### 3.4.3 Financial security

Older people can find themselves more susceptible to poverty for a number of reasons, including living alone, social isolation, limited employment opportunities and lack of access to information.<sup>208</sup> The Australian Government has introduced the Superannuation Guarantee (Administration) Amendment Bill 2011 to increase the Superannuation Guarantee rate from 9 per cent to 12 per cent and will introduce further amendments to abolish the age limit so that workers aged 70 years and more can also enjoy the Superannuation Guarantee from 1 July 2013.

The Australian Government has also introduced a further incentive to boost the superannuation savings of some of our lowest paid workers and improve the fairness of the superannuation system. From 1 July 2012 workers earning \$37 000 or less will receive up to \$500 a year through a refund of the 15 per cent contribution tax paid on their superannuation contributions. The annual tax refund will be paid directly into their superannuation savings and will boost

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<sup>206</sup> M Clare, B Black Blundell & J Clare (Crime Research Centre, University of Western Australia, joint initiative with Advocare Inc.), *Examination of the Extent of Elder Abuse in Western Australia: a qualitative and quantitative investigation of existing agency policy, service responses and recorded data*, Crime Research Centre, Perth, April 2011, p 48.

<sup>207</sup> *ibid.*, p 2.

<sup>208</sup> Human Rights Council Advisory Committee, *The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person: working paper by Ms Chinsung Chung*, UN Doc A/HRC/AC/4/CRP.1, 2009, p 3.

the superannuation savings of 3.6 million low-paid workers, 60 per cent of whom are women.

There remain, however, other age limits in federal workers compensation schemes, income maintenance insurances and mandatory retirement ages that act as additional limits on the capacity of older people to save.

In 2009 the Australian Human Rights Commission released a paper examining the gender gap in retirement savings. The paper concluded that the aim of the current retirement income system—for individuals to accumulate wealth over their life cycle to provide for their own financial security in retirement—does not serve women well, leaving a gender gap in retirement incomes and giving rise to concern about poverty and financial hardship for women in retirement. The gender gap comes from linking the retirement income system (particularly superannuation) to engagement in paid work and the level of earnings.<sup>209</sup>

Women commonly move into and out of the paid workforce because of caring responsibilities and generally earn less than men, so they usually have lower levels of superannuation coverage over their life cycle and, when they do engage in paid work, accumulate less in superannuation funds. The commission's paper notes that 'currently, superannuation balances and payouts for women are approximately half of those of men'.<sup>210</sup> Submissions to the Baseline Study noted that the issue is exacerbated for women in same-sex relationships.

The Consultative Forum on Mature Age Participation has proposed a review of Commonwealth legislation, policies and practices in order to identify age-based limitations or disincentives for older people to participate in the workforce or in other productive work. The Australian Government is considering whether the Australian Law Reform Commission should be issued a reference to conduct this review.

There was considerable pension reform in 2009, and an important part of it was the introduction of a new Pensioner and Beneficiary Living Cost Index. The index takes account of the fact that pensioners spend more of their income on essentials such as food, health and clothing. Another element of the reform is a raised community living standard benchmark, which ensures that age pensioners share in rising community living standards, from 25 per cent to

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<sup>209</sup> Australian Human Rights Commission, *Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle*, AHRC, Sydney, 2009, p 1.

<sup>210</sup> *ibid.*, citing R Clare, *Retirement Savings Update*, Association of Superannuation Funds of Australia, 2008, p 3, viewed 31 August 2009, <http://www.superannuation.asn.au/Reports/default.aspx>.

about 27.7 per cent of male total average weekly earnings for the single Age Pension rate and to 41.7 per cent for the couples Combined Pension rate. The reform also includes the Work Bonus, which is a concession on the income tax treatment of employment income for people over pension age. From 1 July 2011 the first \$250 of a pensioner's fortnightly employment income is not assessed under the income test, and any unused fortnightly Work Bonus accrues, to a maximum of \$6500, to offset future employment income.

#### 3.4.4 Freedom from discrimination

The former commissioner responsible for age discrimination, Elizabeth Broderick, identified age discrimination as a primary concern for mature age workers (over 45 years). In 2008–09 the commissioner consulted a cross-section of stakeholders, including peak community bodies, service providers, academics, unions and employer groups and relevant sections of government. The commissioner also raised the question of age discrimination occurring in promotions and the provision of training opportunities.

Age-based bullying, harassment and situations of forced retirement were also found to be issues.<sup>211</sup> On 1 October 2010 the Australian Human Rights Commission released a paper entitled *Age Discrimination—exposing the hidden barrier for mature age workers*, seeking to raise awareness about the matter.<sup>212</sup> The paper noted that the majority of the age discrimination complaints received by the commission in 2008–09 related to employment, and most of these complaints were made by individuals over the age of 45 years. Although the Fair Work Act prohibits discrimination against employees or prospective employees on the basis of age, age discrimination emerged as the predominant barrier to workforce participation by mature age workers.

In July 2011 the Australian Government appointed the Hon. Susan Ryan AO to be Australia's first dedicated Age Discrimination Commissioner in the Australian Human Rights Commission. The commissioner will advocate for all Australians who experience age discrimination and will seek to break down stereotypes that contribute to age discrimination, including barriers to mature age workplace participation.

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<sup>211</sup> Elizabeth Broderick, 'Is it time for a Convention on the Rights of Older People', Speech presented to the International Federation of Ageing, Melbourne, 6 May 2010, viewed 15 February 2011, [http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506\\_rights\\_older.html](http://www.hreoc.gov.au/about/media/speeches/age/2010/20100506_rights_older.html).

<sup>212</sup> Australian Human Rights Commission, *Age Discrimination—exposing the hidden barrier for mature age workers*, AHRC, Sydney, 2010.

In addition, the Government has established the Consultative Forum on Mature Age Participation to recommend further measures to remove the barriers to employment for mature age people. The forum includes representatives of employer and industry groups, unions and other interested parties. The Age Discrimination Commissioner is also a member. The forum will oversee a national survey to measure the prevalence of barriers to employment for mature age people, including age discrimination, to be conducted in 2011–12 and will present its final recommendations to Government by 30 June 2012.

The work of the forum builds on a range of initiatives designed to encourage the recruitment and retention of mature age people. *Experience+* started on 1 July 2010 and provides professional career advice, support and training to mature age people at risk of becoming disengaged from the labour market and training grants for employers to help build the capacity of mature age workers to supervise or mentor apprentices or trainees. The Government is also investing \$30 million in skills assessment and training for mature age people who have trade skills but no formal qualifications.

Additionally, the Government has established the Advisory Panel on the Economic Potential of Senior Australians to assist Australia to respond effectively to the opportunities presented by a larger and more active community of seniors. The panel will examine how we can best harness the life experiences and intellectual capital of older members of our community, and it will ensure that the potential of older people is considered in a range of policy debates.

The Australian Government supports the work of the Open-Ended Working Group on Ageing, established by the UN General Assembly on 21 December 2010. The Working Group will consider the existing international framework in relation to the human rights of older people and identify possible gaps and how best to address them, including by considering the feasibility of further instruments and measures.

The Australian States and Territories are also exploring ways to remove discriminatory barriers. For example, in December 2009 the ACT Government launched the ACT Strategic Plan for Positive Ageing 2010–2014: Towards an Age-friendly City, which includes the priorities of ‘Respect, Valuing and Safety’ and ‘Work and Retirement’. In September 2011 an Older Persons Assembly will explore these priorities and the assembly outcomes will in turn be used to guide the ACT’s 2012–2014 Positive Ageing Action Plan.



## 3.5 Gay, lesbian, bisexual, and sex and/or gender diverse people

### 3.5.1 Same-sex relationships

In 2009 the Australian Government removed discrimination against same-sex couples from 85 Commonwealth laws in the areas of taxation, social security, health, aged care, superannuation, immigration, child support and family law. The Fair Work Act, also enacted in 2009, ensures that same-sex de facto relationships are recognised in the provision of unpaid parental leave entitlements.<sup>213</sup> It also prohibits employers taking adverse action against employees or prospective employees because of their sexuality or marital status.<sup>214</sup> These reforms extend to same-sex people and couples the entitlements and obligations that apply to opposite-sex people and couples.

The question of same-sex marriage continues to attract extensive attention.<sup>215</sup> Recommendations made during the Universal Periodic Review process called on Australia to take measures to ensure equality in same-sex relationship recognition.<sup>216</sup> The Australian Government's position is that the definition of marriage in the *Marriage Act 1961*—that is, marriage is between a man and a woman—is appropriate. The Government does support a nationally consistent framework for the recognition of relationships. Relationship recognition schemes exist in Tasmania, the ACT, Victoria and New South Wales, and relationships recognised under these schemes are also recognised under Commonwealth laws. The Australian Government continues to encourage other jurisdictions to implement similar schemes.

### 3.5.2 Freedom from discrimination

Submissions to the Baseline Study expressed concern about multiple forms of discrimination faced by gay, lesbian, bisexual, and sex and/or gender diverse older people, people living with disability, and people with HIV. Gay, lesbian, bisexual, and sex and/or gender diverse people continue to report experiencing

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<sup>213</sup> *Fair Work Act 2009* (Cth), ss 12, 70.

<sup>214</sup> *ibid.*, s 351(1).

<sup>215</sup> For example, F Brennan et al., 'Should same-sex marriage be legalised?', *Sydney Morning Herald*, 26 February 2011, p 12.

<sup>216</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.69 (United Kingdom)] and [86.70 (Norway)].

a higher incidence of discrimination, prejudice and violence over their lifetime compared with the rest of the Australian population.<sup>217</sup>

All state and territory anti-discrimination laws provide at least some protection against discrimination on the basis of sexual orientation, gender expression, sex and/or gender identity, or the identity of a partner. Some participants in the National Human Rights Consultation were, however, of the view that the legislative protections are inconsistent.<sup>218</sup> Submissions to the Baseline Study also proposed that effective remedies be included in any such legislation. A further issue for gay, lesbian, bisexual, and/or gender diverse people raised in submissions to the Baseline Study concerned the use of discriminatory language in legislation, policies and other government documents. This was attributed to assumptions made about, for example, parenting, naming and home life.

The Australian Government intends to introduce federal legislation to prohibit discrimination on the basis of a person's sexual orientation or gender identity. The legislation will apply consistently throughout the nation.

### 3.5.3 Freedom from violence

A number of studies have found that gay, lesbian, bisexual, and sex and/or gender diverse people experience higher levels of violence and harassment. For example, the 2006 report entitled *Private Lives: a report on the health and wellbeing of GLBTI Australians* found that 23 per cent of respondents had been threatened with violence and 14.7 per cent had experienced a physical attack.<sup>219</sup> Similarly, a 2003 study reported that 56 per cent of gay men and lesbian women had experienced one or more types of homophobic abuse, harassment or violence during the preceding 12 months and 85 per cent had had one or more of these experiences during their lifetime.<sup>220</sup> Schools are notable sites for homophobic violence and abuse: *Writing Themselves in Again: 6 years on* stated that 74 per cent of abuse towards young people reportedly

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<sup>217</sup> Australian Coalition for Equality, 'Submission to the National Human Rights Consultation', 2009, pp 121–2.

<sup>218</sup> *ibid.*, pp 122–3.

<sup>219</sup> M Pitts, A Smith, A Mitchell & S Patel, *Private Lives: a report on the health and wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health & Society, La Trobe University, Melbourne, 2006, p 50.

<sup>220</sup> NSW Attorney-General's Department, *You Shouldn't Have to Hide to be Safe: a report into homophobic hostilities and violence against gay men and women in NSW*, Attorney-General's Department, Sydney, 2003, p 2.

occurred in schools.<sup>221</sup> The report also noted, however, that young people feel safer in schools now than they did in 1998.<sup>222</sup> Violence and abuse have an impact on the right of children to education and a considerable impact on the health and wellbeing of young people.<sup>223</sup> The extent of the issue is probably under-recorded and under-reported for a variety of reasons, including a lack of suitable support services and fear of stigma.<sup>224</sup>

A number of submissions to the Baseline Study referred to reports showing that gay, lesbian, bisexual, and sex and/or gender diverse people experience high levels of discrimination, prejudice and violence. Concern was expressed about violence against children generally, including in schools and in the family, but the availability of disaggregated data is limited.

Same-sex domestic violence has historically received little attention in the Australian criminological and social science research community.<sup>225</sup> An online survey involving 5476 Australians who identified as gay, lesbian, bisexual, or sex and/or gender diverse described domestic and family violence as a hidden issue because of the lack of recognition of its existence in same-sex relationships.<sup>226</sup> This is despite 33 per cent of survey respondents reporting having been in a relationship with an abusive partner.<sup>227</sup> As with other instances of domestic violence, many victims of same-sex domestic violence do not report incidents to the police. The Australian Research Centre in Sex, Health and Society has found that only 10 per cent of surveyed victims reported the abuse to the police.<sup>228</sup> There is also a lack of support services and referrals to these services for same-sex domestic violence. Only 6 per cent of gay, lesbian, bisexual, or sex and/or gender diverse respondents who reported same-sex partner abuse to the police were referred to advice or support services.<sup>229</sup> Submissions to the Baseline Study expressed concern about

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<sup>221</sup> L Hillier, A Turner & A Mitchell, *Writing Themselves in Again: 6 years on—2nd national report on the sexual health and wellbeing of same-sex attracted young people in Australia*, Australian Research Centre in Sex, Health & Society, La Trobe University, Melbourne, 2005, p viii.

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

<sup>224</sup> Australian Human Rights Commission, *Violence, Harassment and Bullying and the LGBTI Communities*, viewed 5 October 2011, <http://www.hreoc.gov.au/bullying/lgbti.html>.

<sup>225</sup> S Jeffries & M Ball, 'Male same-sex intimate partner violence: a descriptive review and call for further research', *eLaw Journal*, 2008, vol. 15, no. 1, pp 134–79.

<sup>226</sup> Australian Research Centre in Sex, Health & Society, *Private lives: a report on the health and wellbeing of GLBTI Australians*, ARCSHS, La Trobe University, Melbourne, 2006, p 51.

<sup>227</sup> *ibid.*

<sup>228</sup> *ibid.*

<sup>229</sup> Australian Research Centre in Sex, Health & Society, *Coming Forward: the underreporting of heterosexual violence and same-sex partner abuse in Victoria*, Monograph series no. 69, ARCSHS, La Trobe University, Melbourne, 2008.

prejudices underlying violence directed at gay, lesbian, bisexual, and sex and/or gender diverse people.

### 3.5.4 Sex and/or gender diverse people

The concluding paper of the Australian Human Rights Commission's Sex and Gender Diversity Project noted continuing discrimination against the sex and/or gender diverse community in the realm of legal recognition of sex in documents and government records. The following points were raised:

- Under most state and territory legislation a married person cannot apply to have their sex changed on their birth certificate.<sup>230</sup>
- A person cannot apply to have their birth certificate changed to note their sex identity if they have not undergone sex affirmation surgery.<sup>231</sup>
- Gender identification on official records is largely binary (male/female).<sup>232</sup>

The paper also noted that the requirement to record an applicant's previous name can reveal information about their previous legal identity if the name is gender specific.<sup>233</sup> Submissions to the Baseline Study noted the need for data on matters specific to gay, lesbian, bisexual, and sex and/or gender diverse people. They also noted with concern the considerable financial cost and health risks associated with sex affirmation surgery and recommended that the surgery not be included in criteria for legally changing sex. The Federal Attorney-General has asked his department to coordinate a review of how and why the Australian Government collects sex and gender data. The department will also work with relevant Australian Government agencies and State and Territory Governments with a view to developing a nationally consistent approach to legally changing sex.

In September 2011 the Australian Government announced changes to its passport policy to make it easier for sex and/or gender diverse people to obtain a passport in their preferred gender, including allowing people to have 'x' listed on their passport.

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<sup>230</sup> 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*, AHRC, Sydney, 2009, p 23.

<sup>231</sup> *ibid.*, p 24.

<sup>232</sup> *ibid.*, p 27.

<sup>233</sup> *ibid.*, p 28.

### 3.5.5 Health care, aged care and disability

Submissions to the Baseline Study also discussed health care and aged care services for gay, lesbian, bisexual, and sex and/or gender diverse people. There was concern about older people suffering from social isolation and feeling they needed to remain ‘closeted’ in order to receive services. Examples of incidents of violence, abuse and discrimination by care givers and service providers were also cited, among them the following:

- refusal to allow same-sex couples to be housed together in care environments or to allow for same-sex partners to be received as family members
- harassment by community care providers
- a lack of understanding of the particular health needs of lesbian women when compared with gay men and heterosexual women.

### 3.5.6 Young people

Matters specific to gay, lesbian, bisexual, and sex and/or gender diverse young people were also raised in submissions—including violence, risk of suicide and self-harm. In particular, the question of surgery on intersex children, to reflect a binary understanding of sex as male or female, was raised. It was noted that this practice often resulted in gender identity issues and increased rates of depression and suicidal tendencies.

## 3.6 People at risk of or experiencing homelessness

On any night in Australia, it is estimated that about 105 000 people are homeless and about 16 000 people are sleeping without shelter.<sup>234</sup> The overall rate of homelessness has been relatively stable during the past 12 years, but increasing numbers of children, families and older people are experiencing homelessness.<sup>235</sup>

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<sup>234</sup> Australian Bureau of Statistics, *Counting the Homeless 2006*, Cat. no. 2050.0, ABS, Canberra, 2006.

<sup>235</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home—a national approach to reducing homelessness*, White Paper, FAHCSIA, Canberra, 2008, pp viii, 3.

