

# Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

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AUSTRALIAN NGO COALITION SUBMISSION TO THE  
UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

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# 1

## Introduction

This report to the United Nations (UN) Committee on the Elimination of Racial Discrimination (the CERD Committee) examines Australia's compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The report is intended to inform the Committee's review of Australia during its 94th session in November 2017. It has been prepared with substantial input by 26 individuals and non-government organisations (NGOs) from across Australia and endorsed by and 53 NGOs, as listed below.

This report seeks to address some of the key concerns and Concluding Observations made by the CERD Committee in its 2010 review of Australia and important issues that have arisen since 2010.

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# 4

## Developments since Australia's last CERD review

Overall, Australia has not made significant progress towards addressing the concerns raised in the Concluding Observations of the CERD Committee on 27 August 2010 following Australia's last periodic review. Alarming, in some areas, Australia has regressed.

There have however been some positive developments, including:

- the establishment of the Parliamentary Joint Committee on Human Rights to scrutinise federal legislation for compatibility with seven core international human rights treaties (section 6.1);
- appointment of a full-time Race Discrimination Commissioner (section 8.1);
- establishment of the National Congress of Australia's First Peoples as a representative body for Aboriginal and Torres Strait Islander peoples (section 7.3);
- adoption of a new multicultural policy (section 10.1);
- progress towards closing the gap in Year 12 attainment rates between Aboriginal and Torres Strait Islander students and non-Indigenous students;
- some reduction in rates of over-crowding in remote Aboriginal and Torres Strait Islander communities (although overcrowding rates remain staggeringly high); and
- adoption of the *National Aboriginal and Torres Strait Islander Health Plan 2013- 2023* (and associated *Implementation Plan*).

Australia has regressed in a number of areas, or has failed to take steps towards progressing the CERD Committee's 2010 Concluding Observations, including in the following areas:

- Australia does not have a Human Rights Act to comprehensively protect human rights (section 6.1);
- Australia does not have entrenched protection against racial discrimination in the Constitution, and still has sections that permit discrimination (section 7.1);<sup>1</sup>
- the Australian Government rejected the Referendum Council's recommendation for a constitutionally-enshrined voice to Parliament (section 7.2).
- the Australian Government has not formally responded to the call from Aboriginal and Torres Strait Islander people for the establishment of a Makaratta (Treaty) Commission to progress treaty negotiations and truth telling (section 7.2);
- the Australian Government attempted (but failed) to make changes to the Australian Citizenship Act, which would make it harder to achieve citizenship and would have had discriminatory and harmful impacts (section 6.3);
- the Australian Human Rights Commission has faced unprecedented political attacks and funding cuts (sections 8.1 and 8.2);
- Australia has maintained its reservation to Article 4(a) of CERD and has attempted on two occasions in three years to water down federal anti-racial vilification laws (section 9.3 and 9.1);
- Australia maintains a system of mandatory indefinite detention of asylum seekers who arrive by boat, has a policy of boat turn-backs that violates its *non-refoulement* obligations and detains new arrivals in

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1. Section 25 of the Constitution allows for people of particular races to be disqualified from voting. Section 51(xxvi) provides the Commonwealth with power to make special laws for people of a particular race, however the High Court of Australia has held

that this power allows the Commonwealth to make laws that are adverse to people of a particular race: *Kartinyeri v Commonwealth* [1998] HCA 22.

- cruel, inhuman and degrading conditions in offshore detention facilities in Papua New Guinea and Nauru (section 12);
- despite supporting the UN Declaration on the Rights of Indigenous Peoples, the Australian Government has not adopted a national implementation plan (section 7.4);
  - the Australian Government is not adequately and sustainably funding Aboriginal and Torres Strait Islander community controlled organisations, or ethnic community controlled services (sections 10.2, 13 and 14.4);
  - while the National Congress of Australia's First Peoples has been established, it has not been properly or sustainably resourced to carry out its functions (sections 7.3 and 13);
  - Australian governments have maintained and, in some cases, created laws and policies that contribute to worsening rates of Aboriginal and Torres Strait Islander over-imprisonment and increase the risks of Aboriginal deaths in custody (section 14);
  - Aboriginal and Torres Strait Islander women continue to be drastically over-represented as victims/survivors of family and sexual violence and the numbers are growing (section 15);
  - Australia has not sufficiently resourced Aboriginal and Torres Strait Islander communities and organisations to address the discrimination against Aboriginal and Torres Strait Islander people in the enjoyment of rights to health, education, housing, sanitation, clean water, social security, work, and culture (sections 13 and 16);
  - Australia has introduced controlling and punitive social security laws and policies, which are disempowering and worsening poverty in many remote communities (section 16.5);
  - Australia has failed to take adequate steps to stem the alarming increase in the number of Aboriginal and Torres Strait Islander children taken from families into out of home care (section 17);
  - Aboriginal and Torres Strait Islander people who are part of the Stolen Generations or whose wages were stolen, have not received any or adequate reparations (sections 18.1 and 18.2);
  - many elements of the Northern Territory Emergency Response remain under a new framework, called 'Stronger Futures', which continues to disempower and discriminate against Aboriginal and Torres Strait Islander people in the Northern Territory (section 19);
  - in making native title claims, the onus remains on Aboriginal and Torres Strait Islander peoples to prove continuity of connection to land since colonisation and the standard of proof remains too high (section 20);
  - the expansion of police powers and toughening of counter-terrorism measures have unfairly and disproportionately discriminated against ethnic and religious minority communities (sections 14.3 and 21); and
  - Australia still does not have an adequate legal framework to regulate the human rights obligations of Australian corporations overseas (section 22).



# Racism and racial discrimination in Australia

## 5.1 Racism is a growing problem in Australia

Australia's culture is rich and diverse. Australia is home to the oldest continuing culture in the world and our Aboriginal and Torres Strait Islander population is growing. One in four Australians were born overseas and around half of the population has at least one parent born overseas.<sup>2</sup>

Most Australians are proud of this cultural diversity, believe multiculturalism has been good for Australia<sup>3</sup> and support action to combat racism.<sup>4</sup> However, past racist laws and policies have also played an instrumental role in the shaping of Australia, including laws that enabled the oppression and dispossession of Aboriginal and Torres Strait Islander peoples and the White Australia Policy.

There is evidence of a 'disturbing reality of everyday racist abuse.'<sup>5</sup> The latest Scanlon Foundation Social Cohesion Survey, a major longitudinal survey on social cohesion, revealed that:

- 20 per cent of respondents reported experiences of discrimination based on skin colour, ethnicity or religion, an increase in such reports from previous years;<sup>6</sup>
- 27 per cent of people of a non-English speaking background reported experiences of discrimination; and
- 55 per cent of all those who reported experiences of discrimination were verbally abused and 18 per cent either had property damaged or were physically attacked.<sup>7</sup>

It is well documented that racism has serious health, social and economic consequences for affected individuals and their families.<sup>8</sup> These impacts can be compounded by intersectional discrimination on the basis of other factors such as gender, sexual orientation, disability and socio-economic status.

## 5.2 Impact on Aboriginal and Torres Strait Islander people

The colonisation process inflicted on Aboriginal and Torres Strait Islander people was characterised by brutality, massacres, land dispossession, forced labour, removal of children, and other discriminatory policies of control, cultural destruction and assimilation.

These histories, and the ongoing forms of discrimination documented throughout this report, pervade the lives of Aboriginal and Torres Strait Islander people today, causing immeasurable harm to individuals and communities. A significant consequence of the continuing lived experience of discrimination for Aboriginal people is intergenerational

2. Australian Bureau of Statistics, 'Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2021' (8 September 2009) <<http://www.abs.gov.au/ausstats/>>; Australian Bureau of Statistics, '2011 Census Quickstats' (28 March 2013) <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/quickstat/0/](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0/)>.

3. Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys 2016* (2016), <<http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>>.

4. Australian Human Rights Commission, *Face the Facts: Cultural Diversity*, <<https://www.humanrights.gov.au/face-facts-cultural-diversity#fn13>> (citing University of Western Sydney, *Challenging Racism Project: National Level Findings* (2008)).

5. Australian Capital Territory Human Rights Office, *Racial and Religious Vilification in the ACT: Investigating the Effectiveness of Part 6 of the ACT Discrimination Act 1991* (Issues Paper, 2006) 3.

6. Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys 2016* (2016).

7. Australian Capital Territory Human Rights Office, *Racial and Religious Vilification in the ACT:*

*Investigating the effectiveness of Part 6 of the ACT Discrimination Act 1991* (Issues Paper, 2006) 3.

8. Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys 2016* (2016), <<http://scanlonfoundation.org.au/>>.

8. VicHealth, *More than Tolerance: Embracing Diversity for Health — Discrimination Affecting Migrant and Refugee Communities in Victoria, Its Health Consequences, Community Attitudes and Solutions — A Summary Report* (Victorian Health Promotion Foundation, 2007).

trauma, which has far-reaching impacts on physical and mental health and wellbeing.<sup>9</sup>

In 2017, the UN Special Rapporteur on the rights of Indigenous peoples ‘found deeply disturbing the numerous reports on the prevalence of racism against Aboriginal and Torres Strait Islander Peoples.’<sup>10</sup> A report in 2012 revealed that a staggering 97 per cent of Aboriginal and Torres Strait Islander people surveyed in Victoria had experienced racism in the previous year and two thirds had experienced eight or more incidents.<sup>11</sup> In 2016, a study on race relations in Darwin found that over 50 per cent of Aboriginal respondents felt they are not wanted in Darwin and 83 per cent felt it was ‘always’ or ‘often’ true that white people judge Aboriginal people by stereotypes.<sup>12</sup>

The Royal Commission into Aboriginal Deaths in Custody identified racism as a central cause of over-imprisonment and deaths in custody.<sup>13</sup> Further, a 2010-11 survey found that:

Racist attacks can cause injury and psychological distress. More subtle forms of racial discrimination, such as bias or exclusion, can be very stressful. They can restrict people’s access to resources required for good health, such as information, employment and housing. People who become worried about being racially discriminated against may become anxious and socially isolated – conditions that can contribute to more serious mental disorders.<sup>14</sup>

A report published by the Lowitja Institute, Australia’s national institute for Aboriginal and Torres Strait Islander health research, concluded that reducing exposure to interpersonal racism is an important aspect of improving Aboriginal and Torres Strait Islander peoples’ health and that effective anti-racism measures were needed to reduce racism.<sup>15</sup>

## 5.3 Impact on refugee and migrant communities

In 2013, the Joint Standing Committee on Migration delivered a report following a national inquiry into migration and multiculturalism in Australia. It provided strong evidence ‘that the impact of race discrimination and prejudice is real, is becoming more pervasive, and can be deeply traumatic for the individuals who experience it.’<sup>16</sup> Mission Australia’s annual youth survey in 2016 found that a third of all young Australians surveyed experienced unfair treatment or discrimination, with around 30% citing race or cultural background as the reason for the discrimination or unfair treatment.<sup>17</sup>

The degree to which newly arrived young people are able to build a sense of belonging is dependent on the host community’s ability to create an environment of inclusiveness.<sup>18</sup>

## 5.4 Anti-racism education and leadership

### ARTICLE 7

Combatting racism and discrimination requires proactive legal and policy reform and also statements of unity, mutual respect and tolerance from political and community leaders.<sup>19</sup> Unchallenged negative public sentiment and media can significantly influence people’s views of themselves and their self-worth, contributing to feelings of isolation and marginalisation and leading to social exclusion.<sup>20</sup> Such concerns led Australia’s Parliamentary Joint Committee on Human Rights (**PJCHR**) to recommend, in a report on freedom of speech and racial vilification, that politicians and community leaders ‘exercise their freedom

9. For discussion on intergenerational trauma, see Judy Atkinson, ‘Trauma-informed Services and Trauma-specific Care for Indigenous Australian Children’ (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013).  
10. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017).  
11. VicHealth, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities — Experiences of Racism: A Summary* (14 November 2012) 2. See also Angeline Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities* (The Lowitja Institute, 2013).  
12. Larrakia National Aboriginal Corporation and the University of Tasmania, *Telling it like it is: Aboriginal Perspectives on Race and Race Relations* (August 2016).

13. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, [12.1.2].  
14. VicHealth, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racism: A Summary* (14 November 2012). See also VicHealth et al, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (November 2009).  
15. Angeline Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (Lowitja Institute, 2012).  
16. Joint Standing Committee on Migration, Parliament of Australia, *Report on the Inquiry into Migration and Multiculturalism in Australia* (2013).  
17. V Bailey et al, *Mission Australia’s 2016 Youth Survey Report* (Mission Australia, 2016) 65.

18. Centre for Multicultural Youth, Submission No 80 to Joint Standing Committee on Migration, *Inquiry into Settlement Outcomes* (January 2017).  
19. Fethi Mansouri et al, *The Impact of Racism on the Health and Wellbeing of Young Australians* (The Institute for Citizenship and Globalisation, Deakin University, 2009).  
20. Multicultural Youth Advocacy Network (Australia) and Refugee Council of Australia, *Speaking Up: The Global Refugee Youth Consultations in Australia Report* (2016); Centre for Multicultural Youth, *Fair and Accurate? Migrant and Refugee Young People, Crime and the Media* (2014); Mansouri, Jenkins and Leach (2009) cited in Fethi Mansouri et al, *The Impact of Racism on the Health and Wellbeing of Young Australians* (The Institute for Citizenship and Globalisation, Deakin University, 2009), *Youth Identity: Culture, Values and Social Connectedness* (Common Ground Publishing, 2009) 105-11.

of speech to identify and condemn racially hateful and discriminatory speech.<sup>21</sup>

The PJCHR's report also highlighted the 'critical role that education can play in tackling racism; properly understanding legal mechanisms and rights; and to reassure people about the limits to what is seen by some as unjustifiable encroachments on freedom of speech.'<sup>22</sup> While the Australian Human Rights Commission runs an important anti-racism education and public awareness program – 'Racism. It Stops with Me' – much more needs to be done. The PJCHR recommended that anti-racism education programs be supported and strengthened.<sup>23</sup>

Australia should work with Aboriginal and Torres Strait Islander and refugee and migrant communities to support, strengthen and develop anti-racism education programs.

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21. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth) (2017)*, recommendation 2.

22. Ibid 43, [2.110].

23. Ibid, [2.137].



# Inadequate legal protections against racial discrimination

## 6.1 Legislative framework for human rights

### ARTICLES 1 & 2

Australia remains the only Western democracy without comprehensive legislative protection for human rights. Australia does not have a bill of rights enshrined in its Constitution, nor a federal Human Rights Act. Many basic rights remain unprotected and others are haphazardly covered by an assortment of laws, including anti-discrimination laws. For many marginalised groups in Australia, human rights protection is inadequate.

In 2009, a national consultation revealed that 87 per cent of the 35,000 submissions received supported the introduction of a federal Human Rights Act, which was then recommended by the Committee conducting the review.<sup>24</sup> However, the recommendation was not taken up by the Australian Government. Since 2009, there has been no further attempt to implement a national Human Rights Act.<sup>25</sup>

Instead of enacting a Human Rights Act, the Australian Government adopted the “Australian Human Rights Framework” in April 2010.<sup>26</sup> Since then, many of the key elements of the Framework have been terminated or suspended. For example, the Australian Government has cut funding to the Human Rights Education Grants Scheme, backed away from its commitment to simplify and strengthen federal anti-discrimination laws, and implementation of Australia’s National Action Plan on Human Rights has stalled.

It should be noted that two Australian jurisdictions have human rights laws - Victoria and the Australian Capital

Territory.<sup>27</sup> These laws have strengthened the human rights culture in both jurisdictions and can provide access to remedies in certain circumstances to people whose human rights have been violated.<sup>28</sup>

### Federal human rights scrutiny

Despite ongoing lack of federal human rights protections, parliamentary scrutiny of human rights has been strengthened as part of the Australian Human Rights Framework. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) came into operation in 2012 and requires:

- each new bill introduced into federal parliament to be accompanied by a Statement of Compatibility with Australia’s international human rights obligations; and
- the establishment of the Parliamentary Joint Committee on Human Rights (**PJCHR**), to provide greater scrutiny of legislation for compliance with the seven core international human rights treaties to which Australia is a party.

The PJCHR should be commended for its generally robust review of the human rights compatibility of proposed legislation. However, the PJCHR has had limited effectiveness and influence and its recommendations are unenforceable and are often ignored. Many Ministerial responses to the

24. See *National Human Rights Consultation Report* (September 2009) 264, recommendation 18.

25. 25 The then Labor Government opted to introduce ‘Australia’s Human Rights Framework’ instead of a charter of right. The Framework does not contain enforceable protection for human rights. It requires that new legislative Bills introduced into Federal Parliament are accompanied by a ‘Statement of Compatibility’ with human rights.

26. See *National Human Rights Consultation Report* (September 2009) 264.

27. *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT). In October 2016, the Queensland Government committed to introduce a Human Rights Act in Queensland, modelled on the Victorian Charter. The legislation has not yet been passed.

28. Whilst the legislation does not create a right to an award of damages, it can create an additional cause of action in proceedings brought before the court on a different ground.

PJCHR's recommendations have essentially disagreed with the PJCHR's views, and some repudiated outright the PJCHR's warnings, even, for example, on bills that gave the Minister extraordinary powers to revoke citizenship and authorise the use of force against detained asylum seekers.<sup>29</sup> In addition, the PJCHR's reports are too often delayed by waiting for government responses, sometimes until after a bill has passed.<sup>30</sup>

The PJCHR cannot conduct inquiries into broader human rights issues without a reference from the Attorney-General. Since the Attorney-General is a Government Minister, this power is unlikely to be exercised in politically controversial matters. By contrast, the equivalent parliamentary committee in the United Kingdom can and does conduct own-motion inquiries.

In relation to Statements of Compatibility, the human rights analysis prepared by the Australian Government is often very poor. Many Statements of Compatibility, even those which acknowledge limitations on fundamental rights, including anti-discrimination, fail to deal with the relevant international jurisprudence.<sup>31</sup> Others engage with the jurisprudence, but implicitly confirm that it has little effect on Australian Government policy.<sup>32</sup>

Australia should strengthen federal legislative protection of human rights by:

- introducing a comprehensive, judicially enforceable federal Human Rights Act to ensure consistent human rights protection for all Australians;
- improving the quality of Statements of Compatibility and responses to the findings of the PJCHR;
- amending section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to allow the PJCHR to conduct own-motion inquiries into human rights issues.

## 6.2 Shortcomings in anti-discrimination laws

ARTICLES 1, 2 & 5

### Absence of entrenched Constitutional protection against racial discrimination

The Australian Constitution does not currently enshrine the right to equality. While section 51(xxvi) of the Constitution allows for the passing of laws consistent with special measures as defined by CERD, it also expressly permits governments to pass laws that *adversely discriminate* against people on the basis of race.<sup>33</sup> A right to equality and non-discrimination, including special measures, that is consistent with Australia's human rights obligations, is therefore required.

Australia should ensure that a right to non-discrimination and equality is introduced into the Australian Constitution.

### Gaps in anti-discrimination laws

Australia's legislative anti-discrimination framework falls well short of comprehensive protection against discrimination and fails to ensure substantive equality for all Australians.<sup>34</sup>

#### *The federal Racial Discrimination Act 1975*

At the federal level, the *Racial Discrimination Act 1975* (RDA) makes both direct and indirect discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.<sup>35</sup> However, the RDA has a number of significant limitations.

- As an ordinary statute (rather than Constitutional protection), the RDA cannot prevent the passage of racially discriminatory federal legislation, and can be suspended.<sup>36</sup> The RDA has been suspended on four

29. See, for example, the responses of the Minister for Immigration and Citizenship in relation to the *Australian Citizenship and Other Legislation Amendment Bill 2014* (Cth) and the *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (Cth) in Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Twenty-Fourth Report of the 44th Parliament* (2015).

30. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013-2014* (2016) 17.

31. See, for example Statements of Compatibility in Explanatory Memorandum, Law Enforcement

Integrity Legislation Amendment Bill 2012 (Cth) 4 and Explanatory Memorandum, Social Services Legislation Amendment (Welfare Reform) Bill 2017.

32. See for example Statement of Compatibility in Explanatory Memorandum, *Migration Amendment Bill 2013* (Cth) attachment A.

33. *Kartinyeri v Commonwealth* [1998] HCA 22.

34. See UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. No. CCPR/C/AUS/CO/5 (7 May 2009) [12].

35. These protections were introduced in response to the recommendations of three major national inquiries: Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into*

*Racist Violence in Australia* (Australian Government, 1991) 298-9); Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) [7.47]; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recommendation 213.

36. Examples of racially discriminatory laws that have been passed by the Federal Government include the *Native Title Amendment Act 1998* (Cth) and the *Northern Territory National Emergency Response Act 2007* (Cth), where the Federal Government suspended the operation of the RDA.

occasions – each time in relation to issues impacting on Aboriginal and Torres Strait Islander people.