Communities and groups who are more at risk of experiencing multiple disadvantage can also be more vulnerable to homelessness.<sup>236</sup> Among these groups are the following:

- Aboriginal and Torres Strait Islander peoples
- women and children escaping domestic and family violence
- young people leaving state care and protection systems
- people with mental health issues
- recently arrived immigrants and refugees.

Submissions to the Baseline Study also noted a number of groups who are more at risk of experiencing homelessness:

- people with disability
- people with disability from culturally and linguistically diverse backgrounds
- ex-prisoners
- refugees and migrants
- young people who identify as gay, lesbian, bisexual, or sex and/or gender diverse.

One submission to the Baseline Study pointed to the link between homelessness and sexual identity, particularly among young people, with reference to the 2005 New South Wales Law and Justice Foundation report *No Home, No Justice* and the 2007 Twenty10 report *It May Not Be Fancy*. Another submission highlighted the Australian Institute of Criminology's 2004 report entitled *Ex-Prisoners, SAAP, Housing and Homelessness*. It referred to the social disadvantages that characterise the general homeless population—for example, mental illness, unemployment and family breakdown—as being highly prevalent in prisoner and ex-prisoner populations. These social disadvantages add to the challenge of finding suitable, stable and secure accommodation for people who have been released from prison.

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<sup>236</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report*, 2009, pp 8–10.

The National Human Rights Consultation report identified a number of human rights issues associated with people experiencing homelessness, among them the availability of adequate housing and the impact of homelessness on other basic human rights.

### 3.6.1 Housing

Access to safe and secure housing is one of the most basic human rights and is protected under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. The UN Human Rights Committee has recommended that Australia take steps to ensure that people experiencing homelessness are not deprived of rights by virtue of their social and economic conditions.<sup>237</sup>

Submissions to the Baseline Study raised the question of the right to adequate housing. They focused on waiting times for government housing and the capacity of specialist homelessness services funded under the National Affordable Housing Agreement. They also discussed options for enshrining the right to adequate housing in legislation, new homelessness legislation, national quality standards for homelessness services, and the development of a national housing strategy rather than a response limited to homelessness. Additionally, they expressed concern about the availability of emergency, transitional and public and community housing and relevant support services that recognise the needs of priority groups at risk of homelessness.

In December 2008 the Australian Government released a White Paper on homelessness, *The Road Home*, that outlines the strategic agenda for reducing homelessness by 2020. It sets a 2020 goal of halving the rate of homelessness and offering supported accommodation to all who are ‘sleeping rough’ and seek such accommodation. A number of mechanisms are involved:

- The National Affordable Housing Agreement is an agreement by the Council of Australian Governments—replacing all previous housing and homelessness support agreements between the Commonwealth and the States and Territories, including the Supported Accommodation Assistance Program—to adopt a whole-of-government approach in tackling the issue of housing affordability.
- The National Partnership Agreement on Homelessness focuses on three broad strategies for reducing homelessness and tackling social inclusion—

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<sup>237</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee—Australia*, UN Doc CCPR/C/AUS/CO/5, 2009, [18].

prevention and early intervention to stop people becoming homeless, breaking the cycle of homelessness, and improving and expanding the service response to homelessness. Under this agreement, the States and Territories have devised implementation plans with a general aim of reducing homelessness, as well as specific targets such as reducing the number of Aboriginal and Torres Strait Islander people experiencing homelessness by one third by 2013.

- The National Partnership Agreement on Remote Indigenous Housing reflects a 10-year funding strategy for remote Aboriginal and Torres Strait Islander communities to address overcrowding, homelessness, poor housing conditions and the severe housing shortage in remote communities.
- The Australian Government has appointed the Prime Minister's Council on Homelessness to provide an independent overview on implementation of targets and provide advice on emerging difficulties.

Governments are also taking other steps in relation to low-cost public and private rental housing:

- Under the National Partnership Agreement on Social Housing and the Social Housing Initiative the Australian Government is implementing a joint initiative with the State and Territory Governments to construct 21 500 new social housing dwellings and provide for repairs and maintenance to existing public housing. At least half of these dwellings will go to Australians experiencing or at risk of homelessness.
- The Australian Government's National Rental Affordability Scheme is providing incentive payments to investors who offer rental properties to low- and moderate-income families at a rate at least 20 per cent below the prevailing market rate. This program will create 50 000 new affordable rental dwellings.

Overall, since 2008 the Australian Government has invested about \$5 billion in additional funding to respond to homelessness, including by providing better support services and more housing.

The Prime Minister's Council on Homelessness has noted that identification of people at risk of or experiencing homelessness is a matter for all of government. In March 2011 the Department of Education, Employment and Workplace Relations introduced the Housing Instability Indicator within the employment services system to assist employment service providers to identify



job seekers who are at risk of or experiencing homelessness. The indicator is designed as a service prompt for providers, to ensure that services are tailored to meet the needs of job seekers at risk of or experiencing homelessness. It is influenced by the job seeker's answers to the accommodation questions in the Job Seeker Classification Instrument and can also be updated by providers through the department's helpdesk.

The next phase of the Housing Instability Indicator will incorporate homelessness information collected by Centrelink. The development process is under way in the IT areas of the Department of Education, Employment and Workplace Relations and the Department of Human Services, with an expected release in the first quarter of 2012. Having these three sources of information—the Job Seeker Classification Instrument, Centrelink and employment service provider updates—casts the widest net to prompt providers and ensures that the services provided are specific to the needs of job seekers.

The White Paper also identified a need for research to better capture information on factors such as how long people are homeless and what causes variation in the length of the homelessness experience. In response, the Australian Government launched the National Longitudinal Homelessness Study to further research the lives of Australians who are at risk of or experiencing homelessness, so that service delivery can be better targeted to preventing homelessness.

A number of other programs and initiatives have also been implemented to support the White Paper targets:

- the roll-out of 110 Community Engagement Officers by Centrelink to provide outreach services and link people who are experiencing homelessness to the support they need
- Disability Employment Services (from 1 March 2010)
- the HOPE (Home Options and Pathways to Employment) project, which delivers a resource kit for employment service providers to raise awareness of and increase knowledge about homelessness, as well as to provide examples and mechanisms for encouraging better collaboration between the employment services and housing sectors
- Youth Connections (from January 2010), which supports disadvantaged young people going back to school or from school to work or further education

- the Compact with Young Australians, which was agreed to by the Standing Committee of Attorneys-General in 2009.

In the Australian Capital Territory an interdepartmental committee has been formed to provide advice on how to better connect service delivery and social inclusion principles within ACT Government agencies providing services to people who are homeless.

### 3.6.2 Voting

The Homeless Persons' Legal Clinic has found that many of its clients are not aware they can enrol as an itinerant voter, an ordinary elector if they have stayed at a fixed residential address for one month or more, or a silent elector if publicly available residential information puts them or their family at risk of violence or harm.<sup>238</sup>

People experiencing homelessness can also have difficulty meeting proof of identity requirements for enrolment, since obtaining the necessary documents can be too expensive or impractical. The threat of monetary penalties for failure to vote or failure to register changes of address is also considered a disincentive for people experiencing homelessness.<sup>239</sup>

In the lead-up to the 2010 federal election, the Australian Electoral Commission adopted initiatives designed to maximise the electoral participation of people experiencing homelessness—such as expanded mobile polling arrangements. Legislation was enacted before the election to facilitate enrolment and continued enrolment for people experiencing homelessness.

### 3.6.3 Social security

Submissions to the Baseline Study expressed concerns about the social security system, including the level of benefits paid and restrictions on and barriers to access to social security. Although Australia upholds the right to social welfare, this is not an unqualified right. If they are to enjoy this right people must accept the responsibility to meet the requirements for receipt of income support and mutual obligations once the income support is granted.

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<sup>238</sup> PILCH Homeless Persons' Legal Clinic, 'I'm homeless and I vote', Submission to the Electoral Reform Green Paper, *Strengthening Australia's Democracy*, 2009, p 25.

<sup>239</sup> P Lynch & J Cole, 'Homelessness and human rights: regarding and responding to homelessness as a human rights violation', *Melbourne Journal of International Law*, 2003, vol. 4, pp 157–8.

A number of concerns were raised during the National Human Rights Consultation, and more recently by the National Welfare Rights Lobby, in connection with Australia's current welfare assistance scheme under the *Social Security Act 1991* (Cth) being unable to adequately account for the unique needs and limitations of people at risk of or experiencing homelessness for two reasons:

- Identity documents, which people experiencing homelessness often do not have and cannot afford to obtain, are required before the issuing of, for example, a Medicare card.<sup>240</sup>
- Obligations once benefits are granted—such as attending job interviews and responding to Centrelink correspondence<sup>241</sup>—are often difficult for people experiencing homelessness to comply with because of poor literacy, issues receiving mail, and the need to give priority to more immediate pressures in their life, such as finding a place to sleep.

Reforms to the requirements for receipt of social welfare have been introduced in response to these concerns. There is now greater discretion to choose other methods for re-engaging or assisting a person receiving social welfare payments to meet his or her obligations and ultimately to obtain employment. One of the alternatives is to use 'contact requests', whereby Centrelink is notified to contact a person receiving social welfare about reconnecting with an employment service provider without penalising that person. It is also now possible for Centrelink to note a vulnerability indicator (including a homelessness indicator) on its records for a person receiving social welfare, in recognition of that person's diminished capacity to comply with the requirements associated with receiving social welfare payments.

#### 3.6.4 Freedom from discrimination

The Homeless Persons' Legal Clinic found that people experiencing homelessness can face discrimination when seeking housing, obtaining goods and services and voting for a range of reasons, among them the following:

- their appearance

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<sup>240</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report*, August 2009.

<sup>241</sup> P Karvelas, 'Mentally ill, homeless being kicked off the dole', *The Australian*, 25 January 2011, viewed 17 February 2001, <http://www.theaustralian.com.au/news/nation/mentally-ill-homeless-being-kicked-off-dole/story-e6frg6nf-1225993888578>.

- an inability to meet certain requirements—such as having a fixed address
- their source of income—such as welfare benefits
- having an association with or receiving assistance from a welfare agency.<sup>242</sup>

Seventy per cent of participants in the clinic’s consultations reported they had experienced discrimination on the basis of homelessness or social status from accommodation providers.<sup>243</sup> The survey also found the situation was exacerbated for individuals with a criminal record because the imperative to explain gaps in their rental history resulted in disclosure of prison time.<sup>244</sup>

Almost 60 per cent of participants in the clinic’s consultations reported experiencing discrimination by providers of goods and services on the basis of their homelessness. The discrimination was most often by restaurants, cafes or bars, followed by banks, retail shops, hospitals and telecommunications providers.<sup>245</sup>

Australia’s current anti-discrimination laws do not prohibit discrimination against people experiencing homelessness. Commonwealth and state and territory anti-discrimination laws do, however, provide protection against discrimination on the basis of disability, including mental health, which is an important risk factor for homelessness.<sup>246</sup>

### 3.6.5 Other rights

Submissions to the Baseline Study highlighted the right to health as a right affected by homelessness. They referred to evidence showing that people experiencing homelessness have poor health outcomes, disproportionately high experiences of physical and mental illness, high mortality, and other

<sup>242</sup> PILCH Homeless Persons’ Legal Clinic, *Discrimination on the Basis of Homelessness: position paper of the PILCH Homeless Persons’ Legal Clinic*, HPLC, Melbourne, p 1, viewed 1 December 2011, [http://www.pilch.org.au/Assets/Files/HPLC\\_position\\_paper\\_discrimination-homelessness.pdf](http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf).

<sup>243</sup> PILCH Homeless Persons’ Legal Clinic, *Discrimination on the Grounds of Homelessness or Social Status*, Report to the Department of Justice, HPLC, Melbourne, 2007, pp 12–13: private rental or real estate agents (41 per cent, or 75 respondents), boarding houses (24 per cent, or 44 respondents), transitional or crisis accommodation (20 per cent, or 36 respondents), hotels and public housing (each 19 per cent, or 35 respondents) and caravan and backpackers (each 17 per cent, or 32 respondents).

<sup>244</sup> PILCH Homeless Persons’ Legal Clinic, *Discrimination on the Basis of Homelessness: position paper of the PILCH Homeless Persons’ Legal Clinic*, HPLC, Melbourne, p 2, viewed 1 December 2011, [http://www.pilch.org.au/Assets/Files/HPLC\\_position\\_paper\\_discrimination-homelessness.pdf](http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf).

<sup>245</sup> PILCH Homeless Persons’ Legal Clinic, *Promoting Equality: homeless persons and discrimination*, HPLC, Melbourne, 2002, p 13.

<sup>246</sup> Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007*, Cat. no. 4326.0, ABS, Canberra, 2007.

health issues. They also noted the link between drug misuse and homelessness and recommended that homelessness be classified as a public health concern. One submission highlighted the considerable exposure to violence among people experiencing homelessness.

### 3.6.6 Homelessness and priority groups

#### ***Aboriginal and Torres Strait Islander peoples***

Aboriginal and Torres Strait Islander peoples accounted for 2.5 per cent of Australia's population in 2001, yet they accounted for 9 per cent of the total homeless population and 19 per cent of people in improvised housing.<sup>247</sup> The Special Rapporteur on adequate housing reported that regional and remote communities face severe housing shortages and a comparatively higher cost of living<sup>248</sup> and that the situation is exacerbated by the greater social and economic disadvantage experienced by Aboriginal and Torres Strait Islander peoples. The Special Rapporteur also reported a lack of culturally appropriate housing<sup>249</sup> that takes account of the cultural importance of communal and outdoor living and the importance of using public space for cultural activities.

The National Partnership Agreement on Remote Indigenous Housing establishes a 10-year strategy for addressing the current housing shortage in remote Australia, affirming the 'joint commitment of the Commonwealth and the States to address the high levels of overcrowding and homelessness in remote Indigenous communities over the long term'.<sup>250</sup> For example, under the agreement, the Cape York Welfare Reform trial and the White Paper strategy for Indigenous people, the Queensland Government is trying to improve the opportunities for Aboriginal and Torres Strait Islander peoples, particularly those living in remote communities, to own their home, with rights and responsibilities comparable with those applying to other Queensland home buyers.

The Northern Territory Government has provided \$1.35 million in funding for Return to Country program services in Darwin, Alice Springs and Katherine as part of its implementation plan for the National Partnership Agreement on Homelessness. The Return to Country program aims to assist itinerant people

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<sup>247</sup> Australian Bureau of Statistics, *Counting the Homeless 2001*, Cat. no. 2050.0, ABS, Canberra, 2003, p 5.

<sup>248</sup> Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, Miloon Kathari, UN Doc A/HRC/4/18/Add.2, 11 May 2007, at [70].

<sup>249</sup> *ibid.* at [84] and [95].

<sup>250</sup> Council of Australian Governments, *Fact Sheet: National Partnership Agreement on Remote Indigenous Housing*, COAG, Canberra, 29 November 2008, p 1.

to return to their home country when this is appropriate. It is linked in with patrol and rehabilitation services provided by a range of government agencies and non-government organisations and is offered on a user-pays basis. From July 2010 to March 2011, 4684 ‘rough sleepers’ were returned to country and 582 were referred to specialist homelessness services and stable accommodation.

## **Women**

It is estimated that up to 44 per cent of the homeless population in Australia consists of women.<sup>251</sup> Women experiencing homelessness are, however, often less visible than men and the extent to which homelessness affects them is often underestimated.<sup>252</sup> The main causes of homelessness among women are domestic violence, sexual assault and family breakdown. Before the National Affordable Housing Agreement came into operation a third of people using the Supported Accommodation Assistance Program were women escaping domestic violence.<sup>253</sup> Abuse in the family or by partners can also pressure women to enter into and remain in other abusive relationships that offer shelter.<sup>254</sup>

Single women experiencing homelessness do not receive priority as a group in terms of visibility, research or advocacy.<sup>255</sup> Further, research is increasingly recognising the vulnerability of some older women to poverty and homelessness—particularly if a woman has experienced family and domestic violence during her lifetime.<sup>256</sup>

All Australian jurisdictions now have laws that allow courts to issue exclusion orders as a condition of domestic violence orders. The exclusion orders allow the person seeking protection from domestic violence to remain in the family home, while the perpetrator is required to seek alternative accommodation.

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<sup>251</sup> Australian Bureau of Statistics, *Counting the Homeless 2006*, Cat. no. 2050.0, ABS, Canberra, 2008, p ix.

<sup>252</sup> *ibid.*, pp 12, 28.

<sup>253</sup> Australian Institute of Health and Welfare, *Homeless People in SAAP*, SAAP NDC report series no. 12, AIHW, Canberra, 2008.

<sup>254</sup> L Syngajewski et al. ‘Women who are single and homeless: myths and realities’, *Parity*, Council to Homeless Persons, May 2007; Australian Domestic and Family Violence Clearinghouse, *It Could Be You: female, single, older and homeless*, 2010, ADFVC, The University of New South Wales, Sydney, pp 24–6.

<sup>255</sup> Australian Institute of Health and Welfare, *Homeless People in SAAP: SAAP national data collection annual report 2007–08*, New South Wales supplementary tables, SAAP NDC report series no. 13, AIHW, Canberra, 2009.

<sup>256</sup> Australian Bureau of Statistics, *Personal Safety Survey*, Cat. no. 4906.0, ABS, Canberra, 2005, p 20; Australian Institute of Health and Welfare, *Female SAAP Clients and Children Escaping Domestic and Family Violence 2003–04*, AIHW bulletin no. 30, AIHW, Canberra, 2005, p 15; Australian Domestic and Family Violence Clearinghouse, *It Could Be You: female, single, older and homeless*, ADFVC, The University of New South Wales, Sydney, 2010.

One submission to the Baseline Study questioned the effectiveness of exclusion orders in providing urgent protection considering that it takes time for a final apprehended violence order to be made.

Another submission highlighted the CEDAW Committee's recommendation to develop strategies for preventing homelessness resulting from domestic violence and ensuring that women who are victims of domestic and family violence and their children receive suitable ongoing accommodation and integrated support. A further submission highlighted the difficulties older women face in relation to obtaining affordable housing. In particular, among the difficulties noted were challenges older women face in obtaining affordable housing after leaving a marriage or relationship later in life because they often have little or no asset base or superannuation.

Women experiencing homelessness are supported and accommodated through a number of services, including the National Affordable Housing Agreement.

### ***Children and young people***

On any night in Australia it is estimated that 45 000 people aged less than 25 years are homeless. Although homelessness among 12–18 year olds decreased by 16 per cent between the 2001 and 2006 censuses, youth homelessness remains a significant issue.<sup>257</sup> A National Youth Commission report found that the level of homelessness among young people doubled between 1988 and 2008.<sup>258</sup>

The homelessness risk factors for young people are multiple and varied; among them are systemic factors such as the availability of affordable housing and individual factors such as family conflict.<sup>259</sup> Importantly, however, research shows that most young people who come into contact with homelessness assistance services do not remain homeless in the long term.<sup>260</sup>

Submissions to the Baseline Study recommended investigating the relationship between child protection services and later experiences of homelessness, the release of young people from institutional care into homelessness, young

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<sup>257</sup> Australian Bureau of Statistics, *Counting the Homeless 2006*, Cat. no. 2050.0, ABS, Canberra, 2008.

<sup>258</sup> National Youth Commission, *Australia's Homeless Youth: a report of the National Youth Commission Inquiry into Youth Homelessness*, NYC, Brunswick, Victoria, 2008, p v.

<sup>259</sup> Tenants Union of Victoria and Council to Homeless Persons, *Young Persons' Housing Affordability Bulletin*, March 2005; D Rosenthal et al., 'Why do homeless young people leave home?', *Australian and New Zealand Journal of Public Health*, 2006, vol. 30, pp 281–5.

<sup>260</sup> S Mallett, 'Looking backwards, moving forward: implications for policy of a longitudinal study on youth homelessness', *Parity*, Council to Homeless Persons, April 2010.

people's right to education, and the extent to which young people experiencing homelessness are held on remand because of a lack of suitable alternative accommodation.

In Victoria the State Government has proposed the creation of three purpose-built, 40-unit youth foyer accommodation and training facilities, as well as piloting work and learning centres on five public housing sites. The intention is to increase young people's and adults' confidence about seeking employment and building life skills for themselves and their families.

### ***People with mental illness***

In 2007 the Australian Bureau of Statistics reported that just over 50 per cent of people who have experienced homelessness have also experienced mental illness.<sup>261</sup> This is three times the prevalence of mental illness among people who have never experienced homelessness.<sup>262</sup>

The relationship between homelessness and mental illness is complex. Mental illness can precede homelessness or it can be caused by homelessness (and a range of other factors that contribute to homelessness). One submission to the Baseline Study noted the difficulties people experiencing homelessness have in obtaining proper treatment for mental illness under current service structures. For example, there is a requirement that people who use short-term crisis accommodation move away from the accommodation service after three months.

People who have severe mental health issues and are at risk of or experiencing homelessness require continuing case management and support.<sup>263</sup> In 2005 the Australian Human Rights Commission, in association with the Mental Health Council of Australia and the Brain and Mind Research Institute, conducted a national review of the delivery of health care services to people with mental illness. The review found there is a critical shortage of suitable and affordable housing for homeless people with mental illness. This poses a significant obstacle to recovery and effective rehabilitation.<sup>264</sup>

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<sup>261</sup> Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007*, Cat. no. 4326.0, ABS, Canberra, 2007.

<sup>262</sup> *ibid.*

<sup>263</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home—a national approach to reducing homelessness*, White Paper, FAHCSIA, Canberra, 2008, p 31.

<sup>264</sup> Australian Human Rights Commission, Mental Health Council of Australia & Brain and Mind Research Institute, *Not for Service—experiences of injustice and despair in mental health care in Australia*, AHRC, Sydney, 2005.



The Australian Government recognises that, without appropriate treatment and community support, people with mental illness, particularly those with severe and persistent mental illness, can be at greater risk of poverty, joblessness and homelessness. The Medicare Benefits Scheme provides for universal health care, but for some more marginalised groups, such as people experiencing homelessness and people with severe mental illness, gaining access to Medicare benefits can be difficult.

As part of the 2011–12 Budget the Australian Government announced \$2.2 billion in mental health investments over five years, including \$1.5 billion in new initiatives. Among the new initiatives is an investment of \$571 million in mental health services and their delivery, \$492 million for prevention and early intervention mental health services for children and young people, \$220 million to improve access to the primary health care system for people with mental illness, and \$12 million for a National Mental Health Commission to increase accountability and transparency.

Also announced in the 2011–12 Budget was the National Partnership on Mental Health, which makes \$201.3 million available over five years in a competitive funding pool for the States and Territories to increase investment in a range of areas. Through this partnership, the Government will seek co-investments from the States and Territories for a variety of projects, including increasing the supply of supported accommodation and improving hospital admission and discharge processes to help prevent the cycle of crisis hospitalisation and homelessness to which many people with severe mental illness are vulnerable.

People who are at risk of or experiencing homelessness are generally less likely to make use of traditional health and mental health services. Programs such as Access to Allied Psychological Services focus on individuals who might be subject to multiple risk factors, including homelessness. To better ensure that mental health services are directed at those who need them most, the Australian Government will invest \$205.9 million over five years for funding more psychological services through expansion of the Access to Allied Psychological Services program. This investment will more than double the existing funding provided through the program and will provide treatment for an additional 184 000 people over five years. The funds will be used to target hard-to-reach areas and social groups that are currently underserved—such as children, Aboriginal and Torres Strait Islander communities and socio-economically disadvantaged communities.

People with mental illness have been identified as a priority group under the New South Wales Homelessness Action Plan, led by Housing NSW. NSW Health's commitments, which focus on mental health and drug and alcohol matters, include a range of Commonwealth- and state-funded projects that aim to do the following:

- provide coordinated health, housing and other services for people at risk of or experiencing homelessness
- improve responses for people experiencing homelessness who are admitted to health facilities
- improve discharge planning from health services to better respond to homelessness
- provide a culturally appropriate model of the Housing Accommodation and Support Initiative for Aboriginal and Torres Strait islander peoples with mental health issues.

### ***Older people***

A growing minority of the homeless population consists of older people. In the 2006 census there were 18 108 people over the age of 55 years who were experiencing homelessness, representing 17 per cent of all people experiencing homelessness. According to census data, there was a 30.5 per cent increase in homelessness among older people (aged over 55) between 2001 and 2006.

Older people experiencing homelessness are supported by a number of measures, including implementation of three recommendations from the White Paper:

- amending the *Aged Care Act 1997* (Cth) to include older people experiencing homelessness as a 'special needs' group in order to formally recognise their unique requirements
- specifically allocating aged care places for older people experiencing homelessness in future Aged Care Approval Rounds in order to support aged care providers with a proven track record in offering services to older people experiencing homelessness
- providing capital funds for at least one new specialist facility for older people experiencing homelessness in each of the four years to 2012. As at June 2011, three grants had been allocated, amounting to \$23 million,

enabling the construction of 176 places to support older people experiencing homelessness.

The White Paper builds on other government activities to support older people experiencing homelessness—for example, the Australian Government’s Assistance for Care and Housing for the Aged program, which is designed to assist older people to gain or maintain secure housing and care in order to live, participate and feel included in the community of their choice. Program workers link clients with State and Territory Government housing authorities and with other service providers that facilitate access to more permanent housing and other community support and care.

### 3.7 People with disability

The 2009 Australian Bureau of Statistics Survey of Disability, Ageing and Carers showed that about one in five people in Australia (4 026 200 people, or 18.5 per cent of the population) had a reported disability.<sup>265</sup> Physical conditions were the most common form of disability (83 per cent); the remaining 17 per cent of people had a mental or behavioural disorder as their main condition.<sup>266</sup> From 2003 to 2009 disability rates declined in Australia.<sup>267</sup> It is expected, however, that there will be increasing numbers of people with disability in Australia in future because of the ageing population: disability rates are higher among older people.<sup>268</sup>

The National People with Disabilities and Carer Council consulted extensively to develop the report *Shut Out: the experience of people with disabilities and their families in Australia*.<sup>269</sup> Both the *Shut Out* report and the National Human Rights Consultation report highlighted important concerns for people with disability. The concerns raised most frequently in the submissions and consultations were the lack of social inclusion and the barriers to meaningful participation in the community people with disability face.

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<sup>265</sup> For the purposes of the survey, ‘disability’ was defined as any limitation, restriction or impairment that has lasted, or is likely to last, for at least six months and restricts everyday activities.

<sup>266</sup> For the purposes of the survey, disabilities were broadly grouped according to whether they relate to anatomy or physiology (physical conditions) or to functioning of the mind or the senses (mental or behavioural conditions), despite the fact that these conditions are also ‘physical conditions’.

<sup>267</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: summary of findings*, Cat. no. 4430.0, ABS, Canberra, 2009, Summary Table 1.

<sup>268</sup> Australian Productivity Commission, *Disability Prevalence in Australia*, Technical paper 7, *The Economic Implications of an Ageing Australia*, Productivity Commission, Canberra, 2005, p 1.

<sup>269</sup> The National People with Disabilities and Carer Council, *Shut Out: the experience of people with disabilities and their families in Australia*, NPDC, Canberra, 2009.

Similarly, submissions to the National Human Rights Consultation noted concerns with continuing negative perceptions of people with disability, especially people with intellectual disability, and their place as valuable members of the community.<sup>270</sup> The Australian Federation of Disability Organisations has argued, ‘There is strong and consistent evidence of entrenched negative attitudes and behaviours towards people with disability which lead to entrenched disadvantage’.<sup>271</sup>

Submissions to the Baseline Study highlighted the need for improved data, disaggregated by disability, gender, ethnicity and Indigenous status. Improved data collection and analysis would assist with understanding intersectional discrimination experienced by groups such as women with disability and people with disability from culturally and linguistically diverse backgrounds.

The *Disability Discrimination Act 1992* (Cth) offers important protection for people with disability. The Act makes it unlawful to discriminate on the basis of disability in a number of areas—among them employment, education, the provision of goods, services and facilities, access to buildings, and the implementation of Australian Government laws and programs. Amendments made in 2009 further improve the overall effectiveness of the Act. All states and territories also have legislation providing remedies for disability discrimination. At present Tasmania is the only state to prohibit the incitement of hatred, serious contempt or severe ridicule on the basis of disability in its anti-discrimination legislation.<sup>272</sup>

The Australian Government’s ratification of the UN Convention on the Rights of Persons with Disabilities reflects the Government’s commitment to the rights of people with disability. Australia’s first report under the convention, which was lodged in December 2010, outlines Australia’s policies, programs and laws relating to the rights of people with disability. In 2009 Australia acceded to the Optional Protocol to the convention, which establishes a complaint procedure and an inquiry procedure.

The Council of Australian Governments endorsed the National Disability Strategy on 13 February 2011. The strategy sets out a 10-year national plan for improving the quality of life for Australians with disability and their families and

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<sup>270</sup> Intellectual Disability Rights Service, ‘Submission to the National Human Rights Consultation’, June 2009, p 7.

<sup>271</sup> Australian Federation of Disability Organisations, ‘Submission to the National Human Rights Consultation’, June 2009, p 8.

<sup>272</sup> *Anti-discrimination Act 1998* (Tas), s 19(b).

carers. It draws on the findings in the *Shut Out* report and covers six policy areas:

- *inclusive and accessible communities*—the physical environment, including public transport, parks, buildings and housing, digital information and communications technologies, and civic life, including social, sporting, recreational and cultural life
- *rights protection, justice and legislation*—statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, and the electoral and justice systems
- *economic security*—jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing
- *personal and community support*—inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services, and informal care and support
- *learning and skills*—early childhood education and care, schools, further education, vocational education, transitions from education to employment, and life-long learning
- *health and wellbeing*—health services, health promotion and the interaction between health and disability systems, and wellbeing and enjoyment of life.

The National Disability Strategy is intended to be a living document, to be refreshed over the strategy's 10-year life span and against which Australians can assess progress for people with disability. It will also inform Australia's future reporting under the Convention on the Rights of Persons with Disabilities. As part of the strategy, a two-yearly report will be prepared to track progress for people with disability at the national level against each of the six policy areas. The intention is to develop, over time, more comprehensive performance indicators by improving the reporting on people with disability assisted through mainstream services and through the inclusion of disability-specific questions in mainstream data collections.

The National Disability Agreement, which replaced the previous Commonwealth – State and Territory Disability Agreement, came into effect on 1 January 2009 and provides the framework for the provision of government support for people with disability. In 2011–12 the Australian Government's contribution to state and territory specialist disability services will exceed \$1.2

billion; this compares with \$620 million in 2006–07 under the previous Commonwealth – State and Territory Disability Agreement.

The National Disability Agreement aims to create an effective, efficient and equitable disability services system with a focus on early intervention, timely, person-centred approaches and life-long planning. The reforms are working towards a system comprising single access points, with nationally consistent assessment processes and quality assurance systems, and more consistent access to disability aids and equipment. Under the Disability Discrimination Act, provision is made for establishing accessibility standards; there are currently accessibility standards in the areas of transport, education and premises. The State and Territory Governments and the Commonwealth have also worked together to bring Australian regulations into alignment with the Act. The Disability (Access to Premises—Buildings) Standards 2010 were incorporated in the Building Code on 1 May 2011, providing, for the first time, a national minimum standard that will increase accessibility to public buildings for people with disability.

### 3.7.1 Freedom from discrimination

#### **Employment**

Thirty-six per cent of complaints made under the Disability Discrimination Act in 2009–10 related to employment.<sup>273</sup> The *NGO Shadow Report* on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women cited the observations by Women with Disabilities Australia that ‘Australians with a disability are much less likely to be employed than people without a disability’ and that ‘... women with disabilities are at a further disadvantage because of the combined discrimination based on gender and discrimination based on disability’.<sup>274</sup>

Australian Governments recognise that people with disability can face additional pressure in being able to enjoy their economic, social and cultural rights on a basis equal with others. For example, some people with disability have limited access to paid employment, which means they are often unable to improve their standard of living; many people with disability rely on government income support as their sole or main source of income.

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<sup>273</sup> Australian Human Rights Commission, *Annual Report 2009–2010*, AHRC, Sydney, 2010, p 72.

<sup>274</sup> YWCA Australia & Women’s Legal Services Australia, *NGO Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, YWCA Australia, Canberra, July 2009, p 55.

The National Disability Strategy is the overarching, whole-of-government policy that directs work to improve employment outcomes for people with disability. The strategy outlines areas for future action—for example, improving employers’ awareness of the benefits of employing people with disability and encouraging innovative approaches such as social enterprises. Further, under the Fair Work Act an employer must not take adverse action against a person who is an employee or prospective employee because of that person’s physical or mental disability.

The National Mental Health and Disability Employment Strategy, released on 14 September 2009, sets out priority actions to assist Australians with disability move into employment, recognising the importance of education and training as a pathway to sustainable employment and the role of employers in increasing employment opportunities for people with disability.

Disability Employment Services provides people with disability with access to individually tailored employment services that are better suited to their needs. The Government is investing more than \$3 billion over the next four years in uncapping access to Disability Employment Services, to ensure that people get the support they need. Previously, places were capped and people had to wait up to a year to gain access to these services. Disability Employment Services also have the capacity to support and manage a participant’s condition in the workplace, as well as provide continuing support in the workplace for as long as required.

In the public sector, the annual *State of the Service* reports prepared by the Australian Public Service Commission show a steady decline in the proportion of people with disability employed in the Australian Public Service. Representation in the Public Service is low compared with the Australian population overall.<sup>275</sup>

The Government is overhauling elements of the Disability Support Pension to ensure that the pension supports people with disability into work wherever possible, while continuing to provide essential income support for people unable to fully support themselves. Among the new initiatives are the following:

- fast-tracking claims for manifestly and severely disabled applicants so they receive support more quickly

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<sup>275</sup> Australian Public Service Commission, *State of the Service Report 2009–2010*, APSC, Canberra, pp 159–60.

- ensuring that eligibility for the Disability Support Pension is assessed by experienced senior job capacity assessors using updated guidelines
- improving the adequacy of the base pension, especially for singles, including improved indexation that will continue into the future
- increasing incentives to give work a try by removing punitive rules that discouraged people with disability from seeking assistance from employment services
- investing \$3 billion over four years to remove waiting lists for access to disability employment services by uncapping places
- establishing a new Health Professional Advice Unit in Centrelink to give DSP assessors independent advice on medical matters in Disability Support Pension assessments
- introducing rules that ensure that applicants for the Disability Support Pension, other than people with severe disability, access support through employment assistance before their application is granted.