- The RDA does not criminalise racial vilification (see section 9.3(a)).
- Enforcement of the RDA is largely through a complaints-based system, in which complainants bear the onus of proof and the risk of costs orders if they commence court proceedings. Many complainants settle their cases confidentially because of the costs risks, which results in a lack of dialogue about racial discrimination.
- The time limit for making complaints to the Australian Human Rights Commission was recently reduced from 12 months to 6 months for no apparent reason. The shortened time limit creates an additional barrier to accessing remedies for racial discrimination or vilification.
- The RDA does not require the Australian Government to take positive steps towards equality in the provision of public services. In this regard, it fails to address systemic discrimination.

Further, the current federal system relies on separate laws to protect against discrimination on the basis of race, age, sex and disability discrimination.<sup>37</sup> This separation of laws results in inadequate protection against intersectional discrimination. Despite previous federal government steps to consolidate federal anti-discrimination legislation, this reform agenda was abandoned in 2013.

#### *Inconsistencies across state and territory laws*

Federal, state and territory governments each have power to pass anti-discrimination laws and each state and territory has its own equal opportunity or anti-discrimination law. However, protections are not consistent and different tests apply depending on the type of discrimination experienced by an individual and the jurisdiction in which it takes place. For example, there is inconsistent protection around Australia against racial vilification (see section 9.1).

There is also inconsistent protection against discrimination on the basis of an irrelevant criminal record, which disproportionately impacts Aboriginal and Torres Strait Islander people, who are over-policed and over-incarcerated (see section 14.1). Tasmania and the Northern Territory

have legislated protection,<sup>38</sup> while Western Australia and the Australian Capital Territory have protection against discrimination on the basis of spent conviction only.<sup>39</sup> Other jurisdictions do not have any protection and federal laws provides limited protection in the context of employment only.<sup>40</sup>

#### Australia should:

- ensure that all Australians are afforded the same protection from discrimination, including on the basis of an irrelevant criminal record;
- consolidate federal anti-discrimination laws to ensure that they provide consistent and effective remedies for discrimination, including intersectional discrimination; and
- reinstate the 12-month time limit to lodge a complaint of discrimination and create a no cost jurisdiction for discrimination complaints.

## 6.3 Discrimination in proposed changes to citizenship laws

#### ARTICLES 1, 2 & 5

The act of acquiring Australian citizenship is a crucial step in the transition for migrants as they develop a sense of belonging in their new community. The opportunity to obtain Australian citizenship is vital to achieving the best possible settlement outcomes.<sup>41</sup>

The *Australian Citizenship Act 2007* (Cth) contains the legislative process for migrants seeking to become citizens. On 20 April 2017, the Australian Government announced a commitment to toughen the requirements for becoming an Australian citizen. The changes were introduced into Parliament on 15 June 2017 through the *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Citizenship Bill)*.<sup>42</sup>

37. The *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). Each of these laws has a different definition of discrimination and different exemptions to the prohibition on discrimination.

38. See *Anti-Discrimination Act 1998* (Tas), s 22; *Anti-Discrimination Act* (NT), s 28.

39. *Spent Convictions Act 1988* (WA); *Discrimination Act 1991* (ACT).

40. The *Australian Human Rights Commission Act 1986* (Cth) protects against irrelevant criminal record discrimination in employment, but not in other areas such as education, housing, membership or a club and Government programs.

41. McKinsey Global Institute (2016) *People on the Move: Global migration's impact and opportunity*, p83.

42. *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017* (Cth).

The changes introduced in the Citizenship Bill included:

- requiring applicants to demonstrate “competent” English;<sup>43</sup>
- increasing the wait time for citizenship by lengthening residence requirements;<sup>44</sup>
- requiring applicants to demonstrate their adherence to “Australian values”;<sup>45</sup>
- measuring an applicant’s level of “integration” as a prerequisite to being granted citizenship;<sup>46</sup> and
- widening ministerial discretion.

The Australian Government justified these measures by reference to a changing global climate, which intensifies Australia’s need to maintain control over its borders and ensure national security.<sup>47</sup> However, consideration must be given to the potential of such measures to amount to discrimination against certain cohorts of migrants, both because of their race and/or nationality and also the circumstances leading to their arrival in Australia. The CERD Committee’s General Recommendation 30 notes that ‘denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention’s anti-discrimination principles.’<sup>48</sup>

The proposed retrospective application of this legislation to all those who had applied for Australian citizenship after 20 April 2017 further increased the unpredictability, uncertainty and opacity of the proposed changes.

After a parliamentary inquiry process in which the overwhelming evidence was that the proposed changes would be discriminatory and detrimental to social cohesion and harmony, the government failed to gain the requisite approval in the Senate, and, facing certain defeat of the amendment, allowed the bill to be removed from the Senate register on October 18. This was considered a victory for many NGOs advocating on behalf of migrants and refugees. However, the government has foreshadowed that it will continue to pursue changes to citizenship requirements, indicating it will reintroduce the bill and aim to have the new requirements come into effect on 1 July 2018. The most concerning proposals of the defeated Citizenship Bill are set out below and are likely to appear in future citizenship changes.

## English language requirement

Demanding higher levels of English to qualify for citizenship will prevent many deserving permanent residents from becoming Australian citizens. Whilst developing English language capacity is an important part of settlement, language learning is a lifetime journey. Throughout Australia’s history, extraordinary contributions have been made by those who may not have achieved a high level of English language proficiency. The requirement of a high level of English language proficiency for citizenship, separately tested, is discriminatory and exclusionary. The government has indicated that it will slightly lower the English language requirement in future legislation. However, even a revised testing level would unfairly target some of the most vulnerable arrivals in Australia, including migrants of refugee backgrounds, women and older people.

It is particularly likely to impact humanitarian entrants from various nationalities but especially North Africa and the Middle East, who are the most likely to not speak English upon arrival. For many, achieving a high level of English is impossible, effectively denying them citizenship no matter how much they contribute to Australian life or how long they live here.<sup>49</sup>

## Waiting periods through residence requirements

Requiring applicants for citizenship to demonstrate four years of continuous permanent residence in Australia,<sup>50</sup> for the purposes of ‘greater examination’ of their ‘integration with Australia’ would have a detrimental effect on social cohesion and undermine the capacity of migrants to integrate into Australian society. The tradition of Australia’s immigration system is that Australian permanent residents should be encouraged to seek citizenship as soon as possible to foster a sense of inclusion and encourage integration.

Citizenship is not only an offer of welcome by a host nation; it is also an expression of commitment by an arriving migrant and a compact between the two. The ability to participate fully in Australian life is dependent upon immigration status. The right to vote; ease of travel; the right to serve your country in jobs reserved for citizens; and access to improved opportunities for education are

43. Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth), items 41 and 53. “Competent” is not defined in the Bill, however it is understood from various media statements, and statements made by the Department before Senate Estimates, that the intention is to adopt the measure of “competent” used by the International English Language Testing System (IELTS), which represents a test result of level 6 on each of the four components (reading, writing, listening and speaking).

44. Ibid, items 54 and 56.

45. Ibid, item 42, noting that “Australian Values” are not defined in the legislation and discussion of values to date has focused largely on universal values such as democracy, rule of law, gender equality and freedom of speech.

46. Ibid, items 43 and 53, again noting “integration” is a term not defined in the bill and is therefore subject to legislative instrument.

47. Stephen Dziedzic and Henry Belot, ‘Australian Citizenship Law Changes Mean Migrants Will Face Tougher Tests’, (ABC News, 20 April 2017) <http://www.abc.net.au/news/2017-04-20/migrants-to-face-tougher-tests-for-australian-citizenship/8456392>.

48. The Committee on the Elimination of Racial Discrimination, *General Comment No 30: Discrimination against non-citizens*, 64th sess, UN Doc CERD/C/64/Misc.11/rev/3 (23 February – 12 March 2004).

49. Refugee Council of Australia, Submission to Department of Immigration and Border Protection, *Strengthening the test for Australian Citizenship* (Discussion Paper, 20 April 2017) 5.

50. Compared with 12 months’ permanent residence (and four years’ total residence) currently required by law.

important facets of integration. These would be delayed by an extended waiting period.

### Widening ministerial discretion

There is significant concern about the expansion of executive powers on matters relating to citizenship. The politicisation of immigration decision-making in individual cases threatens the fundamentals of Australia's immigration system which has a long-standing reputation for being impartial, fair and transparent. The following changes are particularly troubling:

- the capacity of the Minister to set aside decisions of a quasi-judicial body, the Administrative Appeals Tribunal, in certain cases;<sup>51</sup>
- the capacity of the Minister to deny a person eligibility to sit the citizenship test based on previous failures;<sup>52</sup> and
- the capacity of the Minister to cancel approval of Australian citizenship before a person makes the pledge of allegiance or delay a person making the pledge of allegiance with no clear criteria or right to appeal.<sup>53</sup>

Compounding the above concerns are reports that processing of certain citizenship applications, particularly for those by applicants of a refugee background, have been significantly stalled, with some applicants facing indefinite waits.<sup>54</sup> There is no justification for halting processing of citizenship applications, and particularly not on the basis of the mode of arrival of an applicant.

#### Australia should:

- resume timely processing of all citizenship applications under existing legislation, without discrimination based on country of origin or mode of arrival of the applicant; and
- refrain from introducing further legislation which would be discriminatory, deprive migrants and refugees of certainty and security or compromise the impartiality of decision-making on matters relating to citizenship by expanding ministerial discretion.

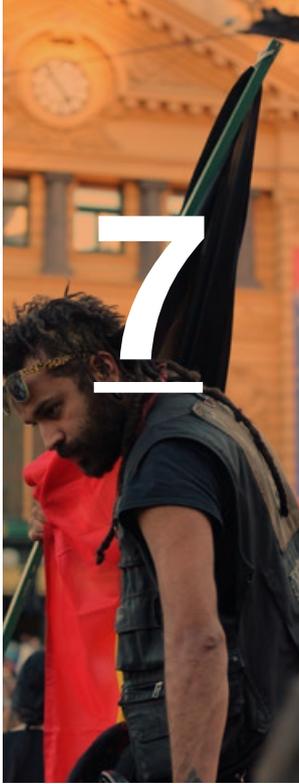
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51. *Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017* (Cth), item 127.

52. *Ibid.*, item 82.

53. *Ibid.*, items 111 and 113.

54. See Refugee Council of Australia, 'Delays Continue for Refugees Awaiting Citizenship', (Briefing Paper, undated) <http://www.refugeecouncil.org.au/wp-content/uploads/2017/04/Citizenship-Brief-2017.pdf>



# Recognition of, and political participation by, Aboriginal and Torres Strait Islander peoples

## 7.1 Constitutional recognition of Aboriginal and Torres Strait Islander peoples

ARTICLES 1, 2, 3, 5 & 7

The Australian Government has been gradually working towards the reform of the Constitution to recognise the distinct experiences and interests of Aboriginal and Torres Strait Islander peoples. The Constitution, Australia's founding document, does not currently recognise the distinct identity and existence of Aboriginal and Torres Strait Islander peoples.

Constitutional change requires a national referendum. While some steps have been taken,<sup>55</sup> no model for constitutional change has been finalised nor the timeframe for a referendum announced.

In a process designed and led by Aboriginal and Torres Strait Islander people, twelve First Nations Regional Dialogues were held in locations around Australia in 2016-17. These were followed by a National Convention at Uluru in May 2017, where delegates from the regional dialogues agreed to and released the Uluru Statement from the Heart (**Uluru Statement**).<sup>56</sup> The Uluru Statement:

- declares that Aboriginal and Torres Strait Islander peoples were at all times and remain sovereign;
- calls for recognition of Aboriginal and Torres Strait Islander peoples in a constitutionally-enshrined voice to Parliament; and

- seeks the establishment of a Makaratta (Treaty) Commission, separate to the referendum process, to supervise a process of truth-telling and agreement-making between governments and First Nations that addresses the inherent power disparity and entrenched disadvantage of Aboriginal and Torres Strait Islander peoples.

The Referendum Council, a government-appointed body tasked with advising the Prime Minister and the Leader of the Opposition on progress and next steps towards Constitutional reform, then recommended that the Government hold a referendum to establish an Aboriginal and Torres Strait Islander voice in Federal Parliament.<sup>57</sup> On 26 October 2017, the Australian Government rejected the Referendum Council's recommendation for a constitutionally-enshrined voice to Parliament.

**Australia should take concrete steps to implement the final report of the Referendum Council, which recommends that the Australian Government:**

- hold a constitutional referendum to include an elected Aboriginal and Torres Strait Islander body, to provide a direct voice to Parliament on matters significantly impacting Aboriginal and Torres Strait Islander peoples;

55. For example, a Referendum Council has been appointed; recommendations have been made by an independent Expert Panel and the Joint Select Committee on Constitutional Recognition; the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*

(Cth) was passed; and funding was been provided to Reconciliation Australia for the *Recognise* campaign to build community support.

56. See Referendum Council, 'Uluru Statement from the Heart', (Statement, 26 May 2017) [https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF).

57. Referendum Council, Final Report of the Referendum Council (30 June 2017) <https://www.referendumcouncil.org.au/final-report>.

- develop an extra-constitutional statement of recognition for Aboriginal and Torres Strait Islander peoples;
- undertake further consultations with the Aboriginal and Torres Strait Islander communities on the structure and function of the representative body, with consultations led by Aboriginal and Torres Strait Islander people and organisations; and
- develop and adopt an apt legal framework for the promotion and protection of fundamental human rights of Aboriginal and Torres Strait Islander peoples, including complete prohibition of racial discrimination against Aboriginal and Torres Strait Islander peoples through legislation and administrative action.

## 7.2 Treaty processes

### ARTICLE 5

Governments in Victoria, South Australia and the Northern Territory have begun treaty discussions with Aboriginal and Torres Strait Islander peoples in their jurisdictions. However, to date, the Australian Government has declined to participate in treaty negotiations.

As demonstrated by the Uluru Statement (above), Aboriginal and Torres Strait Islander peoples are united in calling for the establishment of a Makaratta (Treaty) Commission, ‘to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.’<sup>58</sup> The Australian Government has not given a formal response to this request.

Australia should take concrete steps to establish a Makaratta Commission that incorporates and facilitates a process for truth telling, as recommended by the Referendum Council and the Uluru Statement.

## 7.3 National Congress of Australia’s First Peoples

### ARTICLE 5

The establishment of an effective national representative body has been a priority for Aboriginal and Torres Strait Islander peoples for over 50 years and is essential to coordinating and unifying the disparate First Peoples’ voices throughout Australia.

In 2010, the National Congress of Australia’s First People (**Congress**) was established as a national representative body for Aboriginal and Torres Strait Islander peoples. It now has over 180 member organisations and around 9,000 individual members who elect a board of directors and co-chairs who serve as Congress’ democratically elected representatives. The work of Congress is hampered however, by insufficient support and resourcing by the Australian Government.<sup>59</sup> The Government has not made any allocations to Congress in its annual budgets since 2013. Inadequate funding and infrastructure, which are required to attain sustainability and independence, compromise the capacity of Congress to facilitate engagement between the Australian Government and Aboriginal and Torres Strait Islander communities.

Australia should provide ongoing and sufficient funding and support for the National Congress of Australia’s First Peoples in a way that acknowledges and respects decision-making by Aboriginal and Torres Strait Islander peoples, consistent with the United Nations *Declaration on the Rights of Indigenous Peoples*.

## 7.4 UN Declaration on the Rights of Indigenous Peoples

### ARTICLE 7

This year marks the ten-year anniversary of the United Nations *Declaration on the Rights of Indigenous Peoples (UN DRIP)*, which is supported by Australia. UN DRIP is underpinned by principles of equality, self-determination,

58. See Referendum Council, ‘Uluru Statement from the Heart’, (Statement, 26 May 2017) [https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF).

59. National Congress of Australia’s First Peoples, ‘Australia’s Second Universal Periodic Review’ (Submission, 2015) <http://nationalcongress.com.au/wp-content/uploads/2015/09/UPR-Australia-Congress-Shadow-Report-and-Factsheets-Final.pdf>.

participation and respect for cultural rights.<sup>60</sup> It is therefore an important vehicle to reduce systemic discrimination against Aboriginal and Torres Strait Islander peoples.

For the last quarter of a century, numerous reports have been delivered to Governments that repeatedly emphasise the importance of Aboriginal and Torres Strait Islander people having a genuine say in decisions and policies that affect their lives. However, as noted by the Special Rapporteur on the rights of Indigenous peoples in 2017, 'the failure to respect the right to self-determination and to full and effective participation is alarming.'<sup>61</sup>

Consistent with UN DRIP, it is essential the Australian Government acknowledge and respect Aboriginal and Torres Strait Islander individual, family and community strengths and capacity to make decisions and deliver culturally safe and effective services. The Australian Government should provide strong support to, and work closely with, representatives chosen by Aboriginal and Torres Strait Islander peoples, to ensure that Government policies and programs are effective and accord with the wishes of Aboriginal and Torres Strait Islander peoples.

Further, to promote the participation of Aboriginal and Torres Strait Islander women in decision-making, an annual 'National Gathering' should be established for Aboriginal and Torres Strait Islander women to come together to share knowledge, promote leadership, build networks and relationships, and identify priority issues for change. Aboriginal and Torres Strait Islander women bear the disproportionate impacts of socio-economic disadvantage, family violence and the removal of children, and remain the most legally disadvantaged group in Australia. In order to make serious inroads into these issues, Aboriginal and Torres Strait Islander women's voices and lived experiences must be front and centre of the political and policy discussions.

In 2014, the UN General Assembly adopted an outcome document from the World Conference on Indigenous Peoples, which included a commitment, 'to cooperate with indigenous peoples...to develop and implement national action plans, strategies, or other measures...to achieve the ends of the [UN DRIP].'<sup>62</sup>

Australia should develop a national action plan to implement, raise awareness about and achieve the imperatives of the UN Declaration on the Rights of Indigenous Peoples. The plan should promote self-determination and outline consultation protocols and strategies for increasing Aboriginal and Torres Strait Islander people's participation in all institutions of democratic governance. Specific strategies should promote Aboriginal and Torres Strait Islander women's participation, including an annual 'National Gathering'.

## 7.5 Redfern Statement

### ARTICLE 5

In 2016, a coalition of Aboriginal and Torres Strait Islander peak organisations, led by the National Congress of Australia's First Peoples, launched the 'Redfern Statement' – a blueprint to address the disadvantage and inequality faced by Aboriginal and Torres Strait Islander people.<sup>63</sup>

The statement highlights the importance of community-led solutions and self-determination in addressing health, disability, housing, justice and family violence. The statement calls for meaningful engagement by government, industry and the non-government sectors with Aboriginal and Torres Strait Islander people, communities and organisations. The United Nations Special Rapporteur on the rights of Indigenous peoples has urged the Australian Government to utilise the Redfern Statement 'to reset the relationship with the First Nations of Australia...[to] construct a new joint pathway to the future.'<sup>64</sup>

Australia should work in close collaboration with the National Congress of Australia's First Peoples and Aboriginal and Torres Strait Islander organisations to implement the recommendations of the Redfern Statement.

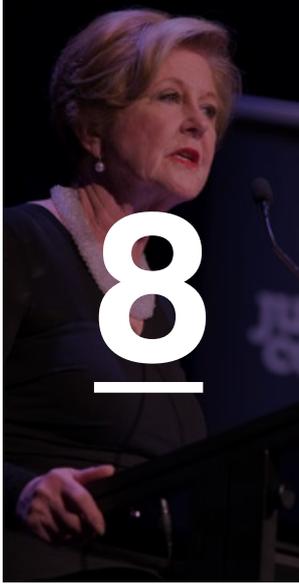
60. *United National Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

61. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 36.

62. *Outcome document of the World Conference on Indigenous Peoples*, GA Res 69/2, UN GAOR, 69th sess, UN Doc A/RES/69/2 (15 September 2014, adopted 25 September 2014).

63. *Redfern Statement* (9 June 2016), National Congress of Australia's First Peoples <[http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-\\_Final.pdf](http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf)>.

64. Victoria Tauli-Corpuz, United Nations Office of the High Commission, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz of her Visit to Australia* (3 April 2017) 15.



# Attacks on the Australian Human Rights Commission

## 8.1 Powers and functions

### ARTICLES 1, 2 & 6

Since the CERD Committee's last Concluding Observations on Australia, a full-time Race Discrimination Commissioner was appointed in 2011. Dr Tim Soutphommasane holds the role.

Australia's National Human Rights Institution is the Australian Human Rights Commission (AHRC). The AHRC is established by legislation to promote and protect human rights in Australia, as defined under UN human rights treaties.<sup>65</sup>

The AHRC is an independent national human rights institution in accordance with the Paris Principles.<sup>66</sup> However, the mandate and powers of the AHRC are limited and there is no requirement for the Australian Government to implement, or even respond to, the Commission's recommendations.