From 1 January 2012 new impairment tables will be introduced to bring Disability Support Pension assessments into line with contemporary medical and rehabilitation practice. This is informed by the World Health Organization's International Classification of Functioning and the Convention on the Rights of Persons with Disabilities. Several other measures will commence from 1 July 2012:

- new participation requirements for some Disability Support Pension recipients under the age of 35 with some capacity to work, to help ensure that people are accessing the support that is available for them
- generous new rules to support Disability Support Pension recipients to enter work or to increase their working hours
- new wage subsidies to assist employers to take on people with disability.

In the 2011–12 Budget the Australian Government invested \$154 million over five years in additional personal helpers and mentors services to support an extra 3400 people with mental illness. Personal helpers and mentors services provide one-to-one support to assist people to relearn or develop new skills, participate in the community and access any support they might need. This includes supporting participants to manage their daily activities and access



appropriate accommodation, community, social support, employment, and health and welfare services. A sum of \$50 million was allocated to provide personal helpers and mentors to specifically assist people with mental illness on or claiming the Disability Support Pension who are also engaged with employment services.

The Australian Government also funds Australian Disability Enterprises, which operate like commercial businesses and are funded to provide supported employment assistance to about 20 000 people with moderate to severe disability who need substantial ongoing support to maintain their employment.

### ***Education***

Early intervention for children with disability significantly improves their life outcomes and improves their ability to transition into mainstream education. Since 2008 the Australian Government has committed \$220 million to the Helping Children with Autism package. For eligible children up to the age of 7 years, the package provides \$12 000 of early intervention services, the Autism Advisor Service, workshops for parents, an autism spectrum disorder website, autism-specific early learning and care centres, autism-specific playgroups and Positive Partnerships for transition to school. More than 15 000 children have received assistance since the package commenced.

The \$147 million Better Start for Children with Disability measure commenced on 1 July 2011. It provides—for children up to the age of 7 years with a diagnosis of Down syndrome, cerebral palsy, fragile X syndrome and moderate or greater vision or hearing impairment (including deafblindness)—access to up to \$12 000 of early intervention services. Registration and information support is provided through Carers Australia. Four months after the commencement of Better Start, over 2200 children had been registered to access this support.

This targeted early intervention in the pre-school and early school years is intended to complement existing state and territory services and to assist these children to have the best possible preparation for formal education.

All Australian children, including children with disability, are entitled to primary and secondary education. Statistics show some improvement in school attendance: attendance among 5–20 year olds with disability rose from 72 per cent in 1981 to 80 per cent in 2003. The proportion of 5–20 year olds with severe or profound limitations attending school rose from 81 per cent in 1981 to 89 per cent in 2003. In 2009–10, 2 per cent of complaints under the

Disability Discrimination Act related to education.<sup>276</sup> Submissions to the Baseline Study expressed concern that the statistics on the provision of services for children with disability in the education system are inadequate.

The Disability Standards for Education 2005 set out the right of students with disability to comparable access, services and facilities and the right to participate in education and training without discrimination.<sup>277</sup> Education providers have an obligation to make changes to reasonably accommodate the needs of a student with disability and to implement strategies and programs to prevent harassment and victimisation. Individuals can make a complaint to the Australian Human Rights Commission if they consider the standards have been breached. The standards are currently under review by the Department of Education, Employment and Workplace Relations and the Attorney-General's Department, to determine whether they have been effective and are the most effective mechanism for achieving their objectives.

In May 2011 the Government announced new budget funding of \$200 million to provide extra support for students with disability in Australia. The More Support for Students with Disabilities initiative may include access to special audio and visual technology in classrooms, additional hours of in-class support from staff, and an adapted curriculum tailored to a student's needs.<sup>278</sup>

In September 2011 the establishment of the Schools Disability Advisory Committee was announced at the National Schools Disability Stakeholder Forum. The committee will provide advice to the Australian Government, through the Department of Education, Employment and Workplace Relations, on issues affecting school-aged children and young people with disability and their families, teachers and carers. It will also provide advice on policy development and implementation of whole-of-government and school education initiatives that aim to improve the educational outcomes, social inclusion and wellbeing of school students with disability.

Among the focus areas for achieving the policy outcome of 'learning and skills' under the National Disability Strategy are developing innovative learning strategies and support for students with disability and investigating options for reporting on the educational outcomes of students with disability.

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<sup>276</sup> Australian Human Rights Commission, *Annual Report 2009–2010*, AHRC, Sydney, 2010, p 79.

<sup>277</sup> The standards are available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination\\_Disabilitystandardsforeducation](http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Disabilitystandardsforeducation).

<sup>278</sup> Further information about the *More Support for Students with Disabilities* initiative is available at <http://www.deewr.gov.au/>.

The States and Territories provide support to students with disability in a range of ways. For example, in Victoria a number of programs and strategies have been developed, including provision of additional support to schools to enable students with disability to have access to an age-comparative educational program and a language-support program to develop strong oral language competency. The Autism Teaching Institute, based in Victoria's Western Autistic School, offers a postgraduate vocational qualification in teaching students with autism spectrum disorder.

### ***Transport***

The Disability Standards for Accessible Public Transport 2002 came into effect on 23 October 2002. They specify levels of service and measures and actions that public transport operators must take to meet their obligations under the Disability Discrimination Act. An independent review of the first five years of the standards' operation was finalised in late 2009. The review found the introduction of the standards has significantly changed the way government and public transport operators and providers deliver access to public transport for people with disability. The report contained 15 recommendations designed to improve accessibility and the operation of the standards. Through the Australian Transport Council, the peak ministerial council for transport matters in Australia, the Government is progressing the outcomes of the review with the States and Territories.

The Australian Government has also established the Aviation Access Working Group, convened by the Department of Infrastructure and Transport. The group contains representatives of industry, government agencies and people with disability. Through this forum, the Government has been encouraging airlines and airports to lodge Disability Access and Facilitation Plans. VirginBlue and Qantas and a number of major airports, including Sydney, Melbourne and Brisbane, have now lodged plans.

At a recent parliamentary hearing the federal Disability Discrimination Commissioner raised the possibility of a co-regulation model, combining the requirements of the Disability Discrimination Act and other related, non-binding standards in respect of access to transport for people with disability. This is being considered under the proposed consolidation of federal anti-discrimination laws.

***Exemption of the Migration Act and the Social Security Act from the operation of certain aspects of the Disability Discrimination Act***

Submissions to the Baseline Study expressed concern about the potentially discriminatory effects of exempting the *Migration Act 1958* (Cth) and the *Social Security Act 1991* (Cth) from the operation of certain aspects of the *Disability Discrimination Act 1992* (Cth). The submissions noted that the Migration Act exemption effectively excludes people with disability, or with disability in their family, from migrating to Australia. Further, some migrants are required to wait 10 years before they become eligible for the Disability Support Pension.

People with disability or other health conditions are not precluded from migration to Australia because of that disability or condition itself. The purpose of the health requirement is threefold:

- to protect the Australian community from public health and safety risks
- to contain public expenditure on health care and community services
- to safeguard the access of Australian citizens and permanent residents to health care and community services in short supply.

Where a person who has applied for a visa to enter Australia, for either a temporary visit or a permanent stay, has been identified as having a health condition or disability, they will fail to meet the health requirement in the following circumstances:

- if their condition is likely to pose a significant cost to health care and community services in Australia
- if their condition would be likely to prejudice the access of Australians to health care and community services in short supply
- if an increased public health risk is identified.

A discretionary waiver of the health requirement is available for some visas—such as humanitarian, child and partner visas, temporary business visas and certain onshore skilled visa subclasses—if the costs are not considered ‘undue’. Compelling and compassionate circumstances are taken into account.

Active tuberculosis is the only health condition currently determined by the Department of Health and Ageing to be a public health risk.

The Joint Standing Committee on Migration conducted the Inquiry on Migration Treatment of Disability, considering over 100 public submissions and holding eight national hearings. On 21 June 2010 the committee tabled its recommendations.<sup>279</sup>

### **Accessible information**

The Australian Government Print Disability Services Program provides funding to produce digital masters of print material that can be converted into alternative formats, including Braille, for people with print disability. Funding is also available under the Information and Captioning Service for information services (including on recreation, tourism, sport, accommodation and the arts) and to provide captioning of educational and community material for people with disability. The Government's Postal Concessions for the Blind program enables blind people and organisations that cater for the needs of blind people to send Braille, Moon, audio recordings and other eligible material through Australia Post.

To assist Australians with disability to gain access to government information online, in June 2010 an Australian Government Web Accessibility National Transition Strategy was announced. Many disabilities affect access to the web—visual, auditory, physical, speech, cognitive and neurological disabilities.

Under this strategy every State and Territory Government as well as the Australian Government must apply the Web Content Accessibility Guidelines version 2.0 and achieve level A conformity by the end of 2012. The Government has extended this mandate and requires all government websites to conform to Level AA by the end of 2014.

Web Content Accessibility Guidelines version 2.0 identifies techniques for creating and managing web content—such as dynamic and static textual, visual or audio electronic information—in ways that are more accessible to people with disability.

### **3.7.2 Care and support**

#### ***A National Disability Insurance Scheme***

The Australian Government asked the Productivity Commission to examine reform of disability support services because it considers that the current system is not delivering the kind of care and support Australians expect for

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<sup>279</sup> Joint Standing Committee on Migration, *Enabling Australia: Inquiry into the Migration Treatment of Disability*, Australian Parliament, Canberra, 2010.

people with disability. The Productivity Commission found that the current system is underfunded, unfair, fragmented and inefficient, gives people with disability little choice, and offers no certainty that people will be able to gain access to appropriate supports when needed.

Through the Council of Australian Governments the Australian Government and all State and Territory Governments have agreed that significant reform of disability care and support is needed through a National Disability Insurance Scheme. A National Disability Insurance Scheme would entitle all Australians to support in the event of significant disability. The Government is starting work right away by laying the foundations which are essential for the launch of a scheme. All Governments have agreed to lay the foundations for the scheme by mid-2013—a year ahead of the timetable set out by the Productivity Commission. An advisory group consisting of disability experts and advocates has been appointed to work closely with all Governments on the scheme.

The States and Territories are primarily responsible for funding and delivering disability support services and are to do the following:

- develop common assessment tools, so that people’s eligibility for support can be assessed fairly and consistently, based on their level of need
- establish service and quality standards, so that people with disability can expect high-quality support regardless of what disability they have or how they acquired it
- build workforce capacity, so that there are more trained staff to support people with disability.

In addition, the *Disability Services Act 1986* (Cth) promotes human rights outcomes for people with disability, supported by disability services funded under the Act. Over time, the Act’s Disability Services Standards have been strengthened to include a Protection of Human Rights and Freedom from Abuse Standard, which must be met by disability services funded under the Act.

### ***Housing***

Improved access to housing options and development of innovative and flexible support models for people with high and complex needs are also part of the National Disability Strategy.

Many submissions to the Baseline Study noted that a shortage of suitable housing is a significant barrier to the right of people with disability to live

inclusive lives in the community. This extends to providing to people with disability the right to choose where and with whom they live, on an equal basis to other people. The *Shut Out* report showed that most people with disability would prefer to live in their own homes, rather than in supported accommodation or with family. This necessitates, the submissions argued, increased access to support services such as in-home support, residential and community support services and personal care.

There are also concerns about the continued use of segregated accommodation or congregate care facilities. Submissions to the Baseline Study argued that this leads to social isolation and exclusion from the community and is based on the erroneous assumption that people with disability choose to live in these facilities.

In response to concerns on the part of many older carers about what will happen to their son or daughter when they are no longer able to care for them, the Australian Government and the State and Territory Governments have entered into a \$100 million Supported Accommodation Capital Works Funding Memorandum of Understanding that requires the State and Territory Governments to construct or acquire a total of 313 supported accommodation places by 30 June 2012.

Additionally, to expand the range of accommodation models available to people with disability who require supported accommodation, the Australian Government has committed \$60 million over three years to build innovative, community-based supported accommodation places for people with disability as part of the Supported Accommodation Innovation Fund. Through the fund the Government proposes to support innovative approaches to supported accommodation that deliver opportunities for people with disability to live as valued members of their community and that embody the principles outlined in the UN Convention on the Rights of Persons with Disabilities. The fund will deliver up to 150 new supported accommodation and respite places nationally. The goal is quality outcomes for people with disability, their families and carers. The selection process emphasises the need for applicants to address residents' choice, freedom, privacy and independence. Safeguards have been built into the assessment process to ensure that projects meet these objectives.

### 3.7.3 Legal capacity

The National Disability Strategy includes actions that aim to promote awareness and acceptance of the rights of people with disability and to allow them to participate in legal processes and civic life on an equal basis to other people.

Australia strongly supports the right of people with disability to make their own decisions. In some cases people with cognitive or decision-making disabilities might need support in exercising that capacity. Australia has made a declaration in relation to Article 12 of the Convention on the Rights of Persons with Disabilities, stating that it allows for fully supported or substituted decision-making arrangements. This position was criticised during the National Human Rights Consultation.<sup>280</sup> In Australia, substituted decision making will be used only as a measure of last resort, when such arrangements are considered necessary and are subject to safeguards. For example, substituted decision making can be necessary as a last resort to ensure that people with disability are not denied access to proper medical treatment because of an inability to assess or communicate their needs and preferences.

Submissions to the Baseline Study further challenged the Government's interpretation of Article 12 of the convention. People with disability and disability advocacy groups argued that fundamental reform in the legal, administrative and service arrangements that regulate legal capacity for people with disability is required in order to give precedence to supported decision making over substituted decision making. They argued that legal and regulatory frameworks need to provide for a range of capacities, providing mechanisms for supported decision making that are proportional and take into account the needs of each individual. This would include substituted decision making as a last resort.

During the National Human Rights Consultation, the ACT Disability, Aged and Carer Advocacy Service Inc. submitted that challenging decisions made by government or service providers takes physical, emotional, intellectual and financial resources not readily available to people with disability. The Intellectual Disability Rights Service also noted a need for specifically tailored written resources in 'Easy English' to assist people with intellectual disability to understand the government services available.

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<sup>280</sup> For example, Intellectual Disability Rights Service, 'Submission to the National Human Rights Consultation', 2009.



In New South Wales, a Capacity Toolkit has been produced and distributed. It is a comprehensive, plain English resource that outlines principles to be considered when assessing a person's decision-making capacity. It also provides information about supported decision making, reinforcing the principles of adopting the least restrictive option and using substitute decision making as a last resort.

### ***Non-therapeutic sterilisation***

In Australia's Universal Periodic Review, several countries called for Australia to enact national legislation prohibiting non-therapeutic sterilisation of children and adults with a disability.<sup>281</sup> Non-government organisations have expressed concern about this practice, referring to it as a 'particularly grave form of human rights abuse, and one that particularly impacts girls and women with disability'.<sup>282</sup>

Submissions to the Baseline Study argued that, despite the existing guardianship and court mechanisms, non-therapeutic sterilisation of children with disability remains an issue. Non-government organisations have suggested that the Government prohibit non-therapeutic sterilisation of children, regardless of disability, except where there is a serious threat to health. They have also proposed that the Government prohibit non-therapeutic sterilisation of adults with disability in the absence of informed consent, unless there is a serious threat to life or health.

Court or tribunal approval is often required for serious medical procedures for children with disability. Under Part VII of the *Family Law Act 1975* (Cth) the Family Court of Australia has jurisdiction to make orders for non-therapeutic sterilisation of children where it is in the best interests of the child. The Family Court has wide powers to ensure that the voice of the child is heard in the proceedings (through the appointment of a case guardian or an independent children's lawyer). The Government has proposed legislation that will confirm an obligation on decision makers to interpret Part VII, to the extent that the language permits, consistently with Australia's obligations under the Convention on the Rights of the Child.

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<sup>281</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendation [86.39 (Denmark, United Kingdom, Belgium and Germany)].

<sup>282</sup> YWCA Australia & Women's Legal Services Australia, *NGO Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, YWCA Australia, Canberra, July 2009, p 110.

The Australian Guardianship and Administration Council has a protocol to which all tribunals adhere when dealing with applications of this kind. The introduction of uniform national legislation dealing with Special Medical Procedures (Sterilisation) is a longstanding recommendation of the council. In the ACT, under the *Guardianship and Management of Property Act 1991*, prior consent for any medical procedure or treatment relating to contraception or reproductive sterilisation or hysterectomy must be obtained from the ACT Civil and Administrative Tribunal. In making the decision, the tribunal must be satisfied the procedure or treatment would be in the person's best interests. In New South Wales the Guardianship Tribunal reported in 2009–10 that two of the six applications for Special Medical Consent (Sterilisation) were granted, one was dismissed, one was withdrawn and two were adjourned.<sup>283</sup>

### 3.7.4 Freedom from exploitation and violence

Women with physical or intellectual disability are more likely to experience domestic violence, and the violence is likely to be more severe and to continue for longer.<sup>284</sup> The NGO shadow report on the implementation of the CEDAW recommended that the Australian Government, as a priority, address the abuse of women with disability living in institutions, view abuse and violence against women with disability living in supported accommodation within the family violence context, advocate for the inclusion of women with disability in support services assisting with recovery from abuse and violence, and ensure that such services are available, accessible and appropriate.<sup>285</sup>

Submissions to the Baseline Study focused on abuse and neglect in institutionalised residential settings such as licensed boarding houses. They argued that the National Plan to Reduce Violence against Women and their Children does not cover the concept of violence on the part of co-residents or staff, which remains common.<sup>286</sup>

In the *Shut Out* report, violence against women with disability was a recurring theme. Submissions to the Baseline Study noted that women with disability escaping family or domestic violence are not well catered for in mainstream

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<sup>283</sup> NSW Guardianship Tribunal, *Annual Report 2009–2010*, NSW Guardianship Tribunal, Sydney, 2010.

<sup>284</sup> A Morgan & H Chadwick, 'Key issues in domestic violence', *Research in Practice*, no. 7, 2009.

<sup>285</sup> YWCA Australia & Women's Legal Services Australia, *NGO Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, YWCA Australia, Canberra, July 2009, p 109.

<sup>286</sup> See NSW Ombudsman, *Report of Reviewable Deaths in 2008 and 2009*, vol. 2, *Deaths of People with Disabilities in Care*, NSW Ombudsman, Sydney, September 2011.

support organisations and services.<sup>287</sup> The National Disability Strategy aims to address this important issue and complement work being carried out under the National Plan to Reduce Violence against Women and their Children, the National Framework for Protecting Australia’s Children and the National Homelessness Strategy.

In February 2011 the National Plan to Reduce Violence against Women and their Children 2010–2022 was endorsed by the Commonwealth and State and Territory Governments. Among the immediate national initiatives is specific action for women with disability—for example, investigating and promoting ways of improving access to specialist domestic violence and sexual assault services for women with disability.

On 24 October 2011, in support of the National Plan to Reduce Violence against Women and their Children, People with Disability Inc. in New South Wales and Montagu Community Living in Tasmania were granted almost \$400 000 in total to undertake activities that prevent and speak out against violence and change community attitudes and behaviours in relation to violence against women with disability. Specifically, People with Disability Inc. will develop and deliver a domestic violence abuse and neglect training package for women with disability, its staff and service providers. Montagu Community Living will support women with disability participate in a skill-building course that will enable them to learn from and be supported by other women living with disability. These grants are part of the Community Action Grants, which fund a range of projects undertaken by community groups, including projects specifically supporting women with disability, one of the program’s priority groups.

The National Disability Abuse and Neglect Hotline is an Australia-wide telephone hotline for reporting abuse and neglect of people with disability who are using government-funded services. In addition, the Australian Government funds the National Disability Advocacy Program, which assists people with disability to gain access to advocacy that promotes their full enjoyment of all human rights.

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<sup>287</sup> National People with Disabilities and Carer Council, *Shut Out: the experience of people with disabilities and their families in Australia*, Australian Government, Canberra, 2009, p 60.

### 3.7.5 Mental illness

The Australian Government's report under the Convention on the Rights of Persons with Disabilities acknowledges that it must significantly improve the support provided to people with severe mental illness. The Government is working with the States and Territories on the scope for additional reform of the mental health service system, including examining the inconsistencies and gaps in services and current roles and responsibilities.

Submissions to the National Human Rights Consultation noted that people with mental health issues remain disproportionately represented in the areas of homelessness, unemployment, poverty, substance abuse, alcohol and drug dependence, and incarceration. The Mental Health Legal Centre highlighted the need to respect the right to freedom from torture and other degrading treatment and the right to liberty and freedom of movement in the context of involuntary treatment orders.<sup>288</sup>

Submissions to the Baseline Study dealt with restrictive practices: concern was expressed about continuing practices in the disability support system whereby people with intellectual disability, people with psychosocial disability and people with acquired brain injury are subjected to physical restraints, chemical restraints and seclusion for the purposes of behaviour control.

The wider health and hospitals reform agenda in Australia provides a foundation for future action on mental health programs. This includes additional funding to address immediate gaps, such as an expansion of youth-friendly mental health services for people aged 12 to 25 years and individualised care packages for people with severe mental illness in primary care.<sup>289</sup>

In May 2011 the Government announced a \$2.2 billion investment package over five years to deal with mental health in Australia, including \$1.5 billion for new initiatives. This package includes \$343.8 million<sup>290</sup> for coordinated care and flexible funding for people with severe and persistent mental illness and complex care needs.

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<sup>288</sup> Mental Health Legal Centre, 'Submission to the National Human Rights Consultation', June 2009, pp 9–10.

<sup>289</sup> The 2010–11 Federal Budget provided \$175.8 million over four years, including \$123 million in new funding for some additional initiatives for mental health care.

<sup>290</sup> Including redirections. A total of \$549.8 million will be spent on this measure over five years.

As part of the 2011–12 Federal Budget the Australian Government also signalled its intention to outline its longer term vision for mental health reform through a Ten-Year Roadmap for Mental Health Reform. This was reiterated at the 19 August 2011 Council of Australian Governments meeting, with all Governments formalising their commitment to develop the roadmap: ‘The Roadmap will set out the vision, priorities, and main steps in achieving this vision’.<sup>291</sup> The Australian Government is working closely with the States and Territories on the development of the roadmap.

As a part of the 2011–12 budget commitment the Government will provide \$208.3 million over five years to expand the Personal Helpers and Mentors initiative. New personal helpers and mentors will assist about 3400 people with severe mental illness reconnect to health care, the workforce and the community. Personal helpers and mentors will continue to provide the practical, intensive support to assist participants to set and achieve personal goals such as finding suitable housing, using public transport and improving relationships with family and friends. The expansion will include \$50 million allocated to provide personal helpers and mentors to specifically assist people with mental illness who are on or claiming the Disability Support Pension and who are also engaged with employment services.

New mental health respite services will assist about 1100 families and other carers who need support to take a break from caring. These services offer a range of activities, such as peer support and education to assist families and carers in their caring role.

The number of Family Mental Health Support Services will also double, from 40 to 80, with an additional investment of \$61 million over five years. These support services provide early intervention support to assist vulnerable families with children and young people who are affected by mental illness.

Another collaborative initiative between the Commonwealth and State and Territory Governments is the National Mental Health Seclusion and Restraint Project, which aims to reduce and eliminate, where possible, the use of seclusion and restraint in public mental health services. The Fourth National Mental Health Plan, *An Agenda for Collaborative Government Action*, provides a framework for developing a mental health system for early intervention. To support recovery and to prevent poor outcomes, a range of bed-based clinical services, accommodation and housing service options are required; this

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<sup>291</sup> COAG Communiqué, 19 August 2011.

includes more short-term and long-term clinically supported mental health accommodation services in the community and stable housing tenancy support for people with mental illness.

### 3.8 Carers

In Australia 2.6 million unpaid carers provide assistance to people in need of support as a result of disability, medical conditions, mental illness or age-related frailty.<sup>292</sup> Carers play a vital role in supporting family members, friends and neighbours to live at home and realise their potential. Some carer groups face particular challenges: young carers, Aboriginal and Torres Strait Islander carers, carers from culturally and linguistically diverse backgrounds, carers living in rural, regional and remote areas, and older carers can be especially disadvantaged.

The House of Representatives Standing Committee on Family, Community, Housing and Youth report entitled *Who Cares ...? Report on the Inquiry into Better Support for Carers* was released in April 2009. The report identified a range of difficulties carers can face, including a lack of community awareness of the needs of carers, financial hardship, barriers to employment and education, and the need for better coordination of support services.<sup>293</sup> Participants in the National Human Rights Consultation suggested that the rights of carers could be better protected.<sup>294</sup>

In response to the House of Representatives report the Australian Government has developed the National Carer Recognition Framework, which consists of the following:

- The *Carer Recognition Act 2010* (Cth) aims to increase recognition and awareness of the role carers play in society. The Act is based on the fundamental principle that all people should be able to participate as valued members of society and that caring responsibilities should not preclude active participation in economic, social and community life.

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<sup>292</sup> Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, Cat. no. 4430.0, ABS, Canberra, 2009.

<sup>293</sup> House of Representatives Standing Committee on Family, Community, Housing and Youth, *Who Cares ...? Report on the Inquiry into Better Support for Carers*, Australian Parliament, Canberra, April 2009, pp 12–13.

<sup>294</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report*, Colmar Brunton, 2009, p 8.

- The National Carer Strategy, launched on 3 August 2011, represents the Australian Government’s long-term commitment to carers and contains a package of measures designed to ensure that the community respects and values carers. The measures correspond to the six priority areas of the Strategy—recognition and respect, information and access, economic security, services for carers, education and training, and health and wellbeing. State and Territory Governments have welcomed the strategy and have committed to identifying strategies and activities that complement the strategy or identifying areas that can be worked on cooperatively.

Respite is provided in aged care homes (under the *Aged Care Act 1977 (Cth)*) and through programs that operate outside the Act, such as the Home and Community Care Program. In 2009–10 there were about 59 602 admissions to residential respite care, and care recipients used more than 1.34 million resident-days, an increase of almost 10 per cent over 2008–09.

The National Respite for Carers Program allowed for a further 5.1 million hours of respite through more than 650 respite services across Australia in 2009–10. In the same period the program provided funding for information, counselling and respite care for carers of older people who are frail and people with disability. Some 143 387 carers received assistance through the program.

The Australian Government also provides a range of income support payments, programs and services for carers and the people they care for.

### 3.8.1 Economic security

Caring can have a profound impact on the ability of carers to find a job, accumulate savings and enjoy the benefits of participating in economic life. Carers have low rates of employment and are less likely to be employed than non-carers. In the 2003 Survey of Disability, Ageing and Carers, only 48 per cent of primary carers were in paid employment and the majority of these were working part time.<sup>295</sup>

Impediments for carers to be able to balance their caring role with participation in paid work and education include a lack of alternative care arrangements, inflexible work practices, and loss of skills as a result of being out of the workforce.

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<sup>295</sup> Australian Institute of Health and Welfare, *Australia’s Welfare 2009*, AIHW, Canberra, p 220, citing Australian Bureau of Statistics, *Disability, Ageing and Carers*, Cat. no. 4430.0, ABS, Canberra, 2003.

An employee who seeks flexible working arrangements because he or she cares for an adult can individually negotiate these arrangements with his or her employer, including through an individual flexibility arrangement.<sup>296</sup> A carer of a child under the age of 18 years who has a disability is able to ask for a change in work arrangements under the *Fair Work Act 2009* (Cth) to facilitate care for the child.<sup>297</sup>

Under the National Employment Standards, all employees excluding casuals are entitled to an additional 10 days of personal/carer's leave for each year of service. There is no annual limit or cap on the amount of accrued paid carer's leave that may be taken by an employee. All employees, including casuals for the first time, are also entitled to two days of unpaid carers leave on each permissible occasion.

In order to remain eligible for the Carer Payment, a carer may not work beyond 25 hours a week (including work, study, training and volunteer work). The Standing Committee on Family, Community, Housing and Youth received submissions from carers in relation to the impact of the 25-hour rule on their capacity to participate in the paid workplace and in education. For example, the New South Wales Youth Advisory Council submitted that the 25-hour rule 'greatly disadvantages and restricts the access young carers have to attend and stay fully engaged with school'. The 2007 report of the Taskforce on Care Costs, *The Hidden Face of Care*, also criticised the rule on the basis that it 'works against maximising workforce participation' of carers.<sup>298</sup>

The Australian Government has acknowledged that carers face many barriers to undertaking study, work and volunteering, but considers the 25-hour rule is not a significant impediment to combining caring with work or study. The 25-hour limit represents an increase on the number of allowable hours of non-caring work from 20 hours a week before April 2005 and 10 hours a week before July 1997.

Under the National Carer Strategy, the Government will consult with interested parties on the option to expand the right to request flexible working arrangements under the Fair Work Act to include eligible employees with elder care responsibilities and care responsibilities for those with a serious long-term illness or disability.

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<sup>296</sup> *Fair Work Act 2009* (Cth), s 202(1).

<sup>297</sup> *ibid.*, s 65(1).

<sup>298</sup> Taskforce on Care Costs, *The Hidden Face of Care: combining work and caring responsibilities for the aged and people with a disability*, TOCC, Sydney, 2007, p 15.



### 3.8.2 Recognition, respect, health and wellbeing

Carers want to be valued for their contribution in reducing the demand for formal care services and acknowledged as individuals with rights and needs that go beyond the caring role. Many carers are dissatisfied in their dealings with health and community professionals and feel they are not respected or acknowledged as experts in the provision of care. Submissions to the Baseline Study also noted the need for greater access to flexible and responsive respite services to enable carers to maintain their health and wellbeing.

In Victoria, Caring Together—An Action Plan for Carer Involvement in Victorian Public Mental Health Services aims to improve the participation of carers of people with a mental illness in the development and delivery of mental health services in the state, including clinical mental health services and the Psychiatric Disability Rehabilitation and Support Services sector. In Western Australia, the Mental Health Commission is in the process of developing a carer advisory position. Recognition of consumer–carer service relationships and collaboration is a central element of providing quality services in the mental health sector.

### 3.9 People in prisons

In the September quarter of 2010 there were 28 924 prisoners in Australia, more than a quarter of them (7467) being Aboriginal and Torres Strait Islander peoples.<sup>299</sup> It is estimated that 43 000 adult prisoners re-enter the mainstream community annually.<sup>300</sup>

The UN Minimum Rules for the Treatment of Prisoners provide detailed guidance on Australia’s commitments under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia is also working towards ratification of the Optional Protocol to the convention. This would require Australia to allow visits to all places of detention by a UN subcommittee and to designate one or more independent bodies—termed ‘national preventive mechanisms’—to conduct regular visits to places of detention.

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<sup>299</sup> Australian Bureau of Statistics, *Corrective Services*, Cat. no. 4512.0, ABS, Canberra, 2010.

<sup>300</sup> Australian Institute of Criminology, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: final report to the National SAAP Coordination and Development Committee*, AIC, Canberra, 2004, p 8.

All people found guilty of a crime and sentenced to imprisonment in Australia are detained in state or territory prisons. Corrective services legislation in each jurisdiction provides the statutory framework for the management of adults remanded or detained in prison. The national Standard Guidelines for Corrections in Australia also outline the goals and principles for the management of correctional services.<sup>301</sup> A national project to annually review the Standard Guidelines to ensure that they remain relevant, contemporary and aligned with internationally accepted standards is under way, led by Western Australia.

Participants in the National Human Rights Consultation focus groups expressed a number of concerns about the protection of prisoners' rights, both in prison and after release<sup>302</sup>, among them the impact of prison on physical and mental health, the impact of prison management procedures on women, prisoners' access to justice, and discrimination on the basis of irrelevant criminal records hindering re-integration into society.<sup>303</sup>

### 3.9.1 Health

#### **Physical health**

The Standard Guidelines for Corrections in Australia provide that people in prison should be managed and treated in an appropriate manner, taking into account the individual prisoner's health, disability, and cultural and/or linguistic issues. Principle 9 of the UN General Assembly resolution on the Basic Principles for the Treatment of Prisoners states, 'Prisoners should have access to the health services available in the country without discrimination on the grounds of their legal status'.<sup>304</sup>

The Special Rapporteur on the right to health noted a number of concerns in connection with health care for prisoners after his visit to Australia in 2009. Among these were delays in gaining access to primary health care, questions about the capacity of primary health services to manage complex chronic diseases, and the fact that detainees cannot receive benefits under Medicare or the Pharmaceutical Benefits Scheme if the medical services are provided by

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<sup>301</sup> Australian Institute of Criminology, *Corrections Standards and Guidelines*, 2009, viewed 23 February 2011, [http://www.aic.gov.au/criminal\\_justice\\_system/corrections/reform/standards.aspx](http://www.aic.gov.au/criminal_justice_system/corrections/reform/standards.aspx).

<sup>302</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report*, 2009, pp 31–2.

<sup>303</sup> For more information about the main human rights problems for Aboriginal and Torres Strait Islander peoples, see Section 3.1.

<sup>304</sup> *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UNGAOR, 68th plen mtg, UN Doc Res A/RES/45/111, 1990.

a private health provider or by, on behalf of or through an arrangement with a State or Territory Government (which is the standard case because the States and Territories have primary responsibility for operating prisons).<sup>305</sup> In its 2009 concluding observations, the Committee on Economic, Social and Cultural Rights also expressed concern about the adequacy of health services in prisons.<sup>306</sup>

At present State and Territory Governments can deliver in-prison health services by employing medical officers or by paying doctors from the public or private sector. As a result of the funding arrangements, for State or Territory operated prisons, prison medical officers are not given a Medicare provider number or PBS prescriber number for providing medical services or prescribing medication in prison. The Australian Government has, however, approved some access for prisoners to medicines supplied under the PBS Highly Specialised Drugs Program; this is in recognition of the need to provide access to important medicines used to treat, for example, HIV/AIDS, hepatitis B and hepatitis C.

In 2011, following an external inspection, the Health Services Directorate of the Western Australian Department of Corrective Services received accredited status from the Australian Council on Health Care Standards. (Since 1974 the council has provided accreditation for Australian health service providers against rigorous standards for quality, safety and governance.)

As part of the development of National Prisoner Health Indicators, a National Prisoner Health Census was conducted in almost all public and private prisons in Australia in mid-2009. The subsequent report, *The Health of Australia's Prisoners 2009*, found there is one full-time-equivalent health staff member to every 33 prisoners.<sup>307</sup> The report also found that prisoners have significant health issues, with high rates of mental health issues, communicable diseases, alcohol misuse, smoking and illicit drug use.<sup>308</sup> For example, 25 per cent of prison entrants self-reported that they had a current chronic condition—asthma, arthritis, cardiovascular disease, diabetes or cancer—while 35 per cent

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<sup>305</sup> Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover, Un Doc A/HRC/14/20/Add.4, 3 June 2010, at [66] and [68]; *Health Insurance Act 1973* (Cth) s 19(2).

<sup>306</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights—Australia*, E/C.12/AUS/CO/4, 12 June 2009, [29].

<sup>307</sup> Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2009*, AIHW, Canberra, 2009, p xv.