## 8.2 Attacks on AHRC

### ARTICLES 2 & 6

There have been unprecedented political attacks, including by members of the Australian Government, on the AHRC's independence and functioning. These arose in 2014 in the context of a report critical about the Government's treatment of children in immigration detention, and in 2016, in the context of racial vilification complaints against prominent media personalities (see section 9.1). These attacks corresponded with a substantial reduction in funding,<sup>67</sup> and attempts to procure the resignation of former AHRC President, Professor Gillian Triggs.<sup>68</sup>

The attacks occurred despite Australia's sponsorship of Human Rights Council resolution 27/18, which states that national human rights institutions should not face any form of reprisal or intimidation.<sup>69</sup> Whilst targeted attacks against the President have subsided, attacks of this nature, coupled with funding cuts, undermine a vital institution that provides an important check on government power.<sup>70</sup>

**Australia should restore the funding to the AHRC that was cut in 2014-15, ensure ongoing adequate funding, and refrain from political attacks on the AHRC.**

65. The legislation which establishes the AHRC is the *Australian Human Rights Commission Act 1986* (Cth).

66. *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134, UN Doc A/RES/48/134 (20 December 1993) annex (*Principles relating to the Status of National Institutions (The Paris Principles)*).

67. In May 2014, the Government announced funding cuts of \$1.7million over four years. In December 2014, further cuts of around 30 per cent over three years were announced. See Australian Government, *Mid-Year Economic and Fiscal Outlook* (2014) appendix A; see also, Human Rights Law Centre, 'Slashing

Funding for Human Rights Watchdog is Dangerous for Human Rights and Democracy' (Media Release, 15 December 2014).

68. *Senate Estimates – Legal and Constitutional Affairs Legislation Committee*, Senate, 24 February 2015, 31 (Chris Moraitis); International Service for Human Rights, 'Australia: UN should act to end reprisals against Australian Human Rights Commission' (Media Release, 16 February 2015).

69. UN Human Rights Council, *Follow-up to and implementation of the Vienna Declaration and Programme of Action*, UN Doc A/HRC/27/L.25 (23 September 2014). See in particular paragraph 9, which states that

'national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitation, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systemic violations in their countries.'

70. Human Rights Law Centre, *Safeguarding Democracy* (Report, 2016) 32.



# Racial vilification and hate speech

## 9.1 Attacks against federal racial vilification laws

### ARTICLES 1, 2 & 4

As set out in section 5 of this report, experiences of racial discrimination and vilification in Australia have increased and are causing immeasurable harm. The law plays a critical role in addressing the harm caused by racial discrimination and vilification and in promoting a culture of inclusion, tolerance and non-discrimination.

Whilst anti-vilification laws exist in most Australian jurisdictions, the type of vilification covered by the legislation varies between jurisdictions.<sup>71</sup> The majority of Australian jurisdictions prohibit racial vilification, however vilification on religious grounds is only unlawful in three states (Victoria, Queensland and Tasmania).

Federal racial vilification protections are set out in section 18C of the *Racial Discrimination Act 1975 (RDA)*. Section 18D provides a number of broad free speech exemptions to the application of section 18C.<sup>72</sup>

The UN Special Rapporteur on racism has noted that section 18C:

...sets the tone for an open, inclusive and multicultural Australia, which respects and values the diversity of its peoples and protects indigenous persons and migrants against bigots and extremists, who have become more vocal in the country and other parts of the world.<sup>73</sup>

The interpretation of the law by Australian courts has struck an appropriate balance between the right to freedom of

expression and the right to freedom from racial discrimination and vilification.<sup>74</sup> However, these laws have come under attack from some politicians and prominent members of the media after attempts by Aboriginal and Torres Strait Islander people to exercise their right to seek a remedy.

In 2014, the Australian Government attempted to water down the laws following an adverse court finding against a popular conservative columnist.<sup>75</sup> The reforms failed due to strong community support for retaining section 18C.<sup>76</sup>

In November 2016, the Attorney-General asked the Parliamentary Joint Committee on Human Rights (**PJCHR**) to conduct an inquiry into freedom of speech and sections 18C and 18D, and to consider whether the laws should be repealed or amended.<sup>77</sup> This followed extensive negative media coverage and statements by some politicians in relation to two discrete allegations of racial vilification.<sup>78</sup> Much of the public debate was based on a misunderstanding of the law and was distressing for minority communities.<sup>79</sup>

The PJCHR's report noted a number of options, but stopped short of recommending any specific reform of sections 18C and 18D.<sup>80</sup> Despite this, a bill was introduced into Parliament in March 2017 to weaken Australia's racial vilification laws. A rapid Senate inquiry failed to hear from any Aboriginal or Torres Strait Islander representatives.<sup>81</sup> The bill ultimately failed to pass in the Senate.

Criticisms of sections 18C and 18D were linked with the Australian Human Rights Commission's (**AHRC**) complaints process and procedural changes were made, including a reduction in the time limit for making complaints of discrimination or vilification to the AHRC.

71. *Racial Discrimination Act 1975* (Cth) pt 2A (racial hatred); *Anti-Discrimination Act 1977* (NSW) pt 2, div 3A (racial vilification), pt 3A, div 5 (transgender vilification), pt 4C, div 4 (vilification based on sexual preference), pt 4F (vilification based on HIV/AIDS status); *Racial and Religious Tolerance Act 2001* (Vic) (racial and religious vilification); *Anti-Discrimination Act 1991* (Qld) s 124A (racial and religious vilification); *Anti-Discrimination Act 1998* (Tas) s 19 (inciting hatred on the grounds of race, disability, sexual orientation, lawful sexual activity, religious belief or activity); *Discrimination Act 1991* (ACT) pt 6 (racial vilification); and *Racial Vilification Act 1996* (SA) s 4 (racial vilification).

72. Section 18D provides for exemptions to the application of 18C for conduct done 'reasonably and in good faith' for a genuine academic, artistic, scientific or public interest purpose, as well as any fair and accurate reporting or commenting on an act or statement done for one of these purposes.

73. Mutuma Ruteere, UN Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and related Intolerance on his Mission to Australia*, UN Doc A/HRC/35/41/Add.2 (9 June 2017) 64.

74. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (French CJ) [62]. Groups that experience racial vilification are often unable to participate in the public debate on an equal

footing with others. Racial vilification can have the perverse impact of silencing affected people: Angeline Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (2012, Lowitja Institute) 24.

75. *Eatock v Bolt* (2011) 197 FCR 261.

76. Human Rights Law Centre, Submission No 136 to Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia Inquiry*, 23 December 2016, 17.

77. The Terms of Reference for the inquiry into freedom of speech in Australia can be found here: Parliamentary Joint Committee on Human Rights,

# CASE STUDY

## Online race hate and the death of Elijah Doughty

Online hate speech is inextricably linked with the tragic death of a teenage Aboriginal boy, Elijah Doughty, in a small town in remote Western Australia.<sup>87</sup> Elijah was struck and killed by a driver, who was pursuing him in the belief that he had stolen a motorcycle. In the days and weeks leading up to Elijah's death, Kalgoorlie Facebook community pages contained remarks such as 'How many human bodies would it take to fill the mineshafts around Kalgoorlie? A: We're one theft closer to finding out!' Another comment read 'everyone talks about hunting down these sub human mutts, but no one ever does.'<sup>88</sup> When news of Elijah's death broke, a comment read 'Good job you thieving bastard... About time someone took it into their own hands hope it happens again.' The vitriolic online hate speech divided the town and caused enormous distress and pain to the Aboriginal community.

**Australia should maintain sections 18C and 18D of the Racial Discrimination Act and refrain from further attempts to remove or diminish these protections for political reasons.**

## 9.2 Combatting online hate speech

### ARTICLES 1, 2 & 7

Cyber-racism is a concerning issue in Australia and globally. There is significant potential for material published on the internet to promote racial hatred. A survey on cyber racism in Australia revealed that more than a third of the 2,000 participants had witnessed racist content online and around 5 per cent reported that they had been targets of racist content online.<sup>82</sup> The research also found that

the targets of online racism are 'deeply affected by their exposure to it.'<sup>83</sup> Harmful effects include medical and psychological harm, as well as feelings of lack of self-worth.<sup>84</sup>

A 2017 analysis reveals a 'gap in the capacity of current regulatory mechanisms to provide a prompt, efficient and enforceable system for responding to harmful online content of a racial nature.'<sup>85</sup> Much less has been done to fully analyse, understand and combat online racism than offline racism.<sup>86</sup> However, the escalating prevalence of online racism, the harm it causes and the difficulty policing the digital environment necessitates the Australian Government taking immediate and effective steps to address it. In a positive development, the Office of the eSafety Commissioner was established in order to provide online safety education for Australian children and young people, a complaints service in relation to serious cyberbullying and addressing illegal online content.

**Australia should work with Aboriginal and Torres Strait Islander and migrant communities to develop an effective plan to address online racial vilification.**

*Freedom of Speech in Australia: Terms of Reference* (28 February 2017) Parliament of Australia [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/FreedomspeechAustralia/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference).

78. The filing of complaints under section 18C of the RDA by three Aboriginal people against *The Australian* and Bill Leak in relation to a cartoon drawn by Leak and published by *The Australian* on 4 August 2016; and the decision of Judge Michael Jarrett of the Federal Circuit Court of Australia to dismiss an application by an Aboriginal woman alleging unlawful discrimination pursuant to section 18C against three students at Queensland University of Technology.

79. As the Australian Law Reform Commission noted in its 2016 report about traditional rights and freedoms,

'[t]hose with concerns about the potential scope of s 18C often place little emphasis on how the provision has been interpreted in practice by the courts'. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016) [4.189].

80. Different members of the Committee had different views, including to make no change to the laws, but ultimately no recommendation was made about which way to proceed. Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017).

81. Gabrielle Chan, '18C Changes: Aboriginal Legal Service was not Allowed to Offer Views' *The Guardian* (online) 25 March 2017 <https://www.theguardian.com/australia-news/2017/mar/25/racial-discrimination-act-18c-aboriginal-legal-service-insult-offend-humiliate-harass>.

82. Gail Mason and Natalie Czapski, 'Regulating Cyber-Racism' (2017) 41 *Melbourne University Law Review* 284, 284.

83. Prof A Jakubowicz, Submission 54 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Freedom of Speech in Australia*, 9 December 2016, 1.

84. *Ibid.*

# CASE STUDY

## Racially motivated violence against Kwementyaye Ryder

In 2009, Aboriginal man Kwementyaye Ryder was killed in a racist attack by five non-Indigenous men in Alice Springs.<sup>90</sup> After an evening of perpetrating racially motivated violence towards Aboriginal people camping just outside town, the five men assaulted Mr Ryder and repeatedly kicked him in the head as he was 'lying defenceless and incapable of posing any threat to any of the offenders.'<sup>91</sup> Chief Justice Martin stated that, 'it is difficult to avoid the conclusion that... the actions of some of the offenders in kicking and striking the deceased while he was on the ground were influenced, at least to a degree, by the fact the deceased was an Aboriginal person.'<sup>92</sup>

### 9.3 Hate crimes

#### ARTICLES 1, 2 & 5

In 1991, the National Inquiry into Racist Violence in Australia, found that 'racist violence is an endemic problem for Aboriginal and Torres Strait Islander people.'<sup>89</sup> This included violence by police and non-Aboriginal people in the community. Aboriginal and Torres Strait Islander people and people from refugee and migrant backgrounds continue to report experiencing racially motivated crimes.

Despite consistent recommendations from the CERD Committee to give full effect to article 4(a), Australia has maintained its reservation and has not criminalised serious acts of racial hatred, incitement to such acts and incitement to racial hatred at the federal level.

**Australia should remove its reservation to Article 4(a) and fully implement Article 4 into Australian law.**

#### Reservation to Article 4(a) CERD

##### ARTICLE 4

The approaches taken by federal, state and territory governments fail to implement Australia's obligation under Article 4(a) of CERD to specifically criminalise and create offences for acts of racial hatred. Treating hate crimes as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases.<sup>93</sup>

Sentencing legislation in New South Wales, Victoria and the Northern Territory enables a court to take into account whether the accused was motivated by hate or prejudice against a group of people when committing the crime.<sup>94</sup>

However, the laws do not stipulate any increase in penalty, which is entirely a matter of judicial discretion.

85. Gail Mason and Natalie Czapski, 'Regulating Cyber-Racism' (2017) 41 *Melbourne University Law Review* 284, 284.

86. *Ibid.*, 287.

87. See eg. James Purtill, 'Racism. Violent. Deleted: The Facebook Posts Dividing Kalgoorlie' ABC (online) 1 September 2016 <http://www.abc.net.au/triplej/programs/hack/the-facebook-posts-dividing-kalgoorlie/7805346>.

88. *Ibid.*

89. Australian Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence in Australia* (1991).

90. See Jano Gibson, 'Five Jailed for Racist Alice Springs Killing' *ABC News* (online) 23 April 2010 <http://www.abc.net.au/news/2010-04-23/five-jailed-for-racist-alice-springs-killing/408320?pfmredir=sm>.

91. Unreported, Supreme Court of the Northern Territory, Martin (Br) CJ, 23 April 2010.

92. See Jano Gibson, 'Five Jailed for Racist Alice Springs Killing' *ABC News* (online) 23 April 2010 <http://www.abc.net.au/news/2010-04-23/five-jailed-for-racist-alice-springs-killing/408320?pfmredir=sm>.

news/2010-04-23/five-jailed-for-racist-alice-springs-killing/408320?pfmredir=sm.

93. Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *University of New South Wales Law Journal* 868, 878.

94. If a court finds that a crime was racially or religiously motivated, this would be taken into account as an aggravating circumstance, and a harsher penalty should result: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Sentencing Act 1991* (NT) s 6A(e).



# Multicultural policy and access to services

## 10.1 Current state of multicultural policy

ARTICLES 2, 5 & 7

Australia has effectively managed cultural diversity with proactive and positive multicultural policies that have fostered social inclusion and embraced cultural, linguistic and faith diversity.

In March 2017, the Australian Government launched the updated Multicultural Policy Statement 'United, Strong, Successful'. This policy emphasises the rights and responsibilities of migrants and shared values of all Australians. However, there is also an emphasis on security measures and counter-terrorism that undermines the intent of the policy – to strengthen multiculturalism. References to terrorism in the Multicultural Policy Statement also risks confusion and potentially encourages negative sentiment towards Australia's highly successful migration program.

Measures such as the Adult Migrant English Program, the Multicultural Access & Equity Policy, and the Australian Multicultural Council are to be commended. The Australian Government's *Multicultural Access and Equity Policy: Respecting Diversity, Improving Responsiveness* acknowledges that government departments and agencies have an obligation to provide equitable access to services regardless of the cultural or linguistic background of clients.<sup>95</sup> However, there is further work to be done in ensuring that Australians from migrant or refugee backgrounds have equal and equitable access to services. In particular, access to culturally, racially and linguistically appropriate employment, healthcare, family violence, aged care and housing services.

Australia should remove references to terrorism in its Multicultural Policy Statement and strengthen the Statement through a greater focus on equal access to education, employment, healthcare, family violence, aged care services and housing.

## 10.2 Lack of specialist and community controlled services for minority communities

ARTICLES 2 & 5

The provision of specialist and community controlled services for ethnic, racial and cultural minority communities is key to ensuring equitable access and outcomes and preserving cultural and ethnic identities. However, these services are severely underfunded.

Individuals from minority groups must be afforded tailored access to care and supports that are appropriate to their health, social, cultural, spiritual and economic needs. Young people from refugee and migrant backgrounds require targeted and specialised approaches to support their full and equal participation.<sup>96</sup> Specialist services are also required for women, particularly for victims/survivors of family violence and sexual violence.

Australia should invest additional resources into community controlled services for ethnic and cultural minority communities to ensure that those communities receive specific and appropriate services.

95. See further, Department of Social Services, 'Multicultural Access and Equity Action Plan 2016-17' (Policy, 2016-17).

96. For a detailed overview of the current barriers and enabler for young people from refugee and migrant backgrounds, see Multicultural Youth Advocacy

Network, Submission number 392 to Australian Parliamentary Joint Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, April 2011. Available at <http://www.myan.org.au/resources-and-publications/145/>. See also David Mejia-Canales and William Leonard, 'Something

for them: meeting the support needs of same sex attracted, sex and gender diverse (SSASGD) young people who are recently arrived, refugees or asylum seekers (2016) La Trobe University.

## 10.3 Inequitable access to government services for minority communities

### ARTICLES 2 & 5

All Australians, regardless of cultural, linguistic, racial or religious background, should be able to access government services equitably. Challenges exist in areas such as settlement, social inclusion, economic participation, employment, education, English language training, health and housing. Discrimination remains an acute issue for many migrant and refugee communities.

### Language services

The provision of comprehensive language services, such as translators, interpreters and bilingual workers, is vital to ensuring full participation and equitable access to government services and programs for culturally and linguistically diverse (CALD) Australians. Because of challenges associated with language many CALD Australians are at risk of isolation.

### Complaints mechanisms

It is critical that complaints mechanisms are designed and maintained in a way that works for all Australians. Consumers generally have an opportunity to make complaints about the accessibility, equity and quality of government services. However, a person's ability to exercise their right to make a complaint is largely dependent on effective access to information and complaints mechanisms. People from minority communities have the potential to be disadvantaged in their knowledge and use of complaints mechanisms as a result of various factors, such as limited English language skills; lack of systems knowledge; different cultural norms; and different communication styles.

As Australia becomes increasingly diverse, the Australian Government must ensure that all public services and processes, including complaints mechanisms, are accessible and facilitate equitable outcomes.

**Australia should invest in and measure the effectiveness of the Access and Equity policy and ensure Government services are accessible and equitable for all Australians, regardless of English language proficiency or cultural background.**

## 10.4 English language education for children and young people

### ARTICLES 5 & 7

English language ability is one of the essential tools that supports participation and engagement in Australian society. While there are many examples of good practice in English language learning, there remain a number of gaps in and improvements to be made to the structure and accessibility of English language learning that would enhance outcomes for young people.<sup>97</sup>

Existing English language programs require more targeted investment in young people's English language learning, including:

- increased investment in programs that support young people's transition from intensive English language programs into mainstream secondary schools or from Adult Migrant English Program into further training/higher education;
- investment in initiatives that support young people from refugee and migrant backgrounds in and outside the classroom (e.g. homework support groups);
- development of nationally consistent definitions, measurements and cost structures for English language provision to newly arrived young people that are tied closely to the education needs and outcomes of students;
- establishment of school accountability mechanisms to ensure that loadings for students with limited English skills are firmly tied to the educational needs of this cohort; and
- development of a national measure of English language proficiency to direct loadings to the most vulnerable students.

**Australia should address existing gaps in, and make improvements to, English language programs.**

97. Multicultural Youth Advocacy Network, Submission number 392 to Australian Parliamentary Joint

Standing Committee on Migration, *Inquiry into Migrant Settlement Outcomes*, April 2011, 35-39.



# Migrant workers

## 11.1 Pathways to citizenship and changes to 457 work visas

ARTICLES 1, 2 & 5

Many migrant workers, particularly temporary migrant workers and those on international student visas or working holiday visas, are very vulnerable to exploitation and mistreatment in Australia. Lack of knowledge about workplace rights and entitlements, lack of support networks, social isolation and language barriers all contribute to this vulnerability. Some migrant workers are forced into breaches of their visa conditions through excessive hours or debt bondage, leaving them in fear of deportation.

People on 457 work visas (a temporary work visa) are heavily reliant on their employers for the continuance of their visa, which puts employers in a position of substantial power. Upon leaving an employer, people on 457 visas have 60 days to secure new employment or otherwise leave Australia, which acts as a barrier to making complaints and pursuing employment rights. There is limited free or affordable legal assistance available. In a positive development, migrant workers are a current area of focus of the national Fair Work Ombudsman.

Changes to 457 visas, which came into force on 1 July 2017, remove pathways to citizenship and create two and four year temporary visas for new migrants. They are therefore not conducive to migrant workers building stable and long term commitments to life in Australia.<sup>98</sup>

Australia has not signed or ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* or the International Labor Organisation's Conventions on the Protection of Migrant Workers. Ratification is critical to signalling to employers that Australia is committed to ensuring that all workers, including migrant workers, are treated fairly and equally.

Australia should ensure that:

- the Fair Work Ombudsman is sufficiently resourced to assist vulnerable migrant workers on temporary visas; and
- temporary migrants can access information about their employment rights, including freedom of association and collective bargaining rights and rights to complain, and are not discriminated against by employers on the basis of immigration status.

Australia should ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* and the International Labor Organisation's Conventions on the Protection of Migrant Workers.

## 11.2 Recruitment

Racial discrimination and unconscious bias in recruitment and employment results in candidates with names linked to particular ethnicities needing to apply for considerably more job vacancies before being short-listed for an interview, as compared with candidates with Anglo-sphere names. Some studies have found that Aboriginal and Torres Strait Islander people have to submit 35 per cent more applications, those with Chinese names submit 68

98. Department of Immigration and Border Protection, *1 July 2017 Changes to Skilled Visa Program* <https://www.border.gov.au/WorkinginAustralia/Pages/1-July-2017-changes.aspx>.

per cent more, Italian names require 12 per cent more and 'Middle Eastern' names 64 per cent more applications.<sup>99</sup> Some research suggests that blind recruitment policies dramatically increase the diversity (gender and ethnicity) of workplaces, while others suggest the opposite.<sup>100</sup>

**Australia should investigate whether blind recruitment policies could improve the diversity of workplaces and reduce discrimination in employment and recruiting processes.**

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99. Julia Calixto, 'Blind Recruitment: how the ABS Broke its Unconscious Bias', SBS News (Australia) 2 June 2016, <http://www.sbs.com.au/news/article/2016/06/02/blind-recruitment-how-abs-broke-its-unconscious-bias>.