<sup>308</sup> *ibid.*, p x.

tested positive to hepatitis C, 21 per cent tested positive to hepatitis B, and less than 1 per cent tested positive to HIV.<sup>309</sup>

In order to address the high prevalence of certain health issues in the Western Australian prison community, a specialist multi-disciplinary team provides medical and psycho-social care to patients in all adult prisons and youth detention centres who are experiencing mental health issues and/or issues related to alcohol and other drugs while in prison. Services offered include mental health and alcohol and other drugs assessments, medical treatments, counselling, group-based health programs, care planning and care management.

The Australian Government's five national blood-borne virus and sexually transmissible infection strategies, endorsed by the Australian Health Ministers Conference, identify people in custodial settings as a priority population. Although no Australian corrections facility currently offers prisoners access to sterile injecting equipment, on a trial basis or otherwise, the strategies do identify opportunities for trialling prison-based needle and syringe exchange programs.<sup>310</sup>

### ***Mental health and disability***

Submissions to the Baseline Study noted the over-representation of people with disability and mental illness in the criminal justice system as an important consideration. There is also concern about the number of people with intellectual or psychosocial disability in the corrections and criminal justice system. Submissions argued that there is a need for more proactive programs—such as justice re-investment programs and mental health courts—to develop diversion and rehabilitation programs matched to the needs of the individual.

The Standard Guidelines for Corrections in Australia state that prisoners suffering from a mental illness should receive relevant support services, including psychiatric services and management by a tertiary or specialist health care facility in cases of severe psychiatric illness. The Australian Government also supports the National Justice Mental Health Initiative, which uses an

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<sup>309</sup> *ibid.*

<sup>310</sup> Ministerial Advisory Committee on AIDS, Sexual Health and Hepatitis, Hepatitis C Subcommittee, *Guidelines for Australian Custodial Settings: evidence base for the guidelines*, Australian Government, Canberra, July 2008, pp 18–19.

evidence-based approach to develop best-practice guidelines for diversion and support for people with a mental illness in the criminal justice system.<sup>311</sup>

The Special Rapporteur on the right to health also expressed concern about the state of mental health care in correctional facilities, observing that the current mental health services are insufficient to treat the number of inmates who suffer from mental illness<sup>312</sup> and that individuals with mental illness are significantly over-represented in prison.

The Australian Institute of Health and Welfare found that 37 per cent of prison entrants reported having a mental health disorder at some time.<sup>313</sup> It reported that 12 per cent of all managed health issues in prisons involved mental health.<sup>314</sup> The Australian Bureau of Statistics has reported that 41 per cent of people who had been in prison had experienced mental illness, which is twice the prevalence for people who had not been in prison.<sup>315</sup>

In New South Wales it has been found that the majority (87 per cent) of young people in custody have a psychological disorder.<sup>316</sup> Possible intellectual disability was also common: 20 per cent of Aboriginal and Torres Strait Islander young people in custody were assessed as having a possible intellectual disability; this compares with 7 per cent of the non-Indigenous cohort. A 2008 study<sup>317</sup> examining more than 2700 people who have been in prison<sup>318</sup> found that 28 per cent of prisoners experienced a mental health disorder (defined as having any anxiety, affective or psychiatric problem in the past 12 months), 34 per cent had a cognitive impairment and 38 per cent had a borderline cognitive impairment.

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<sup>311</sup> National Justice Chief Executive Officers' Group & Victorian Government Department of Justice, *Diversion and Support of Offenders with a Mental Illness: guidelines for best practice*, Justice Health, Victorian Government Department of Justice & the National Justice Chief Executive Officers' Group, Melbourne,, August 2010.

<sup>312</sup> Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Anand Grover, Un Doc A/HRC/14/20/Add.4, 3 June 2010, at [69].

<sup>313</sup> Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2009*, AIHW, Canberra, 2009, p x.

<sup>314</sup> *ibid.*, p 85.

<sup>315</sup> Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007*, Cat. no. 4326.0, ABS, Canberra, 2007.

<sup>316</sup> D Indig et al., *2009 NSW Young People in Custody Health Survey: full report*, Justice, Health and Juvenile Justice, Sydney, 2011.

<sup>317</sup> E Baldry et al, *A Critical Perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, The University of NSW, Sydney, 2008.

<sup>318</sup> The term 'people who have been in prison' is used because the data for this study are drawn from two data collections (2001 NSW Prisoner Health Survey and the NSW statewide Disability Services of Corrective Services client database) and those involved might have subsequently been released.

A number of reports<sup>319</sup> on the forensic mental health system have expressed concern about the appropriateness of detaining forensic patients<sup>320</sup> in correctional centres. In some jurisdictions, such as New South Wales, forensic patients can be held in correctional facilities. With the recent opening of the Forensic Hospital, however, fewer forensic patients are held in New South Wales correctional facilities. All forensic patients in the state are subject to periodic review by the Mental Health Review Tribunal, which is also responsible for decisions relating to a forensic patient's care, detention, treatment and release.

As noted, the Western Australian specialist multi-disciplinary team focuses on mental health. Queensland provides another example: there is a Mental Health Court for the expert determination of the defence of unsound mind in the case of indictable offences. A defendant who is found to be of unsound mind or unfit for trial is diverted into the mental health system (where detention takes place in a mental health care facility rather than a prison) if required for treatment or care or to minimise the risk of personal harm or harm to others.

In its 2008 concluding observations, the Committee against Torture expressed concern about detainees in supermaximum security detention facilities, particularly in connection with reports of prolonged isolation periods and the impact of this on detainees' mental health.<sup>321</sup> The supermaximum High Risk Management Correctional Centre in New South Wales tries to balance a highly secure, restrictive physical environment for prisoners convicted of some of the most serious crimes with the necessary facilities for delivery of programs by educational and counselling staff. Contact between inmates is controlled and limited by staff according to prescribed guidelines, and the centre's physical conditions do not emulate the level of isolation or 'solitary confinement' recommended in the prison management literature for supermaximum facilities.

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<sup>319</sup> See, for example, NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Report 80*, LRC, Sydney, 1996; Legislative Council Select Committee on Mental Health, *Inquiry into Mental Health Services in NSW*, NSW Parliament, Sydney, 2002; Senate Select Committee on Mental Health, *A National Approach to Mental Health—from crisis to community: final report*, NSW Parliament, Sydney, 2006; G James, *Review of NSW Forensic Mental Health Legislation*, NSW Government, Sydney, 2007.

<sup>320</sup> A forensic patient is a person who is found unfit to be tried by reason of mental illness and is subject to detention or a person detained or subject to conditional release after being found not guilty of an offence by reason of mental illness.

<sup>321</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: concluding observations of the Committee against Torture—Australia*, 40th session, UN Doc CAT/C/AUS/CO/3, 22 May 2008, at [24].

### 3.9.2 Women in prisons

In its submission to the National Human Rights Consultation the Prisoners Legal Service cited statistics indicating that 60 per cent of women in prison had experienced sexual abuse before the age of 16 and 95 per cent had a chronic health condition.<sup>322</sup> The Human Rights Law Centre's report to the Committee against Torture in 2008 referred to research suggesting that more than half of women in prison in Australia had been diagnosed with a mental health condition and 30–40 per cent had attempted suicide at some time.<sup>323</sup>

The advocacy group Sisters Inside has suggested prison might disproportionately affect women because of the use of security systems that are designed for men.<sup>324</sup> For example, both the Prisoners Legal Service and Sisters Inside pointed to the over-use of strip searches<sup>325</sup> and the access of women in prison to their children.<sup>326</sup> In its 2005 concluding observations, the Committee on the Rights of the Child encouraged Australia to continue to strengthen measures facilitating contact between children and their imprisoned parents.<sup>327</sup> There are limited government-collected data available on the rate of strip searches being conducted on female prisoners and the effect of prison security systems on women in prison.

Western Australia has developed Women's Way Forward: Women's Corrective Services Strategic Plan 2009–2012, which adopts a women-centred approach to the custodial component of the Western Australian corrections system. In addition, a Female Offender Strategic Policy and a Female Offender Framework are being developed to guide the future development and delivery of correctional services for females, taking account of the distinct needs, characteristics, life experiences and family circumstances of female offenders in Western Australia.

Western Australia has also developed the Prisoner Mothers/Primary Carers and their Children policy to respond to the needs of women in prison in relation to maintaining contact with their children. Under the policy female prisoners can

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<sup>322</sup> Prisoners Legal Service, 'Submission to the National Human Rights Consultation', 2009, p 4.

<sup>323</sup> Human Rights Law Centre, *Australia's Compliance with the Convention against Torture: report to the UN Committee against Torture*, April 2008, HRLC, Melbourne, p 17.

<sup>324</sup> Sisters Inside, 'Submission to the National Human Rights Consultation', 2009, pp 18–21.

<sup>325</sup> Prisoners Legal Service, 'Submission to the National Human Rights Consultation', 2009, p 13; Sisters Inside, 'Submission to the National Human Rights Consultation', June 2009, pp 52–4.

<sup>326</sup> Prisoners Legal Service, 'Submission to the National Human Rights Consultation', 2009, pp 7, 8; Sisters Inside, 'Submission to the National Human Rights Consultation', 2009, pp 68–73.

<sup>327</sup> Committee on the Rights of the Child, *UN Committee on the Rights of the Child: Concluding Observations, Australia*, 20 October 2005, CRC/C/15/Add.268 at [41].

care for their babies or children in prison if that is considered to be in the best interests of the baby or child and the management and security of the prison is not threatened. In addition, Western Australia has two prisons for women that specifically accommodate prisoners and their children, with accommodation for pregnant and female prisoners and their babies and specially built houses for women with residential children or children who visit regularly.

### 3.9.3 Oversight mechanisms

A number of recommendations made during Australia's Universal Periodic Review called on Australia to ratify the Optional Protocol to the Convention against Torture without delay and establish a National Preventative Mechanism.<sup>328</sup> The role of the mechanism under the Optional Protocol is to allow for independent and regular visits to places of detention.

All jurisdictions currently have mechanisms such as official visitor schemes, department-based oversight, or independent bodies that conduct regular visits to prisons. For example, as part of the Western Australian oversight mechanism, the Western Australian Office of the Inspector of Custodial Services, an independent statutory body, conducts regular external scrutiny of public and private sector prisons, juvenile detention centres, court custody centres, prescribed lock-ups and prisoner transport services. The office has extensive statutory powers to obtain access to the detention facilities and relevant information and to interview staff and inmates. It publishes a report in relation to each full inspection, providing recommendations for the administering department as necessary. In South Australia and the ACT complaints can be made through visiting inspectors, Aboriginal liaison officers, the Health and Community Services Complaints Commissioner and prisoners' own legal representatives.

Between 15 February and 30 June 2010 the ACT Official Visitor recorded 276 discrete complaints from detainees—250 from Alexander Maconochie Centre detainees and 26 from Symonston detainees. The Official Visitor raised these complaints with the acting superintendent and the superintendent and communicated them to Corrective Services. Where relevant, the Official Visitor also raised complaints with the Human Rights Commissioner, the Health Services Commissioner and ACT Health. Some complaints were referred to the

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<sup>328</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.1 (Republic of Moldova)], [86.2 (Azerbaijan)], [86.3 (Maldives)], [86.4 (New Zealand)], [86.5 (Mexico)] and [86.6 (Denmark)].



ACT Ombudsman and Prisoners Aid when these agencies were better placed to deal with them.

In Western Australia and South Australia people in prison can lodge complaints through a free-call prisoner telephone system that is available in all prisons. In the ACT the 2010 Independent Review of Operations at the Alexander Maconochie Centre found that the centre gave high-level consideration to detainees' human rights and that it has good systems and processes for protecting and upholding those rights. A taskforce has since been formed to implement a range of the findings and recommendations resulting from the review.

The Australian Government is working with State and Territory Governments to determine the best way of establishing a National Preventative Mechanism, as required by the Optional Protocol to the Convention against Torture. This is being done in order to ensure that Australia is ready to comply with the Optional Protocol before it is ratified.

#### 3.9.4 Freedom from discrimination

In 2009–10, 30.5 per cent of the complaints the Australian Human Rights Commission received under the *Australian Human Rights Commission Act 1986* (Cth) were about discrimination on the basis of irrelevant criminal record.<sup>329</sup> The number of criminal history checks processed increased from less than 500 000 in 2000–01 to 2.7 million in 2009–10, although some of this increase is a result of increased activity in the labour market.<sup>330</sup>

Discrimination on the basis of irrelevant criminal record involves the stereotyping of a person's financial capacity or 'trustworthiness' and can result in:

- termination of employment upon discovery of an employee's criminal record—regardless of performance or the relevance of the criminal record
- refusal to consider housing applicants who disclose a prison history to explain gaps in their rental history.<sup>331</sup>

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<sup>329</sup> Australian Human Rights Commission, *Annual Report 2009–10*, AHRC, Sydney, 2010, p 88.

<sup>330</sup> CrimTrac, *Annual Report 2009–10*, CrimTrac, Canberra, 2010, pp 59–60.

<sup>331</sup> PILCH Homeless Persons' Legal Clinic, *Discrimination on the Basis of Criminal Records*, Position paper, HPLC, Melbourne, 2008.

In Australia an employer should ask a prospective employee to disclose a criminal record only if it is relevant to the job. There is, however, evidence to suggest that discrimination might also occur when an employer terminates an employee's employment after having discovered an irrelevant criminal record.<sup>332</sup>

The Australian Human Rights Commission has the power to handle complaints and conciliate instances of discrimination in employment on the basis of irrelevant criminal record under the Australian Human Rights Commission Act.<sup>333</sup> Such discrimination is minimised in some instances through Australia's spent convictions schemes, which allow some convictions to be permanently removed from a person's criminal record after a certain period. All jurisdictions except Victoria have spent convictions legislation.<sup>334</sup>

### 3.10 Refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds

Australia is a multicultural country that seeks to protect and promote the human rights of its newest residents. It recognises that migrants, asylum seekers, refugees and people from culturally and linguistically diverse backgrounds have needs, experiences and challenges that differ from those of the rest of the population and from each other. Submissions to the Baseline Study revealed a number of concerns in this regard and made recommendations for further improvement in the protection of human rights for these groups.

- Migrants are people who have been granted permanent visas to allow them to move to Australia, generally for employment or family reasons.
- Asylum seekers are seeking Australia's protection after having left their own country and are waiting for their claim to be assessed. During this time they might hold a temporary visa, such as a student visa, they might be given a visa to allow them to remain lawfully in Australia until their

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<sup>332</sup> *ibid.*, p 1.

<sup>333</sup> Australian Human Rights Commission Act 1986 (Cth), s 31; Australian Human Rights Commission, *On the Record: guidelines for the prevention of discrimination in employment on the basis of criminal record*, AHRC, Sydney, September 2007, p 10.

<sup>334</sup> See *Crimes Act 1914* (Cth), *Criminal Records Act 1991* (NSW), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Criminal Records (Spent Convictions) Act 1992* (NT), *Spent Convictions Act 1988* (WA), *Annulled Convictions Act 2003* (Tas) and *Spent Convictions Act 2009* (ACT).

application is decided, or they might be unlawful non-citizens who are held in immigration detention.

- Refugees are people who have been found to be unable or unwilling to return to their own country because of a well-founded fear of persecution under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol and have been granted a permanent visa. The term ‘refugee’ is sometimes also used to describe people with humanitarian needs who are selected from outside Australia to resettle permanently in this country.

In 2010–11, 168 685 people were granted visas to migrate to Australia. During that time 13 799 humanitarian and refugee visas were granted.<sup>335</sup>

Submissions to the Baseline Study noted concerns relating to ‘stateless persons’<sup>336</sup>, including that many stateless people face exclusion from political processes, difficulty in obtaining identity documents, and hence difficulty in gaining access to publicly funded services and employment. These issues pertain to stateless people around the world. It is difficult to return a stateless person with no lawful right to remain in Australia unless their country of habitual residence or former nationality is willing to accept them, and sometimes this results in a protracted period during which the person’s status is being resolved. The Australian Government is committed to considering ways to identify situations of statelessness more rapidly and to provide for decision makers better tools for assessing the claims of stateless people.

### 3.10.1 International obligations

The seven core UN human rights treaties listed in Chapter 1 apply to all people in Australia, regardless of their migration status. For example, all people in Australia are protected from discrimination on the ground of their race, colour, descent or national or ethnic origin by the *Racial Discrimination Act 1975* (Cth). Other relevant treaties to which Australia is a party are the 1951 Convention Relating to the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The Australian Government is also a participant on the Executive Committee of the UN High Commissioner for Refugees.

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<sup>335</sup> Department of Immigration and Citizenship, *Annual Report 2010–2011*, viewed 16 November 2011, <http://www.immi.gov.au/about/reports/annual/2010-11/pdf/>.

<sup>336</sup> Defined in the 1954 Convention Relating to the Status of Stateless Persons to mean ‘a person who is not considered as a national by any State under the operation of its law’.

Some human rights are primarily directed to Australian citizens only. For example, with some exceptions<sup>337</sup>, only eligible Australian citizens aged 18 years or more have the right to vote in federal elections (along with British subjects who were on the electoral roll before 26 January 1984). In the case of those rights not reserved for citizens, any distinction in the enjoyment of rights must be for a legitimate purpose, based on reasonable and objective criteria, and proportionate to achieving the aim. For example, Australian citizens and permanent residents generally receive more government-funded services than people in Australia on a temporary basis. This ensures that Australia is not adversely affected by the costs of providing benefits (such as social security) to all temporary visitors.

### 3.10.2 Assessment of protection claims and *non-refoulement* obligations

Consistent with the Convention Relating to the Status of Refugees and its Protocol, Australia is committed to providing protection to refugees. As part of Australia's refugee status-determination procedures, a person seeking Australia's protection has their claim assessed on an individual basis against the Refugees Convention criteria, with reference to up-to-date information on conditions in the applicant's home country.

The Australian Government is also introducing a statutory system of complementary protection to ensure that consideration of all Australia's *non-refoulement*<sup>338</sup> obligations under international human rights law is integrated into one protection visa process. The *Migration Amendment (Complementary Protection) Act 2011* (Cth) was passed on 19 September 2011 and received Royal Assent on 14 October 2011. It amends the *Migration Act 1958* (Cth) to introduce new criteria, tests and definitions to allow the granting of a protection visa on the basis that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. The new criteria, tests and definitions are expected to come into effect in March or April 2012. In the interim, Australia's

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<sup>337</sup> Australian citizens of 'unsound mind' or those who have been convicted of treason or treachery or those who are serving a full-time prison sentence of three years or more are not able to vote in federal elections.

<sup>338</sup> *Non-refoulement* is the principle of not forcibly returning individuals to a country where they have a well-founded fear of persecution for a reason set out in the Refugees Convention or where they face a real risk of certain types of significant harm—being arbitrarily deprived of their life, having the death penalty carried out or being subjected to torture or other cruel, inhuman or degrading treatment or punishment. Providing protection from return in situations that involve these types of significant harm is known as 'complementary protection' since it complements the protection provided to people found to be refugees under the Refugees Convention.

*non-refoulement* obligations continue to be met through use of the Minister for Immigration's public interest powers.

### 3.10.3 Asylum seekers arriving at excised offshore places

A number of submissions to the Baseline Study discussed Australia's policy in relation to people who are non-citizens arriving at excised offshore places without a valid visa. Concern was expressed that these asylum seekers are processed in a manner that differs from the refugee status–determination system applying on the Australian mainland. The laws applying to such asylum seekers were introduced to strengthen the integrity of Australia's migration system, to reduce instances of people entering Australia without a valid visa by means of hazardous sea voyages, and to deter people smugglers.

People who arrive unauthorised at an excised offshore place and seek to engage Australia's protection obligations under the Refugees Convention are prevented by s 46A of the Migration Act from lodging a valid visa application. They are, however, able to have their protection claims examined by the Department of Immigration and Citizenship under the Protection Obligations Determination, or POD, process, which closely mirrors the onshore protection visa process: asylum seekers are assessed against the criteria set out in the Refugees Convention.

Under the POD process, asylum seekers are provided with publicly funded independent advice and assistance under the Immigration Advice and Application Assistance Scheme. POD also offers the following:

- access to independent review for people who have not received a favourable refugee status assessment
- improved procedural guidance for departmental officers conducting the POD
- external scrutiny of the POD process by the Commonwealth and Immigration Ombudsman
- access to judicial review of the assessments made as part of the POD process.

The POD process also builds in the common law requirement of procedural fairness.

People found to be refugees and considered eligible for a protection visa are referred to the Minister for Immigration with a recommendation that the

minister allow the person to apply for a visa. The minister then considers whether to exercise a non-compellable power to allow that person to apply for a visa if it is in the public interest. The public interest criteria include health, character and security checks. If the minister agrees with the recommendation and exercises the non-compellable power, the person is eligible to make an application for a visa.

#### 3.10.4 Regional processing

The Australian Government continues to work towards a sustainable and effective regional framework for managing irregular migration and combating people smuggling. In March 2011 ministers at the Bali Process Ministerial Conference endorsed a Regional Cooperation Framework to promote burden sharing and cooperation between source, transit and destination countries and lay the foundation for the implementation of practical arrangements to address irregular movement through the region.

The Arrangement between Australia and Malaysia on Transfer and Resettlement was an important initiative under the Regional Cooperation Framework. Submissions to the Baseline Study expressed concern that the arrangement did not ensure adequate human rights protections, including for children. There was particular concern about Malaysia not being a party to the Refugees Convention. In view of a recent High Court decision<sup>339</sup>, the arrangement cannot be implemented and the Australian Government is considering its options. It remains committed to working with countries in the region under the Regional Cooperation Framework to improve protection outcomes and reduce people-smuggling activity.

On 13 October 2011 the Australian Government announced that, although still committed to implementing its arrangement with Malaysia, in recognition of the legal barriers to implementing that arrangement at present it would implement onshore processing and use other measures to manage people who arrive by boat. Those other measures include the granting of bridging visas and continued use of community detention.

#### 3.10.5 Immigration detention

A Joint Select Parliamentary Committee is conducting an inquiry into Australia's immigration detention network. The Australian Government's position is that mandatory detention of people who are non-citizens arriving in Australia

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<sup>339</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

without a valid visa for the purpose of health, identity and security checks is necessary to manage the risks to the Australian community.<sup>340</sup> The Government recognises, however, that detention that is indefinite or otherwise arbitrary is not acceptable. A number of submissions to the National Human Rights Consultation criticised the Government's policy of mandatory detention for people who are non-citizens arriving without a valid visa, arguing that the policy breached the right not to be arbitrarily detained under Article 9(1) of the International Covenant on Civil and Political Rights.<sup>341</sup> Several recommendations made during Australia's Universal Periodic Review also expressed concern in relation to this policy.<sup>342</sup>

Australia's response to the Universal Periodic Review emphasised that under current government policy the following applies:

- Mandatory detention is an essential component of strong border control and is based on people who are non-citizens arriving without a valid visa, not on individuals seeking asylum.
- Immigration detention policy and the operation of detention facilities in Australia are subject to close scrutiny from both domestic and international bodies.
- The length and conditions of detention are subject to regular review.

As at 30 September 2011 there were 4446 people in immigration detention facilities, 3066 of them in immigration detention centres and 1380 in alternative detention arrangements, immigration residential housing and immigration transit accommodation. Separately, 1151 people were living in the community under a residence determination, often referred to as 'community detention'.

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<sup>340</sup> Department of Immigration and Citizenship, 'Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009', July 2009, p 11.

<sup>341</sup> Gilbert + Tobin Centre of Public Law, 'Submission to the National Human Rights Consultation', 2009, pp 13–14; Queensland Refugee and Immigration Legal Service, 'Submission to the National Human Rights Consultation', 2009, pp 2–3; Refugee Council of Australia, 'Submission to the National Human Rights Consultation', 2009, p 3.

<sup>342</sup> UN Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.123 (Norway)], [86.126 (Pakistan)], [86.127 (Ghana)], [86.128 (Philippines)] and [86.132 (Switzerland)].

### ***Length of detention***

Submissions to the Baseline Study expressed concern that detention is indefinite or prolonged. There was particular concern about people awaiting security clearances or who cannot be returned to their country of origin. Many submissions argued that lengthy periods of detention can be detrimental to mental health. Table 3.1 provides information on the length of time in detention for the 5597 people in immigration detention facilities, alternative detention and community detention as at 30 September 2011.

**Table 3.1 Length of time in detention, 30 September 2011**<sup>343</sup>

Period detained	Total	% of total
7 days or less	307	5.5
8 days – 31 days	173	3.1
32 days – 91 days	695	12.4
92 days – 182 days	758	13.5
183 days – 365 days	1629	29.1
366 days – 547 days	1445	25.8
548 days – 730 days	534	9.5
Greater than 730 days	56	1.0
Total	5597	100.0

### ***Conditions of detention***

Submissions to the Baseline Study also expressed concern about the quality and remoteness of immigration detention facilities and the effect of this on access to services. They highlighted the importance of independent inspection arrangements for those facilities.

In recent times much attention has focused on conditions at the detention facility on Christmas Island. Although acknowledging that the Department of Immigration and Citizenship has, on the whole, managed operations better than could be expected under current conditions<sup>344</sup>, both the Commonwealth and Immigration Ombudsman and the Australian Human Rights Commission have expressed concern about the facility, including the fact that no

<sup>343</sup> Department of Immigration and Citizenship, *Detention Services—facilities statistics*, viewed 28 October 2011, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

<sup>344</sup> Commonwealth and Immigration Ombudsman, *Christmas Island Immigration Detention Facilities: report on the Commonwealth and Immigration Ombudsman's oversight of immigration processes on Christmas Island October 2008 to September 2010*, Commonwealth Ombudsman, Canberra, 2011, p 2.



community detention is available because of the lack of alternative accommodation.<sup>345</sup>

### *Remoteness*

It has been argued that Christmas Island's remoteness and the small size of the local community limit the availability of important services for detainees. In particular, the Australian Human Rights Commission referred to the number of interpreters needed to meet the heavy demand for entry interviews, status assessment interviews, security-related interviews, health appointments and everyday communications.<sup>346</sup>

Under the Immigration Advice and Application Assistance Scheme it is a contract requirement that IAAAS service providers regularly inform their clients about the progress of their application and any next steps. Additionally, the Department of Immigration and Citizenship has an IAAAS provider – client communication protocol that clearly establishes the framework whereby clients can be confident their agent will be available to speak to them at pre-arranged times with the assistance of an interpreter. If a client is dissatisfied with the level of service provided, a complaints mechanism is available.

### *Medical care*

Both the Australian Human Rights Commission and the Commonwealth and Immigration Ombudsman have expressed concern about access to specialist medical care, psychiatric care and dental care for asylum seekers on Christmas Island.<sup>347</sup>

Health care services—including general and acute medical and mental health services, an after-hours paramedic service, emergency and specialist care, and torture and trauma counselling—are provided to people in immigration detention on the island. Video-conferencing facilities have also been used to improve access to medical specialists. If clinically necessary, people in immigration detention can be transferred to the mainland for additional specialist care, including for specialist psychiatric services. The Department of Immigration and Citizenship also organises regular visits by a psychiatrist.

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<sup>345</sup> *ibid.*, p 12; Australian Human Rights Commission, *Immigration Detention on Christmas Island*, AHRC, Sydney, 2010, p 22.

<sup>346</sup> Australian Human Rights Commission, *Immigration Detention on Christmas Island*, AHRC, Sydney, 2010, [21.2].

<sup>347</sup> *ibid.*, [19]; Commonwealth and Immigration Ombudsman, *Christmas Island Immigration Detention Facilities: report on the Commonwealth and Immigration Ombudsman's oversight of immigration processes on Christmas Island October 2008 to September 2010*, Commonwealth Ombudsman, Canberra, February 2011, p 15.

### *Other detention conditions*

Several countries expressed concerns about detention conditions during Australia's Universal Periodic Review.<sup>348</sup> Similarly, the Australian Human Rights Commission drew attention to the following in relation to amenities in its 2010 report on Christmas Island:

- lack of privacy and no secure place to store personal belongings
- insufficient amenities—toilets, showers and washing machines—for the number of people detained and concerns about the impact of this on hygiene
- a reduction in recreation rooms and facilities
- insufficient phones and computer terminals to facilitate communication.<sup>349</sup>

Although acknowledging a general improvement in the services provided, the Commonwealth and Immigration Ombudsman noted the pressures placed on services by the large number of people in detention on Christmas Island.<sup>350</sup> The population of asylum seekers there increased dramatically during 2010. Between March and June 2011, however, the number returned to pre-2010 levels. As at 30 September 2011, 885 people were in immigration detention on the island (down from 2835 in January 2011).

The Australian Government recognises that managing a large number of asylum seekers on Christmas Island, a remote and confined location, is complex. At times, short-term accommodation strategies have been used to temporarily manage accommodation and processing pressures; this has included using marquees and converting communal living areas into temporary accommodation.

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<sup>348</sup> UN Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.130 (Islamic Republic of Iran)] and [86.131 (Brazil)].

<sup>349</sup> Australian Human Rights Commission, *Immigration detention on Christmas Island*, AHRC, Sydney, 2010, [19]; Commonwealth and Immigration Ombudsman, *Christmas Island Immigration Detention Facilities: report on the Commonwealth and Immigration Ombudsman's oversight of immigration processes on Christmas Island October 2008 to September 2010*, Commonwealth Ombudsman, Canberra, February 2011, [17.1(b)], [17.2], [21.1].

<sup>350</sup> Commonwealth and Immigration Ombudsman, *Christmas Island Immigration Detention Facilities: report on the Commonwealth and Immigration Ombudsman's oversight of immigration processes on Christmas Island October 2008 to September 2010*, Commonwealth Ombudsman, Canberra, February 2011, pp 14–16.

The Government recently announced the establishment of a variety of additional detention accommodation options. It has placed a large number of unaccompanied minors and vulnerable families in community detention arrangements. Many asylum seekers have also been transferred from Christmas Island to new and expanded accommodation options on the mainland. As a result of these measures, the population of asylum seekers on Christmas Island has more than halved since February 2010, and this has assisted in easing conditions on the island. The significant reduction in numbers has improved the level of amenity available to people in detention, including providing better access to ablutions, recreation and communications facilities.

### ***Children in detention***

As at 30 September 2011 there were 446 people under the age of 18 in the community under residence determinations: 396 were in alternative temporary detention in the community, 42 were in immigration residential housing and two were in immigration transit accommodation.<sup>351</sup>

Several recommendations made during Australia's Universal Periodic Review and in submissions to the Baseline Study dealt with children held in immigration detention.<sup>352</sup> They highlighted the pre-arrival trauma of children seeking asylum and how the usual difficulties encountered during adolescence can be exacerbated by time in detention. Others argued that the Minister for Immigration and Citizenship has a conflict of interest in acting both as the guardian of unaccompanied minors and as the decision maker in relation to their claims for protection.

The Australian Government's policy has always been that the least restrictive form of immigration detention available should be used for people who cannot be released into the community. In particular, the placement of minors and their accompanying families in community-based accommodation remains the Government's priority. There will, however, be a continuing need to accommodate some children and their families in alternative places of detention.

In October 2010 the Australian Government announced plans to progressively move large numbers of children and vulnerable family groups out of

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<sup>351</sup> Department of Immigration and Citizenship, *Detention Services—facilities statistics*, viewed 28 October 2011, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>.

<sup>352</sup> UN Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review—Australia*, A/HRC/17/10, recommendations [86.128 (Philippines)] and [86.129 (Brazil)].

immigration detention facilities and into community-based accommodation.<sup>353</sup> It has since moved many children and vulnerable families into such accommodation. As at June 2011 the majority of children and vulnerable family groups who had been in immigration detention facilities were in community-based accommodation. Children and vulnerable family groups remaining in facility-based detention will be progressively moved into community detention arrangements.

### 3.10.6 Refugees, humanitarian entrants and asylum seekers in the community

#### ***Resettling refugees and humanitarian entrants***

Australia has a strong record of assisting new arrivals to resettle. A primary objective of the Humanitarian Program is to ensure that refugees and humanitarian entrants have the support they need to rebuild their lives and become fully functioning members of the Australian community as soon as possible after arrival. In addition to language barriers and lack of familiarity with Australian institutions, refugees and humanitarian entrants often encounter multiple disadvantages and barriers to integration. They might have mental health issues resulting from pre-arrival experiences of torture and other trauma; they might have disability or long-term health issues; they might also have had a disrupted education; or they might have been subjected to violence in places of war and refugee camps. They are also particularly vulnerable to homelessness.<sup>354</sup>

The Australian Government funds a range of programs designed to assist newly arrived refugees and humanitarian entrants. These services focus on building self-reliance, developing English language skills and fostering connections with mainstream services. Among them are the Humanitarian Settlement Services Program, the Settlement Grants Program and the Adult Migrant English Program. In addition, the Complex Case Support Program provides specialised and intensive assistance to humanitarian entrants who have a complexity or multiplicity of needs extending beyond the scope of other settlement services. Many of the immediate and longer term needs of new arrivals—such as

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<sup>353</sup> Minister for Immigration and Citizenship, 'Government to move children and vulnerable families into community-based accommodation', Joint media release with the Prime Minister, 18 October 2010, viewed 11 February 2011, <http://www.minister.immi.gov.au/media/cb/2010/cb155484.htm>.

<sup>354</sup> L Coventry, C Guerra, D Mackenzie et al., *Wealth of All Nations: identification of strategies to assist refugee young people in transition to independence. Report to the National Youth Affairs Research Scheme*, 2002, viewed 28 October 2011, <http://www.deewr.gov.au/Youth/Programs/NYARS/Documents/WealthofAllNationsReport.pdf>.

employment, education and health care—are similar to those in the wider Australian community and are dealt with through mainstream agencies.

State and Territory Governments also provide assistance to new arrivals. For example, in Victoria the Community Grants Program provides support to Victoria’s culturally and linguistically diverse communities, especially new and emerging communities, to assist them to develop and sustain local community organisations and programs, to promote social, cultural and economic inclusion, and to encourage greater community participation, understanding and mutual respect.

The Refugee Council of Australia’s submission on Australia’s Refugee and Humanitarian Program 2010–11 and the Australian Human Rights Commission’s 2010 review of the human rights and social inclusion issues faced by African Australians suggest there is still room for improvement in meeting the needs of some new arrivals.<sup>355</sup> Although submissions to the Baseline Study highlighted the generally limited data about the wellbeing of refugees, they noted that recent humanitarian arrivals experience particular difficulty securing housing and employment and engaging in education.

### ***Barriers to housing***

The Australian Government’s Humanitarian Settlement Services program, administered by the Department of Immigration and Citizenship, uses a coordinator case management approach to provide intensive settlement support to newly arrived humanitarian entrants, both on arrival and throughout their initial settlement period.