100. Henry Belot, 'Blind Recruitment Trial to Boost Gender Equality Making Things Worse, Study Reveals', ABC News (Melbourne) 30 June 2017, <http://www.abc.net.au/news/2017-06-30/blind-recruitment-trial-to-improve-gender-equality-failing-study/8664888>.



# Mandatory detention of asylum seekers

ARTICLES 1, 2 & 5

## 12.1 Discrimination of asylum seekers based on mode of entry

Australia maintains a range of discriminatory policies specifically directed at boat arrivals. The UN Special Rapporteur on the human rights of migrants recently stated:

At all levels, unauthorized maritime arrivals face obstacles that other refugees do not face, including mandatory and prolonged detention periods, transfer to [Regional Processing Centres] in foreign countries (Papua New Guinea and Nauru), indefinite separation from their family, restrictions in the social services and no access to citizenship.<sup>101</sup>

Likewise, the UN Special Rapporteur on racism criticised the diversion of Australian asylum policy from internationally-accepted human rights norms, and noted the long term damage caused by the negative framing of newly-arrived migrants, asylum seekers and refugees.<sup>102</sup>

## 12.2 Boat turnbacks

In 2013, the Australian Government implemented a militarised regime to prevent people seeking asylum in Australia by boat. Australian naval and customs officers are under orders to turn back boats carrying asylum seekers “when it is safe to do so”. As of April 2017, 30 boats carrying 765 people have been turned back to their country of departure.<sup>103</sup>

In 2014, the Government legislated for new powers to detain people at sea (both within Australian waters and

on the high seas) and to transfer them to any country or a vessel of another country – even if Australia does not have that country’s consent to do so. These powers can be exercised without consideration of Australia’s *non-refoulement* obligations, the law of the sea or any other international obligations.<sup>104</sup>

Australia should abandon the boat turnbacks policy and amend the *Maritime Powers Act 2013 (Cth)* to remove powers to detain asylum seekers and refugees on the high seas and transfer them to any country or a vessel of another country.

## 12.3 Offshore processing

Since 19 July 2013, people seeking asylum who attempt to arrive in Australia by boat are subject to offshore processing, and are ineligible to ever be resettled in Australia. Asylum seekers are transferred to Refugee Processing Centres (**RPCs**) in the Republic of Nauru and Papua New Guinea’s (**PNG**) Manus Island, where their claims are assessed under the laws of those countries. If found to be refugees, they will be settled in a country other than Australia (currently those countries include Nauru, PNG, Cambodia and the United States). As at 30 September 2017, 1786 of these people have been found to be refugees,<sup>105</sup> but just over 50 people have been resettled

101. Francois Crepeau, UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 2.

102. Mutuma Ruteere, Special Rapporteur, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and*

*Related Intolerance on his Mission to Australia*, UN Doc A/HRC/35/41/Add.2 (9 June 2017).

103. The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Press Conference 7 April 2017, <http://www.minister.border.gov.au/peterdutton/2017/Pages/press-conference-07042017.aspx>.

104. *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

105. Department of Immigration and Border Protection, *Operation Sovereign Borders monthly update: September 2017* (10 October 2017) <<http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/ecba2582-f774-46d7-b4ff-7e987056209c>>.

in safety in the United States. Over 2000 people have been held for over four years in offshore processing countries.

Australia maintains 'effective control' over the RPCs and is responsible for the people it sends there.<sup>106</sup> As at 31 August 2017, 369 people, both refugees and people seeking asylum, were held in the Nauru RPC, including 279 adult men, 47 women and 43 children.<sup>107</sup> A further 757 people, including 124 children, have been found to be refugees and released into the Nauruan community.<sup>108</sup> On Manus Island, as at 27 February 2017, 839 adult men remained in the processing centre, 57 were living in the East Lorengau Refugee Transit Centre and 32 refugees have been resettled elsewhere in PNG.<sup>109</sup>

Accommodation standards, facilities and services in the detention centres remain well below international standards. There have been consistent and alarming reports of abuse (including sexual abuse), including of those living in the community in Nauru, including targeting of gay men. There has been one murder and eight other deaths from inadequate care in RPCs.<sup>110</sup>

The Special Rapporteur on violence against women has observed:

that accounts of rape and sexual abuse of female asylum seekers and refugees by security guards, service providers, refugees and asylum seekers or by the local community, without providing a proper and independent investigation mechanism, was making life of women in the RPCs unbearable.<sup>111</sup>

The Special Rapporteur on the human rights of migrants further found that:

the forced offshore confinement (although not necessarily detention anymore) in which asylum seekers and refugees are maintained constitutes cruel, inhuman and degrading treatment or punishment according to international human rights law standards.<sup>112</sup>

Over 400 people previously held on Nauru and Manus have been returned to Australia for medical treatment, and

remain there due to legal action. At the end of August 2017, the Australian Government abruptly cut income support to more than 60 of this group, effective immediately, and gave them three weeks' notice that they were to be evicted from their housing, forcing them to choose between destitution and deportation. These 400 people are ineligible to apply for Australian visas and continue to face deportation offshore. This group includes over 50 babies born in Australia. Some of these 400 have now been in detention centres in Australia for over 4 years.

#### Australia should:

- end its policy of offshore processing;
- immediately bring all refugees and asylum seekers on Manus Island and Nauru to Australia;
- immediately reinstate the housing and income support to those individuals whose income and housing were recently cut and ensure access to adequate housing and sufficient income support to meet basic needs; and
- allow all refugees and people seeking asylum who have been evacuated from Nauru or Manus Island to Australia for medical treatment to apply for refugee status in Australia and to have their protection claims assessed under Australian law.

## 12.4 Onshore detention

Australia maintains a policy of indefinite mandatory immigration detention for anyone who arrives in Australia without a visa.<sup>113</sup> There is no time limit on immigration detention in Australia, even in cases where continued detention causes

106. Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015); Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014); Francois Crepeau, UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Australia and the Regional Processing Centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 14.

107. Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary', 31 August 2017, 4.

108. Evidence to Senate Estimates, Immigration and Border Protection, Parliament of Australia, Canberra, 28 April 2017, Senator McKim.

109. Ibid.

110. Monash University, *Australian Border Deaths Database*, <<http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>>.

111. Dubravka Šimonović, 'End of Mission Statement' (27 February 2017) <http://un.org.au/files/2017/02/End-of-mission-statement-by-Dubravka-Simonovic-draft-final.docx>.

112. Francois Crepeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017). Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot report (2nd edition)* (2017), 16.

113. Ibid.

serious harm.<sup>114</sup> The Human Rights Committee has repeatedly held that Australia's policy of mandatory detention is in violation of international law.<sup>115</sup> As of 31 August 2017, there are 1,259 people held in closed immigration detention centres, of whom 454 have been detained for over one year and 276 for greater than two years.<sup>116</sup>

The legislative principle that detention of children is to be of last resort<sup>117</sup> does not override the legislative requirement to detain a person who does not have valid visa. Thus, there is no impediment to the detention of children. In addition, laws introduced in 2015<sup>118</sup> have seen the use of restraints rapidly increase, from 2,386 incidents of use of force in 2014-15, to 8,637 incidents in 2015-16.<sup>119</sup>

**Australia should:**

- repeal the mandatory detention provisions in the *Migration Act 1958* (Cth);
- codify that asylum seekers should be detained only as a last resort and for the shortest possible time, including a legislated maximum time limit on immigration detention;
- introduce a system of periodic judicial review of all decisions to detain; and
- prohibit the detention of children for immigration purposes, in line with the best interest of the child obligations.

## 12.5 Asylum application process

Australia has introduced a "fast track" refugee status determination process for asylum seekers who arrived by boat after 13 August 2012 and who were not taken to Nauru or Papua New Guinea for offshore processing. People in this group whose applications are refused are affected by a deficient and inadequate review process. Some have no review rights. From August 2012 to 2015, refugee status determination was suspended for asylum seekers who arrived in Australia by boat after 13 August 2012. The withdrawal of government-funded legal advice resulted in waiting lists of up to a year to access pro-bono services. On 21 May 2017, the Minister for Immigration announced that people seeking asylum who did not submit applications by 1 October 2017 would be considered to have no protection claims

and would face detention and deportation, despite having raised protection claims when they arrived in Australia.

**Australia should ensure that all people who raise protection claims have access to a fair refugee status determination procedure. Australia should abolish the 'fast track' process for protection visa applications and restore funding for legal assistance and language services for people seeking asylum.**

## 12.6 Families kept apart

Refugees who arrived in Australia by boat and have yet to achieve citizenship have virtually no opportunities for family reunion. While they can be technically eligible to apply to sponsor family members, they are considered the "lowest processing priority". In addition, Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV) holders are not permitted to sponsor family members under any program. Such policies violate Australia's obligations to protect the family unit and the rights of the child. Further, there are significant delays for people from refugee backgrounds in obtaining citizenship.

Families who sought asylum by boat, but arrived at different times are subject to different regimes and face indefinite separation from each other. There is no system or process that will see these husbands, wives and children reunited.

**Australia should:**

- permit Temporary Protection Visa and Safe Haven Enterprise Visa holders to sponsor family members;
- immediately reunite families in Australia who are split between offshore processing countries and Australia; and
- allocate at least 5,000 visas under the family stream of the Migration Program for refugee and humanitarian entrants, and introduce needs-based concessions under this stream to make family visas more accessible.

114. Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary', 31 August 2017.

115. *A v Australia* (HRC, 1997); *Baban v Australia* (HRC, 2003); *C v Australia* (HRC, 2002); *FKAG et al v Australia* (HRC, 2013); *Kwok v Australia* (HRC, 2009);

*MMM et al v Australia* (HRC, 2013); *Shafiq v Australia* (HRC, 2006); *Shams et al v Australia* (HRC, 2007).

116. Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary', 31 August 2017, 11.

117. *Migration Act 1958* (Cth) s 4AA.

118. *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Act 2015*.

119. Evidence to Legal and Constitutional Affairs Legislation Committee, Senate, Canberra, 27 February 2017.



# Self-determination and funding of Aboriginal community controlled organisations

## 13.1 Unfairness in the Indigenous Advancement Strategy

### ARTICLES 1, 2 & 5

In 2014, the Indigenous Advancement Strategy (IAS) became the mechanism used by the Australian Government to fund and deliver a range of programs for Aboriginal and Torres Strait Islander peoples. Under the IAS, funding for Aboriginal and Torres Strait Islander services has been substantially reduced from \$2.4 billion in 2014 to \$860 million. 55 per cent of grants have been allocated to non-Indigenous bodies, effectively mainstreaming services needed by Aboriginal and Torres Strait Islander people.<sup>120</sup> According to the Special Rapporteur on the rights of Indigenous peoples, 'the Strategy has effectively undermined the key role played by indigenous organizations in providing services for their communities.'<sup>121</sup>

The reduction in funding has meant that many organisations, particularly smaller organisations, are now trying to do the same work to meet demand with less funding.<sup>122</sup> Additionally, many small Aboriginal and Torres Strait Islander organisations with less experience in applying for competitive funding have been placed at a significant disadvantage, competing against non-Indigenous profit-driven corporations and government agencies with dedicated tendering teams.<sup>123</sup> These small organisations provide targeted, culturally safe services, but are being forced to turn away people needing help.

Australia should provide increased and secure funding to Aboriginal and Torres Strait Islander community controlled organisations to deliver effective services to Aboriginal and Torres Strait Islander peoples.

## 13.2 Under-funding and funding restrictions

### ARTICLES 1 & 2

Restrictive funding agreements are a reality for many Aboriginal and Torres Strait Islander community controlled organisations (ATSICCO). In particular, there are common restrictions on undertaking law reform and advocacy work. This silences the voices, expertise and influence of ATSICCOs and undermines their ability to meaningfully advocate for progressive changes to front line services, and against harmful policies that affect Aboriginal and

120. Australian Government, *Budget 2014-15, Budget Paper No. 2: Budget Measures* [http://www.budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-20.htm](http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-20.htm).

121. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 38.

122. Senate Finance and Public Administration Committee, Parliament of Australia, *Commonwealth Indigenous Advancement Strategy Tendering Processes* (2016), 61.

123. Ibid.

Torres Strait Islander people's human rights and fundamental freedoms in political, economic and social life.

Policy and advocacy activities are a necessary extension of front line service delivery in addressing the systemic disadvantage Aboriginal and Torres Strait Islander peoples face. In seeking to reform laws and policies that discriminate or impose disproportionate hardship on Aboriginal and Torres Strait Islander people, law and policy reform advocacy is a vital preventative strategy.<sup>124</sup>

It is essential for ASTICCOs to engage in law reform and policy practices to ensure front line service delivery remains appropriate, adequate and responsive to Aboriginal and Torres Strait Islander peoples' needs, human rights and freedoms. This includes peak body functions within and across all sectors and the coordinating and unifying function of the National Congress of Australia's First Peoples. The role of ATSIICCO peak bodies is particularly important for policy reform and advocacy efforts, and capacity building to support local ATSIICCO service providers. Both the Special Rapporteur on human rights defenders and the Special Rapporteur on the rights of Indigenous peoples have raised concerns about restrictions on freedom of expression of ATSIICCOs.<sup>125</sup>

**Australia should reinstate and commit to ongoing sufficient funding to peak Aboriginal and Torres Strait Islander community controlled organisations and remove restrictions to funding agreements, including limitations on the right to engage in law reform and advocacy.**

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124. Human Rights Law Centre, 'Defending Democracy: Safeguarding independent community voices' (Report, 2016).

125. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc

A/HRC/36/46/Add.2 (8 August 2017) 41; See, also, Michel Frost, (Special Rapporteur End of Mission Statement, 18 October 2016).



# Discrimination in the administration of justice

## 14.1 Over-imprisonment of Aboriginal and Torres Strait Islander peoples

### ARTICLES 1, 2 & 5

In 1991, the Royal Commission into Aboriginal Deaths in Custody identified the over-imprisonment of Aboriginal and Torres Strait Islander people as the key driver of deaths in custody. Twenty six years later, the rate at which Aboriginal and Torres Strait Islander people are imprisoned has more than doubled and continues to rise.<sup>126</sup> The national imprisonment rate for Aboriginal and Torres Strait Islander adults is currently 15 times higher than that for non-Indigenous adults.<sup>127</sup> Whilst Aboriginal and Torres Strait Islander people make up only 3% of the national population, they account for 27% of the national prison population.<sup>128</sup>

The incarceration of Aboriginal and Torres Strait Islander people has been described by the Attorney-General of Australia as a 'national tragedy',<sup>129</sup> and by the Special Rapporteur on the rights of Indigenous peoples as a 'major human rights concern'.<sup>130</sup>

### Children

In 2016, the Australian Bureau of Statistics reported that Aboriginal and Torres Strait Islander children were imprisoned at 25 times the rate of non-Indigenous youth.<sup>131</sup> The Special Rapporteur on the rights of Indigenous peoples concluded that Aboriginal and Torres Strait Islander children in the criminal justice system 'are essentially being punished for being poor and in most

cases, prison will only aggravate the cycle of violence, poverty and crime.'<sup>132</sup> She found the 'routine detention of young indigenous children the most distressing aspect of her visit.'<sup>133</sup> Commonwealth, state and territory governments must meaningfully invest in alternatives to punitive youth justice measures to end the over-imprisonment of Aboriginal and Torres Strait Islander children.

**Australia should invest in therapeutic measures of justice that prioritise providing Aboriginal and Torres Strait Islander children with the best opportunity to thrive and reintegrate into community.**

### Age of criminal responsibility

The current age of criminal responsibility in all Australian jurisdictions is 10 years with a rebuttable presumption (known as *doli incapax*) that applies to children aged between 10 and 14 years. This presumption requires the prosecution to prove that at the time of the offence, the child had the capacity to know that he or she ought not to have done the act or made the omission constituting the offence.

Amnesty International notes that the rate of overrepresentation of Aboriginal and Torres Strait Islander children is particularly bleak for 10- and 11-year-olds, who made up 74% of all 10 and 11 year-olds in detention in Australia in 2014-15.<sup>134</sup>

126. Australian Bureau of Statistics, Corrective Services, Australia, June Quarter 2016, Cat No 4512.0 (2016) quoted in PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017) 5.

127. PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017).

128. *Ibid.*

129. Senator George Brandis, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' (Media Release, 27 October 2016).

130. United Nations Human Rights, Office of the High Commissioner, 'Australia's Aboriginal peoples face "tsunami" of imprisonment US expert finds' (Media Release, 3 April 2017).

131. ABS (2016). Corrective services, Australia, June quarter 2016. Canberra: ABS; AIHW 2017. Youth justice in Australia 2015-16. AIHW Bulletin no. 139. Cat. no. AUS 211. Canberra: AIHW.

132. United Nations Human Rights, Office of the High Commissioner, 'End of Mission Statement by the

United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia', (Media Release, 3 April 2017), 10.

133. *Ibid.*

134. Amnesty International 'The state of the world's human rights' *Amnesty International Report 2016/2017*, 2017, accessed online via <file:///C:/Users/madeleinelynch/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/POL1048002017ENGLISH.PDF>.

All Australian jurisdictions must increase the minimum age of criminal responsibility to at least 12 years and retain the rebuttable presumption of *doli incapax* for children up to 14 years of age. The Special Rapporteur on the rights of Indigenous peoples has urged Australia to increase the age of criminal responsibility, noting that children 'should be detained only as a last resort, which is not the case today for Aboriginal and Torres Strait Islander children.'<sup>135</sup>

Australia should raise the age of criminal responsibility to at least 12 years in all states and territories, and retain the rebuttable presumption of *doli incapax* for children up to 14 years of age.

### Mistreatment of children in youth detention facilities

In recent years 'there have been serious abuses committed against Aboriginal and Torres Strait Islander children in custody.'<sup>136</sup> Aboriginal and Torres Strait Islander children represent 54 per cent of children in detention between the ages of 10 and 17.<sup>137</sup>

Over the past year, Australia has seen numerous reports detailing systemic abuses occurring in children's prisons nationwide. Allegations including assaults, the use of dogs, solitary confinement, detention of children in adult prisons, hog ties and evidence that children who have attempted self-harm and suicide are met with violence have spanned Barwon prison in Victoria,<sup>138</sup> Cleveland Youth Detention Centre in Queensland,<sup>139</sup> Don Dale Youth Detention Centre in the Northern Territory,<sup>140</sup> Cobham Juvenile Justice Centre in New South Wales, Banksia Hill Detention Centre in Western Australia and Bimberi Youth Justice Centre in Australia's Capital Territory.<sup>141</sup>

The abuses which took place at Don Dale have led to the establishment of a Royal Commission into the Protection and Detention of Children in the Northern Territory, which is due to report on 17 November 2017.<sup>142</sup>

The Royal Commission will consider the failings of the child protection system (where 89 per cent of children are Aboriginal) and youth detention system (where 94 per cent of children are Aboriginal).<sup>143</sup>

### Australia should:

- support Aboriginal and Torres Strait Islander communities, organisations and representative bodies to design and implement a national Youth Justice Action Plan,<sup>144</sup> to reduce detention rates of children and to prevent the abuse of children in detention; and
- work cooperatively with state and territory governments through COAG to fully implement the recommendations to be made by the Royal Commission into the Protection and Detention of Children in the Northern Territory both in the Northern Territory and in other jurisdictions, where relevant.

### Disability

Aboriginal and Torres Strait Islander people with a disability who are in detention typically have co-occurring disabilities and other vulnerabilities, such as: hearing loss; higher rates of psychological distress; unstable housing and social support; and exposure to trauma and violence.<sup>145</sup>

The key barriers to justice for people with cognitive and psychiatric impairments relate to under-diagnosis, lack of access to appropriate services, lack of awareness of issues relating to disability amongst professionals working within the criminal justice system, inflexible and inappropriate legislative regimes, and a lack of effective diversion options.<sup>146</sup>

135. United Nations Human Rights, Office of the High Commissioner, 'End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia', (Media Release, 3 April 2017), 10.

136. Ibid.

137. Australian Institute of Health and Welfare, 'Youth Detention Population in Australia', Bulletin 131, December 2015

138. Victorian Aboriginal Legal Service, Submission No. 15 to Parliament of Victoria, Inquiry into Youth Justice Centres, March 2017 and NATSILS, Submission No. 42 to Parliament of Victoria, Inquiry into Youth Justice Centres, March 2017. See, also, NATSILS, 'Media Release: A Government sanctioned 'shake-up' to Youth Justice' (Media Release, 7 February 2017).

139. Independent review of youth detention centres in Queensland, *Review of Youth Detention Centres* (28

June 2016), < <http://www.youthdetentionreview.qld.gov.au/>>.

140. Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report*, (2017).

141. NATSILS, 'NATSILS calls for national action following reports from the Bimberi youth justice centre' (Media Release, 4 July 2017) <http://www.natsils.org.au/portals/natsils/MEDIA%20RELEASE%20Bimberi%20youth%20detention%20centre%20FINAL.pdf?ver=2017-07-05-090749-150>>. See, also, Michaela Carr, 'Banksia Hill: Damning report prompts call for specialised centres for young detainees', *Australian Broadcast Corporation News* (online), 18 July 2017, <http://www.abc.net.au/news/2017-07-18/banksia-hill-specialised-wa-detention-centres-needed-expert-says/8717818>.

142. Royal Commission into the Protection and Detention of Children in the Northern Territory, (2017),

<<https://childdetentionnt.royalcommission.gov.au/Pages/default.aspx>>

143. Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report*, (2017).

144. See, eg, NATSILS and Amnesty International 'The crisis of indigenous youth detained in Australia' (Written Statement, 11-29 September 2017).

145. First Peoples Disability Network (2016) 'The life trajectory for an Aboriginal and Aboriginal or Torres Strait Persons with disability'. Chapter 2. Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment.

146. Baldry, E., McCausland, R., Dowse, L. and McEntyre, E. 2015 A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system. UNSW, Sydney <https://www.mhdc.unsw.edu.au/>.

# CASE STUDY

## Compounding injustice for an Aboriginal man with a disability: Gene Gibson

Gene Gibson is an Aboriginal man with a cognitive impairment who speaks very limited English. He spent almost five years in prison before a manslaughter conviction was quashed by the Western Australian Court of Appeal after it was found that he did not understand the court process or instructions given to him, even with the use of an interpreter, before entering a guilty plea.<sup>147</sup> Statements made by Mr Gibson during police interviews were also thrown out by the court which found that the 'plea was not attributable to a genuine consciousness of guilt.'<sup>148</sup>

The lack of available supports and services for Aboriginal and Torres Strait Islander people with a disability in the criminal justice system reflects the compounding impact of intersectional discrimination. It is imperative that federal, state and territory governments work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to develop responses that address the growing prevalence of disability in Aboriginal and Torres Strait Islander communities.

**Australia should increase funding for culturally appropriate services, including interpreters, diversion and rehabilitation programs tailored to the needs of Aboriginal and Torres Strait Islander people with a disability.**

### Women

As at 30 June 2016, Aboriginal and Torres Strait Islander women made up 34% of the female adult prison population but only 2% of Australia's female adult population.<sup>149</sup> The rate has increased more than twice the rate of Aboriginal and Torres Strait Islander men since 2000.<sup>150</sup> The Special Rapporteur on racism highlighted in 2017 that 'the incarceration rate of indigenous women is on the rise and they are the most overrepresented population in prison.'<sup>151</sup>

Around 80% of Aboriginal and Torres Strait Islander women in prison are mothers, and up to 90% are victim/survivors of family and/or sexual violence.<sup>152</sup> Many women in the justice system care for their own children, the children of others and members of extended family and community. As such, imprisoning Aboriginal and Torres Strait Islander women has a devastating impact on families and communities and increases the risk of children entering the child protection and youth justice systems, in which they are already over-represented.<sup>153</sup>

A national taskforce should be established to investigate and report on the deaths of Aboriginal and Torres Strait Islander women in custody and to make comprehensive recommendations for systemic change. The 1991 Royal Commission into Aboriginal Deaths in Custody was almost entirely silent on the experiences of Aboriginal and Torres Strait Islander women. Australia lacks a comprehensive national picture of the systemic issues and trends across different jurisdictions that contribute to the over-imprisonment of Aboriginal and Torres Strait Islander women. A national taskforce would be able to identify opportunities to better intervene and prevent death, injury and poor outcomes for Aboriginal and Torres Strait Islander women.

**Australia should invest in Aboriginal and Torres Strait Islander-led programs designed specifically for women, with the aim of strengthening families and reducing over-representation in the criminal justice system.**

147. Gene Gibson freed as conviction for Broome manslaughter of Josh Warneke quashed', *Australian Broadcast Corporation News* (online), <<http://www.abc.net.au/news/2017-04-12/gene-gibson-josh-warneke-manslaughter-conviction-quashed-appeal/8436550>>.

148. *Gibson v The State of Western Australia* [2017] WASCA 141, at [35].

149. Australian Bureau of Statistics, *Prisoners in Australia, 2016* (8 December 2016).

150. Productivity Commission, *Overcoming Indigenous Disadvantage* (2016).

151. Mutuma Ruteere, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia*, UN Doc A/HRC/35/41/Add.2 (9 June 2017) 45.

152. Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment* (2017) 13, 17.

153. *Ibid* 5.

# CASE STUDY

## Injustice caused by mandatory sentencing: John

'John' was a young man represented by the Aboriginal Legal Service of Western Australia for one charge of reckless driving, one charge of driving without a licence and one charge of failing to stop. John made a rash decision to drive a motor cycle to work because his employer was unable to do so. When he saw the police he panicked, sped off, drove through a red light and veered onto the wrong side of the road. He had a relatively minor record – his only prior offences were failing to stop, excess 0.02% and driving without a licence. These offences were dealt with in 2010 by the imposition of fines and John had not offended since that time. When sentencing John, the magistrate observed that he worked hard and 'had the potential to actually live a productive life' and stay out of trouble. However, the magistrate was forced to impose a mandatory sentence of six months' imprisonment. The magistrate indicated that, but for the mandatory sentencing regime, the sentence would have been less, and possibly not one of imprisonment.

## 14.2 Laws and policies that impair rights and contribute to over-imprisonment

ARTICLES 1, 2 & 5

### Mandatory sentencing

Mandatory sentencing requires sentencing courts to impose a fixed penalty on offenders convicted of a particular crime. It removes the discretion of the court to consider mitigating factors or alternate sentencing options and can result in harsh and unjust punishment. The Special Rapporteur on the rights of Indigenous peoples noted after her visit to Australia in 2017 that 'longstanding calls for the abolishment of mandatory sentencing laws... continue to be ignored'.<sup>154</sup>

In Australia, mandatory sentencing regimes disproportionately affect Aboriginal and Torres Strait Islander people. The Australian Bureau of Statistics reported in 2013 that the most common offences for Aboriginal and Torres Strait Islander people to be charged with were acts intended to cause injury, unlawful entry with intent and

robbery, extortion and related offences – all of which are mandatory sentencing offences in at least some Australian jurisdictions.<sup>155</sup>

Mandatory sentencing practices are of particular concern in the Northern Territory (NT) and Western Australia (WA), where the discriminatory impact on Aboriginal and Torres Strait Islander people is most acute. In the NT mandatory sentencing applies to violent offences and in WA to home burglary, assaulting a public officer and certain driving offences.<sup>156</sup> These two jurisdictions also have the highest rates of Aboriginal and Torres Strait Islander incarceration.<sup>157</sup>

**Australian governments should remove mandatory sentencing provisions that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander people, particularly in Western Australia and the Northern Territory.**

154. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 68.

155. Australian Bureau of Statistics, *Prisoners in Australia*, 2013 Report, 5 December 2013.

156. Section 78BA of the *Sentencing Act 1995* (NT); 53AE of the *Juvenile Justice Act 1983*; 2013 the *Sentencing*

*Amendment (Mandatory Minimum Sentences) Act 2013*; Criminal Code Amendment Act 2009 (WA)

157. Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) 8. Jurisdictions vary as to the kind of offences that attract a mandatory sentence.

# CASE STUDY

## Punitive fines laws and the death of Ms Dhu<sup>160</sup>

In 2014, a 22-year-old Aboriginal woman, Ms Dhu, died in a police cell less than 48 hours after being taken into custody for unpaid fines. A few hours after being arrested, Ms Dhu complained of severe pain while breathing. Video footage released by the Coroner shows Ms Dhu crying and moaning in pain, police dragging and carrying Ms Dhu's limp body to a police van and one officer pulling Ms Dhu by the wrist to sit her up before dropping her, causing her to hit her head. Prior to being arrested, Ms Dhu had sustained a fractured rib through family violence, which became infected. Being detained in police custody meant that she could not seek her own medical treatment and she ultimately died a cruel death from complications caused by the undetected infection. The Coroner recommended that laws authorising imprisonment for unpaid fines be abolished. The Coroner also found that Ms Dhu was treated inhumanely by police and that the actions of police and health professionals had been affected by "unfounded assumptions" about Ms Dhu as an Aboriginal woman.

### Fines and punitive enforcement processes

Different laws across Australia provide for escalating punishments, including prison, for unpaid fines. The Australian Law Reform Commission has noted that:

Aboriginal and Torres Strait Islander peoples are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at first notice (attributed to financial capacity, itinerancy and literacy levels), and are consequently susceptible to escalating fine debt and fine enforcement measures.<sup>158</sup>

Laws that fail to distinguish between those who cannot and those who will not pay fines, disproportionately affect the most vulnerable, including people experiencing homelessness, people experiencing mental health issues and people living in poverty. Imprisoning people who cannot pay fines is unjust and unfairly impacts Aboriginal and Torres Strait Islander people and women.<sup>159</sup>

A positive alternative has been developed in New South Wales - the 'Work and Development Order Scheme'. The Scheme allows those who cannot pay fines because of vulnerabilities, such as homelessness, mental illness, disability or acute economic hardship, to undertake activities

such as voluntary work, health treatment, education or training, financial counselling, drug and alcohol treatment or a mentoring program, as an alternative to paying off their fines. Critically, these activities can address the causes of offending and the breach of an order does not result in further enforcement of penalties.

#### Australia should:

- abolish imprisonment for fine default and implement work and development order schemes for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions, based on the New South Wales model;
- develop culturally appropriate support programs that address underlying factors of disadvantage linked to the imposition of the fine or inability to pay; and
- ensure that any reform to infringement regimes is preceded by genuine consultation with Aboriginal and Torres Strait Islander peoples and community controlled organisations.

158. Australian Law Reform Commission, *Incarceration Rate of Aboriginal and Torres Strait Islander People*, Discussion Paper No 84 (2017), 108.

159. Aboriginal Legal Service of Western Australia, *Addressing fine default by vulnerable and disadvantaged persons*: Briefing Paper, August 2016.

160. Coroner's Court of Western Australia, *Inquest into the death of Ms Dhu (11020-14)*, 16 December 2016,

[45], [239], [856]-[863]; Calla Wahlquist, "Ms Dhu death in custody inquest hears details of the last 48 hours of her life" *The Guardian* (online) 23 November 2015 available at <https://www.theguardian.com/australia-news/2015/nov/23/ms-dhu-death-in-custody-inquest-hears-details-of-the-last-48-hours-of-her-life> (accessed 19 July 2017); Robert Burton-Bradley, "Coroner: Ms Dhu's death preventable, police

"unprofessional and inhumane" *Special Broadcasting Service* (online) 19 December 2016 available at <http://www.sbs.com.au/nitv/nitv-news/article/2016/12/16/coroner-ms-dhus-death-preventable-police-unprofessional-and-inhumane> (accessed 18 July 2017).

## Health and wellbeing services

Aboriginal and Torres Strait people in the criminal justice system experience high levels of mental illness and psychosocial distress. In one study, Aboriginal and Torres Strait Islander detainees reported receiving unclear information about their medications and less than a third reported custodial assuagement of their psychological distress.<sup>161</sup>

Provision of inadequate and culturally inappropriate health and wellbeing services is a common experience for Aboriginal and Torres Strait Islander people in detention.<sup>162</sup> This may be attributed to a number of factors including lack of culturally responsive service provision, poor clinician-patient cross-cultural communication, and an inability to accommodate Aboriginal and Torres Strait Islander models of health.<sup>163</sup>

**Australia should prioritise and invest in the health of Aboriginal and Torres Strait Islander people in prison, including through culturally appropriate services, delivered by Aboriginal community controlled health organisations through properly trained medical staff and liaison and wellbeing officers in all prisons.**

## Rehabilitation services

Aboriginal and Torres Strait Islander people in the criminal justice system often do not qualify for rehabilitation programs. This is because they are frequently held on long periods of remand and those who are serving sentences are often serving sentences of less than 12 months for relatively minor offences.<sup>164</sup> Where rehabilitation services are available, they are generally generic and are not tailored to the unique and complex experiences of Aboriginal and Torres Strait Islander people in the criminal justice system.

The provision of culturally appropriate rehabilitation services is essential to reducing the risk of future contact with the justice system, particularly for those who are serving shorter sentences. Rehabilitation programs must be equally accessible and provided in a holistic way that recognises the particular historical and socio-cultural backgrounds unique to Aboriginal and Torres Strait Islander people.

**Australia should ensure that culturally sensitive rehabilitation programs are available for Aboriginal and Torres Strait Islander people in the criminal justice system, including those serving short sentences and on remand.**

## Diversions

People placed on diversionary pathways are less likely to reoffend when compared to those sentenced to a term of imprisonment.<sup>165</sup> Despite this, there is a dearth of culturally appropriate diversionary options for Aboriginal and Torres Strait Islander people, particularly women and girls. Aboriginal and Torres Strait Islander sentencing courts, Mental Health Courts and Drug and Alcohol Courts are examples of positive diversion options that see the causes of offending behaviour identified and addressed through treatment and support services, with supervision by a court.<sup>166</sup>

There is great opportunity to improve the diversion options that are available, especially in lower courts. Central to successful diversion for Aboriginal and Torres Strait Islander people is culture, which is a key protective factor that supports families and communities. Further, given that many diversion options rely on health and welfare service provision, appropriate funding and resourcing must be provided to services to ensure the availability of diversion options.

**Australia should work with Aboriginal and Torres Strait Islander organisations to develop culturally appropriate diversion options, including bail support and community-based sentencing options, with a particular emphasis on ensuring availability in rural and remote locations.**

161. Stephane Shepherd, James Ogloff and Stuart Thomas, 'Are Australian prisons meeting the needs of Indigenous offenders?' (2016) 4:13 *Health and Justice* 6.

162. Halacas, C & Adams, K (2015), Keeping our mob healthy in and out of prison: Exploring Prison Health in Victoria to Improve Quality, Culturally Appropriate Health Care for Aboriginal People, Victorian Aboriginal Community Controlled Health Organisation, Collingwood, pg 9.

163. Stephane Shepherd, James Ogloff and Stuart Thomas, 'Are Australian prisons meeting the needs of Indigenous offenders?' (2016) 4:13 *Health and Justice* 6.

164. Queensland Corrective Services, *Rehabilitation needs and treatment of Indigenous offenders in Queensland* (2010), 7.

165. Victorian Equal Opportunities and Human Rights Commission, *Unfinished Business* (2013), 29.

166. However, it should be noted that under this approach there is significant reliance upon external services to support clients so that a significant injection of resources into health and welfare services would also be required. See, National Aboriginal and Torres Strait Islander Legal Service, submission No 34, *Submission to the Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia*, April 2017.

# CASE STUDY

## Denial of interpreter and a denial of justice: Elodie

In *RP v Alcohol Mandatory Treatment Tribunal of the Northern Territory* [2013] NTMC 3214, the Central Australian Aboriginal Legal Service successfully challenged the validity of a Tribunal order detaining 'Elodie' in a residential facility for mandatory alcohol treatment. Elodie was from a remote community thousands of kilometres from Alice Springs and did not speak English as a first language. She was not provided with an interpreter to prepare for the Tribunal hearing or to participate in the hearing, nor was she provided with a legal representative or an advocate. On appeal, the Court found that, 'without an advocate Elodie was effectively not being heard on factors crucial to the Tribunal's determination and as such...was a denial of natural justice.'

### Interpreters

Effective communication is central to provision of quality services to Aboriginal and Torres Strait Islander peoples. This is impossible without the assistance of an interpreter for many Aboriginal and Torres Strait Islander people who do not speak English as a first or second language, and/or are unfamiliar with court processes. Gaps in interpreter services have been identified as a key barrier to equality before the law for Aboriginal and Torres Strait Islander people.<sup>167</sup>

Poor communication at the first point of contact with the criminal justice system can have enormous implications for a person's experience in the justice system. The absence of culturally competent services and a lack of access to interpreters, can see responses during police interviews or in the court room mistaken for indications of guilt. Alternatively, poor communication may result in a defendant or victim having no comprehension of the proceedings taking place.

**Australian governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure equitable access to interpreter services nationwide.**

### Justice Targets

The disproportionately high rates of imprisonment and violence experienced by Aboriginal and Torres Strait Islander people is a national crisis.

The Council of Australian Government's 'Closing the Gap' framework set targets in seven areas to reduce Aboriginal and Torres Strait Islander disadvantage. The 'Safer Communities' area, which relates to the justice system, is the only area that is **not** accompanied by any specific targets. This is a clear failure to acknowledge the root causes and the consequences of Aboriginal and Torres Strait Islander over-imprisonment. Justice targets are required, together with sub-targets that focus on the importance of resourcing Aboriginal and Torres Strait Islander community controlled organisations to deliver front line services essential to meeting such targets.

As noted by the Special Rapporteur on the rights of Indigenous peoples:

it is the responsibility of the federal Government to ensure compliance with international human rights obligations. The inclusion of targets on justice in the "Closing the Gap" strategy and the development and implementation of a national plan of action are needed to address the incarceration crisis.<sup>168</sup>

Change the Record is an Aboriginal and Torres Strait Islander-led coalition of organisations, whose aim is to close the gap in imprisonment and violence rates by 2040, with priority strategies for women and children.<sup>169</sup> Change the Record has developed a *Blueprint for Change*, which is a robust framework to address the high rates of incarceration and violence against Aboriginal and Torres Strait Islander people.

167. Senate Finance and Public Administration References Committee, Parliament of Australia, Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services (2016) 36–7.

168. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 86.

169. Change the Record, *Our Vision* (2014) <<https://changetherecord.org.au/solutions>>.

Australia should adopt national justice targets, focusing of reducing imprisonment rates of, and violence against, Aboriginal and Torres Strait Islander people, as part of the Closing the Gap framework, together with sub-targets that focus on the importance of resourcing Aboriginal and Torres Strait Islander community controlled organisations.

Australia should implement outstanding recommendations of the Royal Commission into Aboriginal Deaths in Custody, and monitor and publicly report on the implementation of the recommendations.

### Recommendations of Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody in 1991 produced a landmark report. However, despite the ongoing relevance of many of the recommendations, implementation by federal, state and territory governments remains largely incomplete.

Aboriginal and Torres Strait Islander people continue to die in custody at much higher rates than non-Indigenous people. It is reported that 209 Aboriginal and Torres Strait Islander people died in police custody or in custody-related operations between 1980 and 2013.<sup>170</sup> No police officer has ever been convicted of any offence relating to an Aboriginal and Torres Strait Islander death in police custody.<sup>171</sup>

It is the responsibility of all governments to take direct action to implement the recommendations of the Royal Commission and address the underlying social and economic drivers of over-imprisonment of Aboriginal and Torres Strait Islander people. This should include the establishment of annual reporting measures by all Australian governments on the implementation of the Royal Commission's recommendations. The Aboriginal and Torres Strait Islander Social Justice Commissioner should be provided with adequate resources to ensure independent oversight of reporting.

## 14.3 Racial discrimination and law enforcement

ARTICLES 1, 2, 5 & 7

### Over-policing and excessive use of force against Aboriginal and Torres Strait Islander people

Racially discriminatory policing continues to be a problem throughout Australia.<sup>172</sup> The over-policing of Aboriginal and Torres Strait Islander people increases negative contact with police and feelings of harassment, which in turn increase the likelihood of Aboriginal and Torres Strait Islander people being arrested and charged with offences, being refused bail and ending up in prison.<sup>173</sup> The Chief Justice of Western Australia recently stated that:

Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested...at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.<sup>174</sup>

The over-policing of Aboriginal and Torres Strait Islander communities is associated with reports of police using excessive force when exercising arrest or detention powers.

Example of excessive police force against Aboriginal and Torres Strait Islander people, include:

- Two police officers tasing an Aboriginal man 13 times while he was in custody after he refused to go to a cell to be strip-searched;<sup>175</sup>
- Police tasing an Aboriginal man who reportedly required urgent medical assistance, with the man dying soon after;<sup>176</sup>

170. Australian Institute of Criminology, *Deaths in custody in Australia to 30 June 2011*, 2013, 137 available at [http://aic.gov.au/media\\_library/publications/mr/mr20/mr20.pdf](http://aic.gov.au/media_library/publications/mr/mr20/mr20.pdf) (accessed 18 July 2017); Australian Institute of Criminology, *Deaths in custody in Australia: National Deaths in Custody Program 2011-12 and 2012-13*, 2015, ix available at [http://aic.gov.au/media\\_library/publications/mr/mr26/mr26.pdf](http://aic.gov.au/media_library/publications/mr/mr26/mr26.pdf) (accessed 18 July 2017).

171. Craig Longman, 'Scales of justice still tipped towards police who harm people in their custody', *The Conversation* (online) 15 April 2016 available at <https://theconversation.com/scales-of-justice-still-tipped-towards-police-who-harm-people-in-their-custody-57125> (accessed 18 July 2017).