Where necessary, the program’s accommodation service provides accommodation for entrants on their arrival in Australia—either directly in long-term accommodation or in short-term housing before long-term accommodation is secured. Accommodation services can also include the provision of a basic household goods package, to help people establish their new residence in Australia.

The Refugee Council of Australia observed that, although the accommodation shortage in Australia affects all Australian residents, refugees and asylum seekers are particularly disadvantaged when competing in the private rental

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<sup>355</sup> Refugee Council of Australia, *Australia’s Refugee and Humanitarian Program 2010–11: community views on current challenges and future directions*, RCA, Sydney, February 2010; Australian Human Rights Commission, *In Our Own Words—African Australians: a review of human rights and social inclusion issues*, AHRC, Sydney, 2010.

market.<sup>356</sup> It attributed this to a number of factors, such as financial hardship, the lack of an Australian rental history, and racism and discrimination.<sup>357</sup>

Similarly, in researching the accommodation-related experiences of African Australians, the Australian Human Rights Commission found that difficulties in securing housing were linked to racial discrimination on the part of some real estate agents (some cited a policy of ‘not renting to Africans’), a lack of knowledge of the Australian housing system and the processes and protocols associated with tenancy and tenancy laws, and a lack of affordable and appropriate housing for larger families.<sup>358</sup> The National Human Rights Consultation report also noted that limited language skills and knowledge about available housing services, as well as past conflict-related trauma and fragmentation of family units, can make access to housing services problematic.<sup>359</sup>

The Department of Immigration and Citizenship is piloting the extension of free interpreting services to selected real estate agents in areas of high settlement in order to support equitable access to housing. The pilot is due to be evaluated in late 2012.

Asylum seekers who cannot secure private rental accommodation can sometimes obtain temporary accommodation through church and other welfare groups. The Hotham Mission Asylum Seeker Project suggests, however, that ‘a more robust and secure response to housing for asylum seekers’ is needed.<sup>360</sup>

### **Barriers to employment**

Submissions to the Baseline Study discussed the barriers refugees face when trying to secure meaningful employment, seeing this as a priority concern. The inability to earn an independent income leaves refugees vulnerable to disadvantage. Submissions noted the following impediments:

- the costs of bridging courses so that qualifications are recognised

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<sup>356</sup> Refugee Council of Australia, *Australia’s Refugee and Humanitarian Program 2010–11: community views on current challenges and future directions*, RCA, Sydney, February 2010, p 75.

<sup>357</sup> *ibid.*

<sup>358</sup> Australian Human Rights Commission, *In Our Own Words—African Australians: a review of human rights and social inclusion issues*, AHRC, Sydney, 2010, p 25.

<sup>359</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report*, 2009.

<sup>360</sup> Hotham Mission Asylum Seeker Project, *Australia’s Hidden Homelessness: community-based approaches to asylum seeker homelessness*, HMASP, Melbourne, 2010, pp 19–20.

- language difficulties, including limitations on free document translation
- lack of familiarity with employment services, training pathways and Australian systems in relation to searching for and securing paid employment
- lack of relevant skills and work experience and the need to demonstrate Australian work experience as a precursor to employment
- experiences of racism and discrimination in selection processes
- limited resources and/or cultural competency within the employment services sector to respond to the needs of this group—including young people
- lack of recognition of prior learning and/or training
- a lack of official documentation relating to a person’s education and employment background.<sup>361</sup>

Humanitarian entrants to Australia are eligible for the full range of Job Services Australia assistance and income support from the date of their arrival. Eligible migrants and refugees are also able to participate in the Adult Migrant English Program or the Language, Literacy and Numeracy Program, which provides accredited English language training and literacy and numeracy training.

### ***Barriers to education***

Submissions to the Baseline Study noted a number of challenges for young humanitarian entrants and their families in gaining access to and remaining involved in education:

- limited understanding of the Australian education and training system, combined with often unrealistic expectations on the part of family or oneself
- a need for intensive ESL (English as a second language) support
- difficulties transitioning from English language schools and centres to mainstream schools (on the basis of age) or to training

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<sup>361</sup> Refugee Council of Australia, *Australia’s Refugee and Humanitarian Program 2010–11: community views on current challenges and future directions*, RCA, Sydney, February 2010, pp 69–74.

- finding space and time to study in often crowded living environments
- the need to contribute financially in addition to studying
- the cost of study materials, transport, and so on.

The Department of Immigration and Citizenship's settlement programs support new arrivals seeking secondary and tertiary education.

In the early intensive settlement period, Humanitarian Settlement Services case management coordinates the delivery of services to new arrivals, including assistance with enrolling in schools and other educational institutions, in keeping with the person's needs. New arrivals are helped to enrol school-age children in primary or secondary school as soon as possible but no later than six weeks after arrival, subject to school holidays. Engagement with the education system is one of the main settlement outcomes of the Humanitarian Settlement Services program: this aspect of the program is so important that clients may not leave the program until school-age children are enrolled and attending school.

The new Adult Migrant English Program business model, which came into effect on 1 July 2011, will provide greater support for migrants and humanitarian entrants whilst improving retention in the program and English language proficiency. The new model has several important features:

- improved pathways for clients through better guidance and support both during and on leaving the program (through an expanded counsellor role) and the introduction of an Individual Pathway Guide for all new clients to document and monitor each of their learning goals and outcomes
- greater accessibility to the program for young people who are not participating in the school system and support for the delivery of 'youth-specific' classes where possible
- additional tuition for clients through the Settlement Language Pathways to Employment and Training program, to assist with the transition to work in Australia. The SLPET provides 200 hours of tuition (which includes up to 80 hours of work experience placements) in addition to the Adult Migrant English Program entitlement of 510 hours. The SLPET also offers clients an employment-focused course to assist them to learn vocation-specific English while gaining familiarity with Australian workplace cultures and practices.



## ***Access to justice***

Difficulties with English, lack of familiarity with Australian law, limited awareness of the available legal services and a distrust of law enforcement based on past negative experiences in other countries can create challenges for recently arrived refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds in interacting with the justice system.<sup>362</sup>

In its 2010 review of the social inclusion issues African Australians face, the Australian Human Rights Commission found that African Australians have very low levels of understanding of Australia's legal system and laws and that this is exacerbated by a lack of accessible information in their own language.<sup>363</sup> The commission also reported a lack of understanding of how the court system works, new arrivals finding it intimidating and extremely formal and the legal language difficult to understand.<sup>364</sup>

A number of programs operate at the state and territory level to improve access to justice for refugees, asylum seekers and migrants. For example, the South Australian Legal Services Commission runs the Family Law and Culturally and Linguistically Diverse Communities Project, which educates new and emerging migrant communities based in South Australia about laws that affect their families. In the ACT the Magistrates Court has developed a notice in 12 languages to be served on defendants in criminal matters with their summons to attend court, and cross-cultural awareness training has been made mandatory for staff and new recruits of ACT Corrective Services.

Non-English speakers are generally eligible to have access to free interpreting services throughout the criminal justice system, in most tribunals and in a limited range of civil disputes. The joint NGO submission to the Committee on the Elimination of Racial Discrimination expressed concern that funding of interpreter services in civil matters is limited, particularly in Victoria.<sup>365</sup> At five Victorian community legal centres with the highest demand for interpreters, 72

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<sup>362</sup> See, for example, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Attorney-General's Department, Canberra, 2009, p 153; Australian Institute of Criminology, *Community Policing in Australia*, AIC, Canberra, 2010, pp 26–7.

<sup>363</sup> Australian Human Rights Commission, *In Our Own Words—African Australians: a review of human rights and social inclusion issues*, AHRC, Sydney, 2010, p 28.

<sup>364</sup> *ibid.*, p 31.

<sup>365</sup> NGO submission to the UN Committee on the Elimination of Racial Discrimination, 'Freedom, respect, equality, dignity: action', 2010, [202].

per cent of requests for services were not fulfilled. The NGO submission argued that this is indicative of significant barriers to civil justice.<sup>366</sup>

Submissions to the Baseline Study also noted the impact of cultural difference on and the potential for miscommunication between young migrants and police. The Australian Human Rights Commission found that young African Australians perceived they were targeted by police or ‘over-policed’.<sup>367</sup> This is consistent with concerns raised in the joint NGO submission to the Committee on the Elimination of Racial Discrimination in relation to excessive targeting of young people of Sudanese origin by police.<sup>368</sup> In November 2009 the Department of Immigration and Citizenship launched Taking the Initiative—Police Working with Australia’s Diverse Communities.<sup>369</sup> This web resource assists Australian police in getting to know what other jurisdictions are doing to improve relationships with Australia’s new arrivals and focuses on initiatives that foster trust and understanding of the police.

Additionally, submissions to the Baseline Study highlighted concerns about access to lawyers for people who arrive at offshore entry places. The Immigration Advice and Application Assistance Scheme provides professional assistance, free of charge, to the most vulnerable visa applicants and asylum seekers who arrive at excised offshore places, to assist them to complete and submit visa applications and claims for protection, to liaise with the Department of Immigration and Citizenship, and to provide advice on complex immigration matters. It also provides migration advice to prospective visa applicants and sponsors. All protection visa applicants in detention, asylum seekers who arrive at excised offshore places, the most disadvantaged protection visa applicants and other visa applicants in the community are eligible for application assistance.

Under the National Partnership Agreement on Legal Aid Services, which came into operation on 2 July 2010, priorities relating to Commonwealth civil law matters include the provision of assistance for migration matters when assistance is not available from services funded by the Department of Immigration and Citizenship. The department provides to people in immigration detention information and facilities that enable them to contact

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<sup>366</sup> *ibid.* [203].

<sup>367</sup> Australian Human Rights Commission, *In Our Own Words—African Australians: a review of human rights and social inclusion issues*, AHRC, Sydney, 2010, p 29.

<sup>368</sup> NGO submission to the UN Committee on the Elimination of Racial Discrimination, ‘Freedom, respect, equality, dignity: action’, 2010, p 64.

<sup>369</sup> Department of Immigration and Citizenship, *Taking the Initiative—police working with Australia’s diverse communities*, 2009, viewed 25 October 2011, <http://www.immi.gov.au/police>.

state and territory legal aid commissions or community legal centres. The grounds for and conditions of access to this publicly funded legal assistance are determined by the legal aid commissions and community legal centres.

### 3.10.7 Community attitudes and multiculturalism

Australia is a multicultural nation. As pointed out in *The People of Australia—Australia’s multicultural policy*<sup>370</sup>, Australia’s diverse composition is at the heart of its national identity and is intrinsic to its history and character. The Scanlon Foundation’s *Mapping Social Cohesion* reports examine community attitudes to culturally and religiously diverse communities and the experiences of members of those communities living in Australia. Among the findings of the 2011 report were the following:

- About 70 per cent of migrants surveyed felt positively about coming to live in Australia as a permanent or long-term resident.<sup>371</sup>
- Sixty-four per cent of people surveyed believe accepting immigrants from many different countries makes Australia stronger.<sup>372</sup>
- Twenty-one per cent of those surveyed felt negative about immigrants from the Middle East.<sup>373</sup>
- Thirty-four per cent agreed or strongly agreed that ethnic minorities in Australia should be given government assistance so that they can maintain their customs and traditions.<sup>374</sup>
- Seventy-two per cent were either positive or neutral in their personal attitude towards Muslims.<sup>375</sup>
- Thirty-four per cent felt the level of racial prejudice in Australia is about the same as it was five years ago.<sup>376</sup>
- Fourteen per cent of respondents had experienced discrimination during the preceding 12 months—up from 10 per cent in 2009.<sup>377</sup>

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<sup>370</sup> See <http://www.immi.gov.au/living-in-australia/a-multicultural-australia>.

<sup>371</sup> A Markus, *Mapping Social Cohesion 2011: the Scanlon Foundation surveys summary report*, Scanlon Foundation, Melbourne, 2011, p 27.

<sup>372</sup> *ibid.*, p 29.

<sup>373</sup> *ibid.*, p 31.

<sup>374</sup> *ibid.*, p 18.

<sup>375</sup> *ibid.*, p 33.

<sup>376</sup> *ibid.*, p 48.

The Australian Human Rights Commission's 2010–11 annual report also noted an increase in the number of complaints received about racial discrimination and hatred on the internet, coinciding with the proliferation of new communications technologies and social networking sites.

Submissions to the Baseline Study noted concerns that misinformation and a lack of understanding about asylum seekers and refugees continue to create negative perceptions of those groups in the community. For young migrants, the experience of explicit racism and discrimination at school, at work or when seeking employment and in the private housing sector can present a barrier to social inclusion and have a detrimental impact on their mental health, psychological development and capacity to negotiate the transition to adulthood.<sup>378</sup> The Committee on the Elimination of Racial Discrimination has recommended that Australia develop a community education campaign to combat discrimination, racism and prejudice. It also recommended that Australia develop an anti-racism strategy.<sup>379</sup>

In February 2011 the Government launched *The People of Australia—Australia's multicultural policy*. This landmark policy commits the Government to upholding four key multicultural principles:

- *Principle 1.* The Australian Government celebrates and values the benefits of cultural diversity for all Australians, within the broader aims of national unity, community harmony and maintenance of our democratic values.
- *Principle 2.* The Australian Government is committed to a just, inclusive and socially cohesive society where everyone can participate in the opportunities that Australia offers and where government services are responsive to the needs of Australians from culturally and linguistically diverse backgrounds.
- *Principle 3.* The Australian Government welcomes the economic, trade and investment benefits that arise from our successful multicultural nation.

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<sup>377</sup> *ibid.*, p 17.

<sup>378</sup> Australian Human Rights and Equal Opportunity Commission, *Listen: national consultations on eliminating prejudice against Arab and Muslim Australians*, AHRC, Sydney, 2004, pp79–82; Western Young Person's Independent Network & Equal Opportunity Commission Victoria, *No Space for Racism: young people's voices and recommendations*, EOC, Melbourne, 2003; VicHealth, *More Than Tolerance: embracing diversity for health*, VicHealth, Melbourne, 2007, p 11.

<sup>379</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination—Australia*, CERD/C/AUS/CO/15-17, 13 September 2010, [27].

- *Principle 4.* The Australian Government will act to promote understanding and acceptance while responding to expressions of intolerance and discrimination with strength and, where necessary, with the force of the law.

One of the initiatives under Australia's new multicultural policy is the National Anti-Racism Partnership and Strategy, part of which involves the development of educational resources. Other initiatives under the policy are the Multicultural Youth Sports Partnership Program, strengthening of the access and equity framework for the delivery of government services, and small grants funding for multicultural arts and festivals. On 3 August 2011 the Australian Government appointed a full-time Race Discrimination Commissioner, Dr Helen Szoke, in recognition of the need for a specific commissioner to respond to race discrimination.

In February 2011 the Federal Attorney-General announced \$1.1 million in funding for seven community-based projects designed to mentor and support young people in building resilience to intolerant or radical ideologies. The projects are in New South Wales and Victoria and are funded under the inaugural Building Community Resilience Youth Mentoring Grants Program. Grant recipients will run mentoring projects in 2011–12 aimed at assisting young people to actively address intolerance, discourage extremist views, and contribute to a safer, more inclusive society.

Australia retains a reservation to Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination, in relation to criminalising the dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination. The Committee on the Elimination of Racial Discrimination has recommended that Australia withdraw the reservation.<sup>380</sup> There is no federal law in Australia specifically criminalising acts of racial hatred. Most States and Territories have, however, enacted legislation that creates criminal prohibitions against racial hatred. In addition, s 17 of the Racial Discrimination Act makes it unlawful to incite, assist or promote racial discrimination.

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<sup>380</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination—Australia*, HR CommERDOR, 56th session, UN Doc CERD/C/304/Add.101, 2000, [14]; *ibid.*, 66th session, UN Doc CERD/C/AUS/CO/14, (2005) [12]; *ibid.*, 77th session, UN Doc CERD/C/AUS/CO/15-17, 2010, [17].

## Conclusion

The first step in preparing the National Human Rights Action Plan is to establish an evidence base relating to human rights in Australia. Building on the work of the 2010 National Human Rights Consultation and Australia's reporting to various international bodies, the Baseline Study considered the protection and promotion of human rights in connection with both the general community and specific groups.

The study demonstrates that Australia has a strong human rights record, and its constitutional system, democratic institutions and legal protections create a stable foundation for human rights protection. An emphasis on protecting and promoting human rights is reflected in many programs and services offered to members of the community.

The study also demonstrates the importance of continuing work to support access to justice, to ensure that Australia's counter-terrorism arrangements balance liberty and security, to monitor the use of force by police, to combat people trafficking, to protect workers' rights, to respond to climate change, and to alleviate disadvantage and poverty.

Particular groups in the community continue to face impediments when seeking remedies, services and equality of opportunity. Among these groups are Aboriginal and Torres Strait Islander peoples; women; children and younger people; older people; gay, lesbian, bisexual, and sex and/or gender diverse people; people at risk of or experiencing homelessness; people with disability; carers; people in prisons; and refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds. There are strong views in the community about these impediments, demonstrating the rigour of public debate on policy in Australia.

Research for the Baseline Study revealed a number of data limitations, particularly in relation to data that can be disaggregated according to sex, age, disability, cultural identity, national or ethnic origin (including immigration status), family status, religion, sexual orientation, and sex and/or gender diversity. If such data were available governments may be better able to identify and respond to the difficulties particular groups face—especially people who experience discrimination or disadvantage on a number of grounds. The National Human Rights Action Plan will aim

to direct government action in such a way as to respond to these shortcomings.