172. See eg Declan Gooch and Dugald Sanders, 'Entrenched racism' in NSW Police harming young people, Indigenous leader says' *Australian Broadcasting Corporation* (online) 29 March 2017 available at <http://www.abc.net.au/news/2017-03-29/entrenched-racism-in-nsw-police-harming-young-people-leader-says/8398122> (accessed 18 July 2017); Michael Gordon, 'Deaths in custody: Deaths in black and white' *The Sydney Morning Herald* (online) 15 April 2016 available at <http://www.smh.com.au/comment/deaths-in-custody-confronting-the-truth-20160415-go7bek.html> (accessed 18 July 2017).

173. The Senate, *Finance and Public Administration References Committee: Aboriginal and Torres Strait*

*Islander experience of law enforcement and justice services*, October 2016, 80-81.

174. *Ibid*, 70.

175. Joanna Menagh, 'Police officers found guilty of assault after repeatedly tasing detainee Kevin Spratt' *Australian Broadcasting Corporation News* (online) 22 January 2014 available at <http://www.abc.net.au/news/2014-01-21/police-officers-found-guilty-of-assault-of-spratt/5211642> (accessed 31 July 2017).

176. 'Man dies after being tasered by officers in East Perth' *The West Australian* (online) 12 May 2017 available at <https://thewest.com.au/news/wa/man-dies-after-being-tasered-by-officers-in-east-perth-ng-b88474557z> (accessed 31 July 2017).

# CASE STUDY

## Paperless arrest laws and the death of Kumanjayi Langdon

In May 2015 an Aboriginal man, Kumanjayi Langdon, was detained under the Northern Territory's paperless arrest laws for public drinking (an offence punishable by a \$74 fine and not imprisonment). Less than three hours later he was found dead in his cell. The Coroner concluded that whilst the arrest complied with the law, Kumanjayi 'had the right to die as a free man.' The Coroner stated that 'the paperless arrest scheme disproportionately impacts on Aboriginal people' and 'perpetuates and entrenches Aboriginal disadvantage.' He recommended that the laws be repealed, warning that 'unless the paperless arrest laws are struck from the Statute books, more and more disadvantaged Aboriginal people are at risk of dying in custody, and unnecessarily so.'<sup>181</sup>

- A police officer racially abusing an Aboriginal man he was detaining, telling the man 'I'd like to tie the hose around your neck, set you on fire, and drag you around the streets attached to our car with lights and sirens on';<sup>177</sup>
- Police officers conducting a "detention and seizure operation" when Aboriginal people in a remote community collected Christmas hampers that contained alcohol (which was prohibited);<sup>178</sup> and
- A police officer filmed using excessive force against an Aboriginal woman, reportedly after attending the scene in response to a domestic violence incident.<sup>179</sup>

### Excessive police powers

#### *Paperless arrests laws*

Paperless arrest laws were introduced as an excessive and alarming expansion of police powers in the Northern Territory in 2014. They authorise a police officer to arrest and detain a person for up to 4 hours on the belief that they may commit, or have committed a minor offence, such as drinking in public, swearing, making undue noise, and other infringement notice offences for which a person may not be sentenced to imprisonment.

The powers effectively allow police, as the executive, to punish a person who has not been charged, let alone

appeared before a court. These laws disproportionately affect Aboriginal and Torres Strait Islander people who, in 2016, accounted for over 70% of those taken into custody and released with an infringement notice. In 2015, the Northern Territory Coroner recommended the repeal of paperless arrest laws.<sup>180</sup>

**Australia should ensure that paperless arrest laws in the Northern Territory are repealed and not replicated in other jurisdictions.**

#### *Move on and protective custody powers*

Public spaces are being increasingly criminalised, such as through begging and public drinking or drunkenness offences, move on powers, and powers to detain people who are drunk but have not committed an offence ('protective custody powers').

Given the high levels of poverty and homelessness experienced by Aboriginal and Torres Strait Islander peoples, the increasing criminalisation of public spaces has a discriminatory impact.<sup>182</sup> For example, between 2008-09 and 2015-16, 92 per cent of those locked up by Northern Territory police under protective custody powers were Aboriginal and Torres Strait Islander people.<sup>183</sup>

177. South Australia Police Ombudsman, *Annual Report 2015*, October 2015, 14, available at <http://www.policeombudsman.sa.gov.au/wp-content/uploads/2015/10/2014-15-Annual-Report.pdf> (accessed 18 July 2017). See also 'Slap on wrist for racist South Australian police officer' *News.com.au* (online) 29 October 2015 available at <http://www.news.com.au/national/south-australia/slap-on-wrist-for-racist-south-australian-police-officer/news-story/42c3a4a7d17bed52bc16f93d7b10cae6> (accessed 18 July 2017).

178. Sean Kerins, *Policing the frontier: Christmas in Borroloola*, Centre for Aboriginal Economic Policy Research, Topic Issue No. 3/2013, February 2013, 4, available at [http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2013\\_03\\_Kerins\\_alcohol\\_management.pdf](http://caepr.anu.edu.au/sites/default/files/Publications/topical/TI2013_03_Kerins_alcohol_management.pdf) (accessed 18 July 2017).

179. Andrea Booth, "Queensland police video: Rights organisations demand public independent investigation as police begin internal one" *Special Broadcasting Service* (online) 22 January 2016 available at <http://www.sbs.com.au/nitv/article/2016/01/21/>

queensland-police-video-rights-organisations-demand-public-independent (accessed 18 July 2017).

180. *Inquest into the death of Kumanjayi Langdon* [2015] NTMC 16, at [93].

181. *Ibid* at [8]-[12], [87], [88], [90].

182. Submission from the Central Australian Aboriginal Legal Aid Service Inc and the North Australian Aboriginal Justice Agency in relation to the Final Report on the Review of the Summary Offences Act, September 2013.

183. Northern Territory Police, *Annual Report 2015-16*, (2016), 171.

# CASE STUDY

## Punitive alcohol laws and Ms Mandijarra's death in custody

In 2012, an Aboriginal woman named Ms Mandijarra died shortly after being detained for a minor offence, punishable only by a fine, of "street drinking" (alcohol consumption on unlicensed premises without consent) in Broome, Western Australia. In 2017, the Coroner found that Ms Mandijarra's death may have been prevented if she had been admitted to hospital rather than taken into custody, as police were not medically trained or able to discern she was ill. The Coroner noted that in most years since 2011, the majority of people kept at the Broome Police Station for alcohol-related offences or detained under protective custody laws were Aboriginal and Torres Strait Islander people. The Coroner recommended that the arrest and detention of people for street drinking be abolished.<sup>184</sup>

Whilst it is important to strike a balance between public order and the rights of individuals, it is essential for public order schemes to place a strong emphasis on the health and wellbeing of those against whom public order powers are disproportionately used, including by addressing the underlying causes of offending, such as poverty and homelessness.

**Australia should reform punitive public order laws and policies to ensure that they are not unfairly and disproportionately applied to Aboriginal and Torres Strait Islander people and do not unjustifiably deprive people of their liberty.**

### Custody notification systems

Mandatory custody notification systems (**CNS**) require police to contact an Aboriginal legal service every time an Aboriginal or Torres Strait Islander person is taken into custody to allow for welfare and legal checks to be conducted. The importance of CNS was articulated 26 years ago by the Royal Commission into Aboriginal Deaths in Custody. CNSs can be lifesaving by ensuring that Aboriginal and Torres Strait Islander people detained in police custody

receive legal advice and support, delivered in a culturally sensitive manner, at the earliest possible opportunity.

A statutory CNS was set up in New South Wales and the Australian Capital Territory in 2000. The CNS is a 24-hour telephone advice service operated by the Aboriginal Legal Service. No Aboriginal deaths in police custody were recorded in New South Wales from the commencement of the scheme until 2016, when a young woman was taken into custody *without* the Aboriginal Legal Service being notified. She was allegedly taken into custody for protective reasons, which did not enliven the statutory requirement for police to notify the Aboriginal Legal Service.<sup>185</sup>

Every Aboriginal and Torres Strait Islander person taken into custody must be guaranteed appropriate safeguards, have their health and wellbeing prioritised, and have access to culturally responsive legal advice. A CNS could have also saved the life of Ms Dhu (see a case study about her tragic death under section 14.2).

**Australia should introduce a mandatory statutory custody notification system, in partnership with Aboriginal and Torres Strait Islander legal services, in every state and territory. Aboriginal and Torres Strait Islander legal services should be resourced to respond to notifications and provide welfare checks.**

184. *Liquor Control Act 1988* (WA), s 199(1); Coroner's Court of Western Australia, *Inquest into the death of Ms Mandijarra 6042-12*, 31 March 2017, [241], [268], [271], [362]-[363], [374].

185. *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) reg 37; Calla Wahlquist, 'Indigenous Woman Died in Police Custody After

Notification Service Not Used', *The Guardian* (online) 16 August 2016 <https://www.theguardian.com/australia-news/2016/aug/16/indigenous-woman-died-in-police-custody-after-notification-service-not-used>.

# CASE STUDY

## Racial profiling of African young people

In 2013, a legal action was brought by a group of African-Australian men who claimed they were regularly stopped, assaulted and searched by police officers for no legitimate reason and that African people were two and a half times more likely to be stopped and searched by Victoria Police.<sup>189</sup> The case settled on the eve of trial. In a joint statement read in court, Victoria Police acknowledged that it had received numerous complaints of racial discrimination.<sup>190</sup> As part of the settlement, the young men were free to tell their story, using redacted versions of documents created by police. The documents revealed that police often described teenagers in public spaces as “criminals” even though they did not have criminal records and were not breaking any law. They also described them as wearing “gangster clothing” and “loitering” when in public places.<sup>191</sup>

### Racial profiling and discriminatory policing of ethnic minorities

A 2015 report found that both African-Australian and Pacific Islander communities were deeply affected by racist policing in the state of Victoria.<sup>186</sup> Young people from those communities reported avoiding the Melbourne city centre where they felt vulnerable to police harassment and assaults, and not lodging complaints for fear of police retribution.<sup>187</sup>

Over the past 18 months, there has been extensive media reporting and negative public debate focused on the criminal and anti-social behaviour of refugee and migrant young people. However, this reporting is at odds with available evidence, which shows that it is a very small number of young people from refugee and migrant backgrounds engaged in the youth justice system, although some groups are overrepresented.<sup>188</sup>

Australia should ensure that all state and territory governments mandate human rights, anti-racism and cultural awareness training for police officers at all levels, and implement data-collection schemes to monitor and report on racial profiling by police.

### The need for independent investigation of police misconduct and deaths

No Australian jurisdiction has established a system for independent, impartial investigation of deaths in police custody or of allegations of torture and mistreatment. It is clear that police investigating police is neither an effective way to eliminate racially discriminatory policing, nor procedurally fair.<sup>192</sup> However, currently, complaints against police officers are primarily investigated by other police officers, usually from the same law enforcement agency.<sup>193</sup> Queensland has implemented a model which more directly involves the State Coroner into deaths associated with police contact.<sup>194</sup> However, this remains far from being a

186. Daniel Haile-Michael and Maki Issa, *The more things change, the more they stay the same*, 2015, available at [http://www.policeaccountability.org.au/wp-content/uploads/2015/07/More-Things-Change\\_report\\_soft-copy.pdf](http://www.policeaccountability.org.au/wp-content/uploads/2015/07/More-Things-Change_report_soft-copy.pdf) (accessed 19 July 2017).

187. Ibid. See also Bec Smith and Shane Reside, 'Boys, you wanna give me some action?' *Interventions into Policing of Racialised Communities in Melbourne*, 2009, 11-18 available at <http://smls.org.au/wp-content/uploads/2016/09/Boys-Wanna-Give-Me-Some-Action.pdf> (accessed 18 July 2017).

188. Multicultural Youth Advocacy Network, Submission No. 91 *Submission to the Joint Standing Committee on Migration, Migrant Settlement Outcomes Inquiry*, November 2016.

189. Vince Chadwick, "Victoria Police settle racial harassment case" *The Age* (online) 18 February 2013 available at <http://www.theage.com.au/victoria/victoria-police-settle-racial-harassment-case-20130218-2emfd.html>; Peter Seidel and Tamar Hopkins, "No one should be stopped by police just because they're black" *The Sydney Morning Herald* (online) 19 February 2013 available at <http://www.smh.com.au/comment/no-one-should-be-stopped-by-police-just-because-theyre-black-20130218-2end5.html>.

190. Anthony Kelly, 'An end to racial profiling in sight' (2013) 8 *Insight* 44, 44.

191. Peter Seidel and Tamar Hopkins, "No one should be stopped by police just because they're black" *The*

*Sydney Morning Herald* (online) 19 February 2013 available at <http://www.smh.com.au/comment/no-one-should-be-stopped-by-police-just-because-theyre-black-20130218-2end5.html>.

192. See Eggington, D and Allingham, K, 'Police Investigating Police Complaints: An Urgent Need for Change in Western Australia' (2007) 6(28) *Indigenous Law Bulletin* 6.

193. Office of Police Integrity, Parliament of Victoria, *Review of investigations of deaths associated with police contact*, (2011).

194. Ibid, 9, 26.

## Accountability for discriminatory policing and Mulrunji Doomadgee's death in custody

In 2004, an Aboriginal man, Mulrunji Doomadgee, was arrested for public nuisance and died 45 minutes later in a police cell in Palm Island, Queensland. Mulrunji died as a result of injuries sustained from force to his abdomen, which, after two coronial inquests, were said to have been either deliberately or accidentally inflicted while in police custody.<sup>196</sup> In the aftermath of Mulrunji's death in custody, police officers ignored Aboriginal witnesses' testimony, conducted unnecessary and disproportionate searches of property across Palm Island, deployed a disproportionately large police presence in what was 'an overwhelming show of force against that community', and failed to impartially investigate Mulrunji's death.<sup>197</sup> In particular, the investigating officers failed to communicate with the local community members, failed to treat the arresting officer as a suspect, allowed the arresting officer to continue to perform policing duties, and even ate dinner at his house when they first arrived on Palm Island.<sup>198</sup>

fully impartial investigation by a body independent to the police, in line with international law standards.<sup>195</sup>

In 2016 the Federal Court found that the Queensland Police's conduct after Mulrunji's death amounted to racial discrimination against the Palm Island Aboriginal community.<sup>199</sup> The investigating officers 'operated with a sense of impunity, impervious to the reactions of Palm Islanders, and very much with an 'us and them' attitude.'<sup>200</sup> Further, the court described the fact that police performed 'their functions differently by reference to the race of the people they are dealing with' as 'an affront to the rule of law.'<sup>201</sup>

Australia should establish an independent body for investigating complaints about police misconduct and deaths in police custody that is hierarchically, institutionally and practically independent of the police. The body should be capable of undertaking investigations that are effective, comprehensive, prompt, and subject to public scrutiny and, in the case of deaths in custody, involve the family of the deceased. It should also be capable of making recommendations about disciplinary action.

## 14.4 Under-funding of Aboriginal legal services

### ARTICLES 1 & 2

The Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Aboriginal Family Violence Prevention Legal Services (FVPLS) were set up in line with the principle of self-determination, with an understanding of the unique impact a lack of access to culturally competent legal assistance services has upon Aboriginal and Torres Strait Islander people and communities. ATSILS and FVPLS are the preferred, and in many instances, the only legal assistance option for Aboriginal and Torres Strait Islander peoples.

In addition, to meet proposed justice targets (see section 14.2) a significant and long term increase in resourcing of ATSILS and FVPLS is required, together with partnership on data collection and evaluation.

### Aboriginal and Torres Strait Islander Legal Services

The ATSILS were established in every State and Territory over 40 years ago to provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. ATSILS are Aboriginal and Torres Strait Islander community controlled non-for-profit organisations

195. Craig Longman, "Police investigators too in-house to probe deaths in custody" *The Conversation* (online) 15 April 2011 available at <<https://theconversation.com/police-investigators-too-in-house-to-probe-deaths-in-custody-838>>.

196. Office of State Coroner, *Inquest into the death of Mulrunji Doomadgee*, 14 May 2010.

197. *Wotton v State of Queensland (No 5)* [2016] FCA 1457.

198. *Ibid* 833 – 890.

199. *Ibid*.

200. *Ibid*.

201. *Ibid* 1806.

which, through funding from the Commonwealth Attorney-General's Department, provide legal assistance services in the areas of criminal, family and civil law in addition to undertaking community legal education, prisoner through-care and law reform and advocacy activities.

The demand for ATSILS services continues to grow. The amount of real funding provided to the ATSILS has been declining since 2013, while the cost of providing services has risen. The expenditure on Aboriginal and Torres Strait Islander people in the criminal justice system is primarily directed towards policing and corrective services and incurred by state and territory governments. Expenditure on the provision of legal assistance services, incurred by the Australian Government, is relatively small.

In the 2017-18 Federal Budget the Government restored funding cuts to ATSILS of \$16.7 million over the forward estimates. However, after 2020, ATSILS will be subject to funding cuts as a result of a budget 'savings measure' made by the Australian Government in 2013. These cuts will have a major impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial.<sup>202</sup>

Australia should commit to adequate, long-term (5 yearly) funding agreements with Aboriginal and Torres Strait Islander Legal Services and Aboriginal Family Violence Prevention Legal Services.

### Family Violence Prevention Legal Services

FVPLSs provide culturally safe and holistic, specialist legal and non-legal support for Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women and their children. As noted below, Aboriginal and Torres Strait Islander women are much more likely to be killed or injured as a result of family violence than other women. Despite these statistics, FVPLSs are chronically under-funded and routinely face funding uncertainty.

Commonwealth funding has remained at the same level since 2013-14, with no government commitment to increase funding. There has also been no commitment to apply the standard Consumer Price Index (CPI) increase, equating to a loss of approximately \$9.7 million.

FVPLSs report being forced to turn away up to 30-40% of Aboriginal and Torres Strait Islander women because there is insufficient capacity to support them. FVPLSs funding is limited to certain identified rural and remote locations, leaving significant geographical areas and communities without access to culturally safe and specialist family violence supports. FVPLSs need increased and dedicated, secure and long term funding (eg 5 year funding agreements) to adequately support Aboriginal and Torres Strait Islander victim/survivors of family violence.

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202. See, The Auditor-General, *Annual Report 2014-2015* (2015), 27 for detail on relative expenditure levels.



# 15 Violence and discrimination against Aboriginal and Torres Strait Islander women

## 15.1 High rates of violence and discrimination

Aboriginal and Torres Strait Islander women and girls are over-represented as victims/survivors of family violence and sexual violence and the numbers are growing. Aboriginal women are 32 times more likely to be hospitalised as a result of family violence,<sup>203</sup> and 10 times more likely to be killed as a result of violent assault compared to non-Indigenous women.<sup>204</sup> Aboriginal and Torres Strait Islander women also experience higher rates of sexual violence. The International Violence Against Women Survey revealed that three times as many Indigenous women reported sexual violence.<sup>205</sup>

The silencing of Aboriginal women's voices through the dual experiences of racial and gender discrimination contributes to the disproportionate impact of family violence, which in turn contributes to the over-representation in child removal, incarceration and homelessness rates.<sup>206</sup>

In 2017, UN Special Rapporteur on the rights of Indigenous peoples found that:

Aboriginal and Torres Strait Islander women endure unacceptable levels of disadvantage that has been informed by a historical context of intersecting, systemic forms of discrimination. Discrimination against Aboriginal and Torres Strait Islander women exists on the grounds of gender, race and class and is structurally and

institutionally entrenched. This discrimination coupled with the lack of culturally appropriate measures to address the issue, fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women.<sup>207</sup>

## 15.2 Factors contributing to high rates of violence

### ARTICLE 5

There are numerous complex and diverse factors contributing to the high levels of family violence against Aboriginal and Torres Strait Islander women. The causes do not derive from Aboriginal culture. Gendered impacts of disadvantage, dispossession and the attempted destruction of Aboriginal and Torres Strait cultures since colonisation has contributed to the proliferation of family violence, with women and children at most risk.<sup>208</sup> These factors, together with current forms of systemic discrimination, have also resulted in a deep distrust of government institutions, including police and the courts. For example, it has been estimated that around 90 per cent of violence

203. The Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2016* (2016) 4.98, table 4A.12.13.

204. Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people*, (2006), 66. Ombudsman Western Australia, Parliament of Western Australia, *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities* (2015), 107.

205. Australian Law Reform Commission, *Sexual Assault*

*and Family Violence*, <<https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/prevalence-sexual-violence>>

206. National Family Violence Prevention Legal Service, *Submission to the Special Rapporteur on Violence against Women*, January 2017.

207. United Nations Human Rights, Office of the High Commissioner, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia*, 3 April 2017.

208. National Family Violence Prevention Legal Service, *Submission to the Special Rapporteur on Violence against Women*, January 2017.

## Punitive response to Ms Mullaley's experience of family violence<sup>214</sup>

In March 2013, Ms Mullaley was violently assaulted by her partner and found injured and naked by police officers. She was then charged with assaulting the police who attended the scene. The police became distracted by Ms Mullaley's agitated behaviour and with processing charges against her. This contributed to their 'delayed and ineffective response' to the abduction of Ms Mullaley's child, who was later murdered by her partner. The Corruption and Crime Commission of Western Australia said that police failed to consider whether the cause of Ms Mullaley's behaviour 'might be the result of an attack that left her naked and injured.' It was noted that 'assumptions were made about the cause of aggression and other behaviour instead of a dispassionate analysis of the whole scene which began with violence to [Ms] Mullaley.'<sup>215</sup>

against Aboriginal and Torres Strait Islander women is not reported to police.<sup>209</sup>

In addition, a range of socio-legal issues and factors of disadvantage increase Aboriginal women's vulnerability to violence and exacerbate the effects. Family violence is intrinsically linked as a cause and a consequence of Aboriginal and Torres Strait Islander women's homelessness, poverty, incarceration, mental and physical ill health, drug and alcohol abuse and removal of children.<sup>210</sup>

### 15.3 Barriers to accessing justice

ARTICLES 1, 2, 5 & 6

There are a multitude of factors that act as barriers to Aboriginal and Torres Strait Islander women accessing justice as victim/survivors of violence. These include the above socio-legal issues, together with a lack of awareness of rights, fear of retaliation, difficulties dealing with courts, a mistrust of mainstream services and a lack of funding for Aboriginal community controlled organisations – services that are skilled at providing culturally safe and holistic services to help women end violence in their lives (funding is discussed at section 14.4).

In addition, poor responses and discriminatory attitudes by some police officers, court staff and child protection authorities prevent Aboriginal and Torres Strait Islander women seeking help.<sup>211</sup>

#### Under-policing and discriminatory police attitudes

Aboriginal and Torres Strait Islander women are simultaneously over-policed as alleged offenders, and under-policed as victim/survivors of crime.<sup>212</sup> There are numerous accounts of police, the majority of whom are non-Indigenous and male, minimising Aboriginal and Torres Strait Islander women's experiences of violence and viewing their responses as atypical and "difficult".<sup>213</sup>

There are a number of other cases involving Aboriginal women who have died following years of domestic violence, in which the police have been criticised for failures to investigate or act appropriately during subsequent coronial investigations, including the deaths of Andrea Pickett in Western Australia, and Kwementyaye McCormack in the Northern Territory. These cases highlight the intersectional discrimination and other barriers faced by Aboriginal women who have experienced violence.

209. The Australian Productivity Commission, *Overcoming Indigenous Disadvantage – Key Indicators 2014*, (2014), at 4.91; Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology (2011) 1.

210. National Mental Health Commission, *The Mental and Social and Emotional Wellbeing of Aboriginal and Torres Strait Islander Peoples, Families and*

*Communities*, (2013) 17; Australian Institute of Health and Welfare, *Specialist Homelessness Services 2011-2012* (2012) 13, 38; Data drawn from a 2004 study.,

211. See further; Hannah McGlade, *Our Greatest Challenge, Aboriginal children and human rights*, (Aboriginal Studies Press, 2012).

212. Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of*

*Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017, 5, 31.

213. *Ibid*, 31.

214. Corruption and Crime Commission, *Report on the Response of WA Police to a Particular Incident of Domestic Violence on 19-20 March 2013*, (2016), 2, 4.

215. *Ibid*, 21.

## Discriminatory responses by child protection authorities

Family violence is one of the greatest drivers of Aboriginal child removal. For example, in Victoria 90% of Aboriginal children have been placed in statutory out-of-home-care due to family violence.<sup>216</sup> Child protection authorities often adopt excessive and inappropriately punitive and judgmental approaches towards Aboriginal or Torres Strait Islander victim/survivors of family violence, rather than supporting them to safely care for their children and live free from violence.<sup>217</sup> This acts as a significant deterrent to disclosing family violence and seeking assistance.

## Need for culturally appropriate and gender sensitive services

Australia has a duty to exercise due diligence in preventing violence against all women.<sup>218</sup> Responses should be culturally appropriate and gender sensitive and led by Aboriginal and Torres Strait Islander women and their communities.

There have been some positive developments, including greater willingness on the part of Australian governments to tackle the causes and consequences of family violence. In Victoria, the Government has committed to implementing all 227 recommendations from a Royal Commission into Family Violence and has provided additional funding to Aboriginal family violence prevention strategies and services. At the national level, Australia has progressed its National Plan to Reduce Violence Against Women and Their Children (**National Plan**) to a third phase.

However, Aboriginal and Torres Strait Islander women continue to be denied equal access to culturally appropriate services and programs across Australia. For example, very few criminal justice responses or programs respond to the particular needs of Aboriginal and Torres Strait Islander women caught in a cycle of victimisation and offending.<sup>219</sup> In addition, Australia's third Action Plan as part of the National Plan does not pay sufficient attention to Aboriginal and Torres Strait Islander women's experiences and needs.<sup>220</sup>

Australia should develop and resource a dedicated plan to reduce violence against Aboriginal and Torres Strait Islander women, designed and led by Aboriginal and Torres Strait Islander women and community controlled organisations working to prevent violence. Detailed action plans should also be developed in each state and territory.

216. Victoria, Commission for Children and Young People, *Always was always will be Koori children- systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, (2016), 47.

217. National Family Violence Prevention Legal Service, *Submission to the Special Rapporteur on Violence against Women* (2017).

218. *Convention on the Elimination of All Forms of Violence Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

219. *Re Application for Bail by Patricia Mitchell* [2013] VSC 59, 13.

220. Office of the High Commissioner, *Australia places violence against women high on the agenda*

*but indigenous women left behind, says UN expert*, United Nations Human Rights <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21275&LangID=E>>.

# 16

## Discrimination against Aboriginal and Torres Strait Islander people and economic, social and cultural rights

ARTICLES 1, 2 & 5

### 16.1 Closing the Gap framework

In 2008, the Australian Government commenced implementation of the national “Closing the Gap” framework to address the stark disparity in the realisation of social and economic rights between Aboriginal and Torres Strait Islander people and non-Indigenous people.

Baseline measurements revealed that life expectancy was 10 to 17 years lower for Aboriginal and Torres Strait Islander people, child mortality much higher, poorer educational and employment outcomes and limited access to early childhood education for Aboriginal and Torres Strait Islander people compared to non-Indigenous people.

The Closing the Gap targets are:

- close the gap in life expectancy by 2031;
- halve the gap in mortality rates for Indigenous children under five by 2018;
- 95 percent of all Indigenous four years-olds are enrolled in early childhood education by 2025;
- close the gap in school attendance by 2018;
- halve the gap in reading and numeracy levels by 2018;
- halve the gap in Year 12 attainment or equivalent by 2020; and
- halve the gap in employment outcomes by 2018.<sup>221</sup>

The Closing the Gap framework is scheduled to run over 25 years. Australia has reached the halfway point and is tragically behind in meeting all targets, except halving the gap in Year 12 attainment rates.<sup>222</sup>

Aboriginal and Torres Strait Islander people have voiced deep concern and called on the Government, through the Redfern Statement (see section 7.5), to take swift action to refocus and work in partnership with Aboriginal and Torres Strait Islander people to address the lack of progress in meeting Closing the Gap targets.<sup>223</sup>

The Special Rapporteur on the rights of Indigenous peoples stated in her 2017 report on Australia that ‘it is woefully inadequate that, despite having enjoyed over two decades of economic growth, Australia has not been able to improve the social disadvantage of its indigenous population.’<sup>224</sup>

While the Australian Government has acknowledged that only one of the seven targets – to halve the gap in Year 12 attainment rates – is on track, it has continued to strip funding from Aboriginal and Torres Strait Islander focused programs and services (see section 13).<sup>225</sup> In addition, a concerning omission is the lack of justice targets

221. John Gardiner-Garden, *What is ‘Closing the Gap’?* Parliament of Australia <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook44p/ClosingGap](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/ClosingGap)>.

222. Department of the Prime Minister and Cabinet, *Closing the Gap: Prime Minister’s Report 2017* (Australian Government, 2017).

223. National Congress of Australia’s First Peoples, *Election 2016-Aboriginal Peak and Torres Strait Islander Organisations Unite -Thursday June 9 2016-The Redfern Statement* (2016) <[http://national-congress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-\\_Final.pdf](http://national-congress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf)>.

224. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on*

*indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 47.

225. National Congress of Australia’s First Peoples, *Election 2016-Aboriginal Peak and Torres Strait Islander Organisations Unite -Thursday June 9 2016-The Redfern Statement* (2016) <[http://national-congress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-\\_Final.pdf](http://national-congress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf)>.

for reducing violence rates and over-representation in criminal justice systems (see section 14.2).

Australia should work closely with the National Congress of Australia's First Peoples and Aboriginal and Torres Strait Islander communities and organisations to:

- revise the Closing the Gap targets, and include imprisonment and violence reduction targets, and housing targets;
- develop and fund Aboriginal and Torres Strait Islander community based strategies to address the revised Closing the Gap targets.

## 16.2 Right to health and lack of access to health-care

Aboriginal and Torres Strait Islander peoples do not enjoy the right to health equally with non-Indigenous Australians, including equal access to primary health care and basic needs to support health, such as adequate housing, safe drinking water and effective sewerage systems.

Mortality rates for Aboriginal and Torres Strait Islander people are twice that of non-Indigenous people and life expectancy is estimated to be 10 to 17 years less.<sup>226</sup> This is estimated to be worse than for other Indigenous peoples globally.<sup>227</sup> Further, suicide rates among Aboriginal and Torres Strait Islander people (and even more acutely lesbian, gay, bisexual, queer, transgender and intersex Aboriginal and Torres Strait Islander people) are 'escalating at a shocking rate and are double that of non-Indigenous Australians.'<sup>228</sup>

Aboriginal and Torres Strait Islander people also face high rates of renal failure, skin, eye and ear infections, gastroenteritis and diarrhoeal disease, rheumatic fever, and parasitic infections that lead to hospitalisation rates 11 times non-Aboriginal rates for children under two years of age.<sup>229</sup> Chronic diseases, such as heart disease, kidney disease and diabetes also disproportionately impact Aboriginal and Torres Strait Islander people.<sup>230</sup> High quality primary health care, incorporating prevention and health promotion programs, is critical to stemming the escalating health impacts and costs of chronic disease.

### Racism in the healthcare sector

The *National Aboriginal and Torres Strait Islander Health Plan 2013- 2023* (and the associated *Implementation Plan*) focuses on the need to address the social determinants for Aboriginal and Torres Strait Islander people's health, together with the need to tackle racism.<sup>231</sup> However, Aboriginal people continue to experience racism in healthcare systems, which compounds the psychological distress of racial discrimination outside of healthcare settings.<sup>232</sup> In 2017, the Special Rapporteur on the rights of Indigenous peoples noted that Aboriginal doctors and patients had informed her about 'experiences of racism within the medical sector and their reluctance to seek services from mainstream medical providers.'<sup>233</sup>

### Availability of Aboriginal community controlled health services

The Aboriginal community controlled health sector is a vibrant sector which has achieved remarkable success in delivering health services.<sup>234</sup> However, the sector is under-resourced to meet the health needs of Aboriginal and Torres Strait Islander communities.<sup>235</sup> The 2016 *Aboriginal Community Controlled Health Service Report Card* identified a lack of mental health, social and emotional wellbeing services, and youth services, as being significant gaps.<sup>236</sup> In addition, more support is needed for these services to provide health promotion, which is most effective when it is community driven.

226. Australian Indigenous Health Bulletin, Vol 15, No 2, April-June 2015, 2.

227. Ibid.

228. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 52. See also D Bonson, *Voices from the Black Rainbow: that inclusion of the Aboriginal and Torres Strait Islander LGBQTI, Sistergirls and Brotherboys in health, wellbeing and suicide prevention strategies*, (2017).

229. Australian Indigenous Health Bulletin, Vol 15, No 2, April-June 2015, 6.

230. Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results*,

*Australia 2012-13*, (27 November 2013), <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/C05464536463EC10CA257C2F001459CB?opendocument>.

231. Department of Health and Ageing, *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* (Australian Government, 2013); Department of Health, *Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013-2023* (Australian Government, 2015).

232. See eg Margaret Kelaher et al, 'Experiencing Racism in Health Care: the Mental Health Impacts for Victorian Aboriginal Communities' (2014) 201(1) *Medical Journal of Australia* 44.

233. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on*

*indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 30.

234. Ibid, 53.

235. See eg Australian Human Rights Commission, 'Health Funding not Enough to Close the Gap' (11 May 2017), <https://www.humanrights.gov.au/news/stories/indigenous-health-funding-not-enough-close-gap>.

236. Australian Institute of Health and Welfare, *Healthy Futures – Aboriginal Community Controlled Health Services Report Card 2016*. (2016) Cat. no. IHW 171. Canberra: AIHW.

Health needs are particularly acute in remote communities.<sup>237</sup> However, Aboriginal and Torres Strait Islander people in remote areas have very limited healthcare options, including mental health and disability support services, and face significant barriers to accessing health services in towns and cities.

Aboriginal primary health care is often provided by state governments, particularly in remote areas. There has been a slow transition away from government service delivery to community control, however many Aboriginal and Torres Strait Islander people in urban/regional areas have limited, if any, access to an Aboriginal community controlled health service. Community controlled health services should be supported to provide a broad range of services including clinical, preventative, health promotion, social and emotional wellbeing, family support, and youth support services. This would have a positive impact on the social determinants of health, while supporting increased employment of Aboriginal and Torres Strait Islander people in the health sector. It is critical that there is also concurrent investment in the social determinants of health such as early childhood services, education, employment and housing.

The CERD Committee, the Special Rapporteur on Indigenous peoples and the Special Rapporteur on the right to health, have all recommended that Australia improve the provision of culturally appropriate and accessible health services and partner with Aboriginal peoples in the design and delivery of these services.<sup>238</sup>

**Australia should:**

- provide sufficient funding for the Implementation Plan for the *National Aboriginal and Torres Strait Islander Health Plan 2013- 2023*; and
- increase support for, and investment in, Aboriginal community controlled health services and programs that promote Aboriginal and Torres Strait Islander employment in the health sector.

## 16.3 Housing and severe overcrowding in remote communities

Housing in remote Aboriginal and Torres Strait Islander communities has suffered from decades of neglect. This continues to undermine the realisation of rights to health, an adequate standard of living and the protection of families, by leaving people with no choice but to live in unsafe or severely overcrowded houses. Aboriginal leaders and organisations in the Northern Territory have described deteriorating housing conditions and high levels of overcrowding as a major threat to health.<sup>239</sup>

A recent report by the Productivity Commission of Australia stated that 49 per cent of Aboriginal and Torres Strait Islander people in remote areas still live in overcrowded housing.<sup>240</sup> Overcrowding is a significant contributor to homelessness. Aboriginal and Torres Strait Islander people are more than twice as likely as non-Indigenous people to experience homelessness.<sup>241</sup> There have been small improvements as a result of government investment in recent years through the National Partnership on Remote Indigenous Housing (see below) but overcrowding in remote communities remains a crisis.

In addition, many people continue to live in houses with major structural problems or failing facilities. The 2014-15 National Aboriginal and Torres Strait Islander Social Survey revealed that 36% of Aboriginal and Torres Strait Islander people in remote communities were living in a dwelling that had major structural problems, compared to 25% in non-remote regions.<sup>242</sup> Basic facilities, including washing facilities, waste removal and proper food storage to prevent vermin, which are necessary for a healthy living environment, were not available or did not work in 28% of remote areas.<sup>243</sup>

Overcrowding and poor housing conditions contribute to higher rates of skin infections, respiratory infections, eye and ear infections, diarrhoeal diseases and rheumatic fever. Inadequate and overcrowded housing also has significant implications for general wellbeing through increased exposure to hazards, stress, disruption of sleep and study, and household violence.

237. Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia 2012-13*, (27 November 2013), <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/C05464536463EC10CA257C2F001459CB?opendocument>.

238. UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on Australia*, UN Doc CERD/C/AUS/CO/15-17; James Anaya, Special Rapporteur, Report by the Special Rapporteur on the Situation of Human

Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia (Advanced unedited version), 50th sess, UN Doc A/HRC/15 (4 March 2010).

239. Hal Bisset, (2015) *Aboriginal Remote Housing Forum 12-13 March 2015*, Aboriginal Peak Organisations of the Northern Territory, 6.

240. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (Productivity

Commission, 2016) 42. This is a reduction from 63 per cent in 2004-05.

241. Australian Bureau of Statistics (2016) National Aboriginal and Torres Strait Islander Social Survey, 2014-15. <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Main%20Features~Housing~9>

242. Ibid.

243. Ibid.

## Addressing severe overcrowding and homeless in the Northern Territory

The situation is most acute in the Northern Territory, where the homelessness rate is nearly 15 times the national average.<sup>244</sup> 2011 Census data indicated that 85 per cent of homeless people in the Northern Territory were in severely crowded dwellings, 91 per cent of those dwellings were in very remote locations and 98 per cent of those living in severely overcrowded houses were Aboriginal.<sup>245</sup>

The 2007 *Ampe Akelyernemane Meke Mekarle-Little Children Are Sacred* report described the housing situation in the Northern Territory at that time as 'disastrous and desperate', estimating that a further 4,000 houses were needed to meet existing demand, with an additional 400 houses required each year for 20 years to meet the expected doubling of population.<sup>246</sup> The report noted overcrowding as a key causal factor to family violence and child sexual assault in the Northern Territory.<sup>247</sup>

### *National Partnership Agreement on Remote Indigenous Housing*

The National Partnership Agreement on Remote Indigenous Housing (NPARIH) commenced in 2008 (now called the National Partnership on Remote Housing or NPRH). The Australian Government sought to have communities enter into leases of their land of at least 40 years under NPARIH.

NPARIH is a national program, however the greatest investment has been in the Northern Territory. In the Northern Territory, as at 31 July 2016, under the NPARIH program 1191 new houses had been built and 2929 houses rebuilt or refurbished.<sup>248</sup> A further 1028 upgrades were completed under other program funding.<sup>249</sup> This is a drop in the ocean compared to the vast need identified above, which increases as the population in many remote communities grows.

The North Australian Aboriginal Justice Agency reported in 2016 that the construction of new houses has been confined to 16 of 73 targeted remote communities, with 57 communities not receiving any additional housing.<sup>250</sup> They suggest that funds have been directed to a few selected 'hub' communities, which pressures people to move away from traditional homelands. In addition, previous building and maintenance skills held in communities are

being lost because the Northern Territory Government has been paying external contractors to do repairs and maintenance.<sup>251</sup> NPARIH is due to end on 30 June 2018, with the replacement strategy still to be developed. A review of NPARIH has been conducted, however the Australian Government has not released the report.

#### Australia should:

- address remote overcrowding and housing maintenance issues as a matter of urgency and ensure that sufficient housing is built to address current and future need. Aboriginal cultural and environmental interests should be factored into the design of housing; and
- consult with the National Congress of Australia's First Peoples and Aboriginal and Torres Strait Islander communities to establish a National Indigenous Housing Authority to provide expert advice to government on remote housing.

## 16.4 Poor sanitation and a lack of safe drinking water in remote communities

Safe clean drinking water and functional waste and sewage systems are vital to health. However, overcrowded housing in remote communities increases the stress on water supplies and sewage disposal systems, causing failures and flooding. In addition, environmental factors such as bacterial and heavy metal contamination of drinking water caused by close proximity of mining and inadequate waste and sewage management, are key contributors to poor health outcomes and increased mortality and morbidity rates of Aboriginal and Torres Strait Islander people.<sup>252</sup>

244. Australian Bureau of Statistics, 2049.0 – Census Population of Housing: Estimating Homelessness (12 November 2012) <<http://abs.gov.au/ausstats/>>. This rate has declined since 2001 but is still substantially higher than any other jurisdiction.

245. Ibid; See commentary by Chris Chamberlain, 'Homelessness: Reshaping the Policy Agenda' *Australian Housing and Urban Research Institute* (2014).

246. Northern Territory, Board of Inquiry into the protection of Aboriginal Children from sexual abuse, *The Ampe Akelyernemane Meke Mekarle-Little Children Are Sacred Report- Rep* (2007), 195.

247. Ibid.

248. Written correspondence, Department of Housing to the Aboriginal Peak Organisations Northern Territory, 3 November 2016.

249. Ibid.

250. The Northern Australian Aboriginal Justice Agency, *Northern Territory Housing Issues Paper and Response to the Housing Strategy Consultation Draft- February 2016*, (2016), 7.

251. Hal Bisset, (2015) *Aboriginal Remote Housing Forum 12-13 March 2015*, Aboriginal Peak Organisations of the Northern Territory, 10.

252. Australian Indigenous Health Bulletin, Vol 15, No 2, April-June 2015, 2, 6.

Reliable data about access to safe water and functional waste and sewage disposal systems is limited.<sup>253</sup> In 2006, 978 remote Aboriginal communities nationally had no connection to town water supplies, with only 17 per cent of those testing their water quality. Thirty per cent of those tested failed to meet minimum standards.<sup>254</sup> In 2016, the Western Australian Government reported that water in remote Aboriginal communities regularly failed to meet Australian standards for safe drinking water, with testing revealing uranium, nitrate and faecal bacteria levels above acceptable standards.<sup>255</sup>

Australia should ensure that drinking water and waste water systems in all Aboriginal and Torres Strait Islander communities are tested monthly and that all remote communities have operational sewage treatment systems that are equipped for population levels and climate conditions.

## 16.5 Discrimination in access to social security and work rights

### Income management

Income management requires 50-70 per cent of a person's social security payment to be quarantined into an account that can only be used to pay for certain goods and in specific stores. Compulsory income management was first introduced as a core component of the Northern Territory Emergency Response laws (see section 19). Income management now applies, in different forms, to people in the Northern Territory, parts of Western Australia and

South Australia and to small areas in Victoria, New South Wales and Queensland.<sup>256</sup>

Quarantined funds are accessible through a Basicscard. The system restricts people's purchases and prevents, for example, purchases of second-hand goods. People have reported difficulty determining the balance of money on their Basicscard and found declined transactions and queues for Basicscard purchases embarrassing.<sup>257</sup> Women have reported difficulties accessing taxis due to the lack of cash, or paying for school excursions. Older people have reported having trouble using the Basicscard, losing the card or forgetting their pin.<sup>258</sup>

The Basicscard stigmatises people on social security payments and has been described as reminding people of painful memories of being paid in rations rather than wages. Limiting access to cash has other unforeseen impacts, for example, making it more difficult to leave family violence,<sup>259</sup> and difficulty traveling for funerals and ceremony and other cultural and community obligations.

Income management was expanded from the Northern Territory to other regions despite there being a lack of positive outcomes identified in a comprehensive four year evaluation of income management in the Northern Territory.<sup>260</sup> In addition, between 2009-10 and 2014-15, \$410.5 million was allocated by the Federal Government for income management in the Northern Territory. Departmental estimates are that income management costs between \$2400 and \$2800 per annum for each person living in an urban area, and \$6600 and \$7900 per annum for those in remote locations.<sup>261</sup>

The Parliamentary Joint Committee on Human Rights (PJCHR) has noted that compulsory income management has not been achieving its objectives in the Northern Territory of supporting vulnerable individuals and families. The PJCHR cited Shelley Bielefeld's observation that 'the finances currently allocated to resourcing the compulsory income management system could arguably be better spent on providing necessary social services to effectively assist these welfare recipients in a culturally appropriate manner.'<sup>262</sup>

253. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (Productivity Commission, 2016) 43.

254. Australian Indigenous Health Bulletin, Vol 15, No 2, April-June 2015, 6.

255. Office of the Auditor General of Western Australia, *Delivering Essential Services to Remote Aboriginal Communities* (2015). See further Nina Hall et al, 'Water, sanitation and hygiene in remote Indigenous Australian communities: A scan of priorities' (Global Change Institute discussion paper: Water for equity and wellbeing series, The University of Queensland, 2017).

256. See, Department of Social Services, *Families and Children*, (24 May 2017) Australian Government

<https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/family-finance/income-management>.

257. Equality Rights Alliance, 'Women's Experience of Income Management in the Northern Territory' (Report, National Women's Alliances, July 2011) 22.

258. *Ibid.*, 20

259. Senate Community Affairs Legislation Committee, Parliament of Australia, *Stronger Futures in the Northern Territory Bill 2011 [Provisions] Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 [Provisions] Social Security Legislation Amendment Bill 2011 [Provisions]*, (2012), 43.

260. J Rob Bray et al, *Evaluating New Income Management in the Northern Territory: Final Evaluation Report*

(Australian National University, 2014). It noted that a small number of people have voluntarily opted into income management, with more positive outcomes achieved by those people.

261. The Auditor-General, Administration of New Income Management in the Northern Territory (Audit Report No 19 2012-13, Australian National Audit Office, 2013) 13, 16, 94.

262. Shelley Bielefeld, *Compulsory Income Management and Indigenous Peoples - Exploring Counter Narratives amidst Colonial Constructions of 'Vulnerability'* (2014) 36 Sydney Law Review 695, 716.

The PJCHR has also described compulsory income management in the Northern Territory as 'a disproportionate measure', observing:

The imposition of significant conditions on the provision of income support payments, including what goods or services may be purchased and where, is an intrusive measure that robs individuals of their autonomy and dignity and involves a significant interference into a person's private and family life.<sup>263</sup>

Additionally, the PJCHR pointed to the discriminatory application of compulsory income management in the Northern Territory, noting that it 'may be viewed as racially based differential treatment within the meaning of article 1 of the ICERD' and that it also appears to have discriminatory impact on women.<sup>264</sup> The PJCHR concluded that income management measures limit the right to equality and non-discrimination, the right to social security and the right to privacy and family.<sup>265</sup> The UN Committee on Economic Social and Cultural Rights, in its review of Australia in 2017, called on Australia to consider maintaining only 'opt in' income management.<sup>266</sup>

### Cashless Welfare Card

Cashless Welfare Card (CWC) trials were introduced in 2016 in two remote areas, with community consent. Under the trials, 80 per cent of a person's social security payments are quarantined onto a cashless debit card.<sup>267</sup> The debit card can only be used to buy basic items. The Australian Government asserts that the cards prevent the purchase of alcohol, gambling and drugs. The CWC arose from recommendations in a report by mining magnate, Andrew Forrest, which lacked academic and policy rigour.<sup>268</sup>

The CWC disproportionately impacts Aboriginal people, who make up 565 of the 752 participants in the trial site of Ceduna, South Australia, and 984 of the 1,199 participants in the East Kimberley, Western Australia.

Consultations leading up to the implementation of the CWC trials were limited to a small number of potential participants. It has been reported that consultations were narrowly focused and that some of those who consented on behalf of their communities did so because of concern about not receiving funding for vital community services if they did not support the CWC trials.<sup>269</sup> Some Elders and community members have said they do not want the CWC in their community because of the shame and suffering it causes.<sup>270</sup>

The second stage of an evaluation of the CWC commissioned by the Federal Government reported that:

- 22 per cent of people said it led to improvements in their life, while 32 per cent reported that the CWC had made their life worse, including because they were prevented from paying bills and lacked access to sufficient cash;
- participants self-reported a reduction in alcohol consumption (41 per cent); gambling (48 per cent) and drug use (48 per cent);
- crime statistics showed no improvement during the CWC trials, with the exception of drug driving offences and apprehensions under the Public Intoxication Act in one of the two sites; and
- community members who felt they spent money wisely felt punished and discriminated against.<sup>271</sup>

Concerns have been raised about the methods used to evaluate the effectiveness of CWC, including the bias in self-reporting of alcohol consumption, drug use and gambling.<sup>272</sup> Some community members have reported increases in black market alcohol consumption.<sup>273</sup> While some communities have seen a reduction in thefts since the introduction of the card, others have seen an increase.<sup>274</sup> The Chairperson of the Aboriginal Health Council of West Australia has reported a surge in prostitution, crime and elder abuse with no drop in the use of methamphetamines or alcohol use.<sup>275</sup> The CWC was linked to a general sense of disempowerment among Aboriginal

263. Ibid, 4.100.

264. Ibid, 4.102.

265. Ibid, 4.104.

266. Committee on Economic, Social and Cultural Rights, Concluding Observations on Australia (2017) [32(c)].

267. Australian Government Department of Social Services, Cashless Debit Card – Overview, <https://www.dss.gov.au/families-and-children/programmes-services/welfare-conditionality/cashless-debit-card-overview>

268. Elise Klein, 'Academic Perspectives on the Forrest Review: Creating Parity' (Topical Issue No 2/2014, Centre for Aboriginal Economic Policy Research, 2014).

269. Elise Klein, 'The Cashless Debit Card causes social and economic harm -so why trial it again?' *The Conversation* (online), 30 March 2017 <http://theconversation.com/the-cashless-debit-card-causes-social-and-economic-harm-so-why-trial-it-again-74985>.

270. Shelley Bielefeld, 'Cashless welfare cards: Controlling spending patterns to what end?' (2017) 8(29) *Indigenous Law Bulletin* 28; Erin Parke, 'Cashless Welfare Card Divides East Kimberly as Battle Lines Drawn Over Future' (*ABC Online*, 24 August 2017), <http://www.abc.net.au/news/2017-08-24/east-kimberley-cashless-welfare-card-trial-divides-community/8839764>.

271. Department of Social Services, Parliament of Australia, Cashless Debit Card Trial Evaluation (Aug 2017) 5, 22, 38; *Indigenous Law Bulletin* 'Cashless welfare cards: Controlling spending patterns to what end?' 8(29) 28-31.

272. See e.g. Jane Hunt, 'The Cashless Debit Card Trial Evaluation: A Short Review' (Topical Issue 1/2017, Centre for Aboriginal Economic Policy Research, 2017).

273. Erin Parke, 'Cashless Welfare Card Divides East Kimberly as Battle Lines Drawn Over Future' (*ABC*

*Online*, 24 August 2017), <http://www.abc.net.au/news/2017-08-24/east-kimberley-cashless-welfare-card-trial-divides-community/8839764>

274. Eliza Borrello and Erin Parke, 'Greens use Kununurra theft spike to call for scrapping of cashless welfare card', *Australian Broadcasting Corporation*, 17 August 2017 <http://www.abc.net.au/news/2017-08-17/greens-use-theft-spike-to-call-for-end-to-cashless-welfare-cards/8817326>.

275. Kate Campbell, 'Cashless welfare card backfires with increase in crime, according to Aboriginal Health Council of WA' *Perth Now Sunday Times*, 21 May 2017 <<http://www.perthnow.com.au/news/western-australia/cashless-welfare-card-backfires-with-increase-in-crime-according-to-aboriginal-health-council-of-wa-news-story/adcl141c9c21467e3c33b6355ff682c29>>.

people during a coronial inquest into 13 suicides in the Kimberley region.<sup>276</sup>

The Australian Government has legislation before Parliament that, if passed, would give it broad power to extend the CWC beyond the trial sites.<sup>277</sup>

**Australia should:**

- end compulsory income management and cashless welfare card schemes; and
- instead invest in trauma-informed and wrap-around family, youth, suicide prevention and alcohol and substance abuse services and programs, delivered by or in partnership with Aboriginal and Torres Strait Islander community controlled organisations, particularly in communities that identify themselves as in high need of these programs.

## Community Development Program

The Community Development Program (CDP) is a racially discriminatory Federal Government program targeting remote areas in Australia, introduced in July 2015. Around 33,000 people are covered by CDP and 84 per cent are Aboriginal and Torres Strait Islander persons.

CDP requires people receiving social security payments in remote communities aged 18 to 49 to undertake 25 hours of work activities per week, 12 months of the year.<sup>278</sup> In contrast, non-remote jobseekers (most of whom are non-Indigenous) are only required to work 6 months of the year and for 15 hours a week (if 30 to 49 years of age) or for 6 months of the year and for 25 hours per week (if 18 to 29 years of age).<sup>279</sup> This means people in remote communities must work up to 760 additional hours per year for the same basic social security payment as people in non-remote areas.

The Special Rapporteur on the rights of Indigenous peoples described the requirements under CDP as 'discriminatory, being substantially more onerous than those that apply to predominantly non-Indigenous jobseekers.'<sup>280</sup>

Many people doing work under CDP and being paid a basic social security payment (nearly half the national minimum wage in many cases), could be employed on award wages and with workplace rights to do the same tasks.<sup>281</sup>

The harshness of the social security penalty regime, together with a lack of access to services and the requirement to work substantially more hours, has seen financial penalties quadruple for CDP participants. Nearly 300,000 financial penalties have been imposed since July 2015. Around 90 per cent of those penalised under CDP are Aboriginal and Torres Strait Islander.<sup>282</sup> There have been reports of youth disengagement, increased poverty and food insecurity for already impoverished families.<sup>283</sup>

The Aboriginal Peak Organisations of the Northern Territory (APO NT) has proposed a promising alternative community-led scheme, called *Fair Work and Strong Communities: Proposal for a Remote Development and Employment Scheme*. APO NT's alternative is for a scheme that is place-based, community driven and aims to increase economic opportunities in remote communities.<sup>284</sup>

**Australia should:**

- cease the Community Development Program and replace it with a community-led alternative; and
- undertake consultations with remote communities to identify community-led strategies, such as the model developed by APO NT, for remote employment and community development, which are responsive to community needs and aspirations.

276. Erin Parke and David Weber, 'Kimberley youth suicide inquest witness attacks cashless welfare cards' *Australian Broadcasting Corporation News* (online), 15 August 2017 <<http://www.abc.net.au/news/2017-08-14/suicide-inquest-hears-concern-over-cashless-welfare-cards/8805774>>.

277. Social Services Legislation Amendment (Cashless Debit Card) Bill (2017)

278. Australian Government, *Community Development Programme Guidelines Handbook* (effective 7 September 2015); Australian Government, *Guide to Social Security Law* (31 May 2017) 3.2.9.70.

279. Australian Government, *Guide to Social Security Law* (31 May 2017) 3.2.10.30.

280. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add. 2 (8 August 2017), 58.

281. North Australian Aboriginal Justice Centre, Submission No 40, *The appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)* June 2017; Australian Council of Trade Unions, Submission No 28, *Inquiry into the Appropriateness and Effectiveness of the Community Development Program (CDP)*, 14 June 2017.

282. Lisa Fowkes, *Social Security Penalties Applied to Participants in the Community Development Programme. Update Including Data for the Quarter Ending December 2016* (24 April 2017).

283. Kiri Jordan and Lisa Fowkes (eds) *Job Creation and Income Support in Remote Indigenous Australia: Moving Forward with a Better System* (CAEPR Topical Issue no 2/2016, Australian National University 2016).

284. Aboriginal Peak Organisations Northern Territory, *Fair Work and Strong Communities: Proposal for a Remote Development and Employment Scheme*, May 2017, 4.

## 16.6 Preservation of Aboriginal and Torres Strait Islander languages and culture

Language is ‘the foundation upon which the capacity to learn, interact and to shape identity is built.’<sup>285</sup> Language learning, maintenance and revival have been identified by the National Congress of Australia’s First Peoples as requiring urgent attention.<sup>286</sup> Educational research over decades has intrinsically linked language maintenance to the wellbeing of Aboriginal and Torres Strait Islander peoples, and to better educational outcomes for individuals and communities.<sup>287</sup> Aboriginal and Torres Strait Islander youth in remote areas who speak an Indigenous language are less likely to experience risk factors associated with poor wellbeing.<sup>288</sup>

The rapid rate of attrition of Aboriginal and Torres Strait Islander languages and the associated loss of cultural identity is a cause of distress for many Aboriginal and Torres Strait Islander people who recognise their ancestral languages as a fundamental factor both to their wellbeing and to Australia’s national heritage.<sup>289</sup> Positively, the Australian Curriculum, Assessment and Reporting Authority has committed to ‘...understand and acknowledge the value of Indigenous cultures and... [provide] the knowledge, skills and understanding to contribute to... reconciliation between Indigenous and non-Indigenous Australians.’<sup>290</sup>

Language is central to cultural restoration, maintenance and development. As such, the establishment of bilingual schools in community languages, is consistent with Article 14 of UN DRIP, which provides that ‘Indigenous peoples have the right to establish and control their educational systems and institutions in their own languages.’ Bilingual education programs create strong links between the community and its culture, and decreases the alienation felt by Aboriginal and Torres Strait Islander students in schools where teaching is by non-Indigenous teachers and in a language which is not the students’ mother tongue.<sup>291</sup>

It is not feasible for all Aboriginal and Torres Strait Islander languages to be taught, nor for each Aboriginal and Torres Strait Islander student to learn the language of their ancestors in a school setting away from their Country. However, the widespread failure to teach Aboriginal and Torres Strait Islander languages in schools around Australia is unacceptable.

### Australia should:

- make additional resources available to support the learning and teaching of Aboriginal and Torres Strait Islander languages and to strengthen existing language and cultural maintenance programs at school and university levels; and
- implement the recommendations of the report by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land: Our Languages: Language Learning in Indigenous Communities*.<sup>292</sup>

## 16.7 Educational inequality

Education is vital to the future empowerment, self-determination and advancement of Aboriginal and Torres Strait Islander peoples and communities, as outlined by National Aboriginal and Torres Strait Islander Higher Education Consortium in 2017. The UN DRIP states that, through education, Indigenous people have the right to control, protect and develop Indigenous cultures and knowledge; and the right to an education without discrimination.<sup>293</sup> Unfortunately, education for Aboriginal and Torres Strait Islander children in Australia still demonstrates Western colonial assimilationist frameworks.

285. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia *Our Land, Our Languages: Language Learning in Indigenous Communities Report* (2012).

286. National Congress of Australia’s First Peoples, *Statement to the Australian Government on the Inquiry into Language Learning in Indigenous Communities Conducted by the Aboriginal and Torres Strait Islander Affairs Committee* (2011); National Congress of Australia’s First Peoples, *Statement to the Australian Government on the Inquiry into Language Learning in Indigenous Communities Conducted by the Aboriginal and Torres Strait Islander Affairs Committee: Supplementary Statement* (2012).

287. Ibid.

288. Australian Bureau of Statistics Education and Indigenous Wellbeing, *4102.0 – Australian Social Trends*. 2011.

289. National Congress of Australia’s First Peoples, *Statement to the Australian Government on the Inquiry into Language Learning in Indigenous Communities Conducted by the Aboriginal and Torres Strait Islander Affairs Committee* (2011); National Congress of Australia’s First Peoples, *Statement to the Australian Government on the Inquiry into Language Learning in Indigenous Communities Conducted by the Aboriginal and Torres Strait Islander Affairs Committee: Supplementary Statement* (2012).

290. David McRae et al, *What Works? Explorations in Improving Outcomes for Indigenous Students*,

Canberra: Australian Curriculum Studies Association and National Curriculum Services, 2000.

291. Simpson J, Caffery J and McConvell P, *Gaps in Australia’s Indigenous Language Policy: Dismantling bilingual education in the Northern Territory*, AIATSIS Research Discussion Paper No. 24, 2009.

292. House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Our Land, Our Languages: Language Learning in Indigenous Communities*, 2012.

293. *United National Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

A 2014 study showed that the 'gap between Indigenous and non-Indigenous students had remained the same for the last decade' and that Aboriginal and Torres Strait Islander 15-year-olds remained approximately two-and-a-half years behind their non-Indigenous peers.<sup>294</sup> According to the Special Rapporteur on the rights of Indigenous peoples, 'there had been no real change in school attendance rates between 2014 and 2016.'<sup>295</sup>

The Prime Minister's 2017 'Closing the Gap' report revealed that halving the gap in Year 12 attainment rates was the only target that the Government was on track to meet.<sup>296</sup> While it is positive to see this improvement in Year 12 attainment, much more needs to be done to close the significant gap that remains between Aboriginal and Torres Strait Islander children and non-Indigenous kids in terms of educational outcomes.

### Deficit education campaigns

National and international instruments are used to measure and identify Aboriginal and Torres Strait Islander peoples' performance in terms of deficit. The challenge is moving beyond the deficit approach to recognise Aboriginal and Torres Strait Islander people as key contributors to the education environment rather than as guests within a white academy. The 'Closing the Gap' campaign demonstrates a commitment to education, however the focus is concentrated on lower levels of education and does not give consideration of the attraction and success of Aboriginal and Torres Strait Islander students in higher education.

The decision to remove Aboriginal and Torres Strait Islander higher education from the Department of Education and place it into a separate portfolio within Prime Minister and Cabinet results in Aboriginal and Torres Strait Islander higher education being removed from the main educational agendas, compounding the view that Aboriginal and Torres Strait Islander higher education is a sideline consideration.

#### Australia should:

- increase support for positive engagement strategies with Aboriginal and Torres Strait Islander communities and families to improve school attendance rates; and
- ensure funding to support curricula to Year 12 level in specific Aboriginal and Torres Strait Islander languages.

### History curriculum

School curriculums around Australia, from pre-schooling through to Year 12, have perpetuated a misrepresentation of Australia's colonial history and the invasion of Australia, and failed to recognise Aboriginal and Torres Strait Islander knowledges, perspectives and experiences. In recognition of gaps in learning outcomes between Aboriginal and Torres Strait Islander students and non-Indigenous students, the Australian Curriculum, Assessment and Reporting Authority states that it is working towards addressing two distinct needs:

1. that Aboriginal and Torres Strait Islander students are able to see themselves, their identities and their cultures reflected in the curriculum of each of the learning areas, can fully participate in the curriculum and can build their self-esteem; and
2. that the Aboriginal and Torres Strait Islander Histories and Cultures cross-curriculum priority is designed for all students to engage in reconciliation, respect and recognition of the world's oldest continuous living cultures.<sup>297</sup>

Whilst Aboriginal and Torres Strait Islander histories and cultures are a 'priority' area in the national curriculum, it is not required content and it falls to state and territories to determine whether and how to teach this in schools.

**Australia should make Aboriginal and Torres Strait Islander histories a mandatory part of the national curriculum throughout primary and secondary school.**

294. Tory Dreise and Sue Thomson, 'Unfinished business: PISA shows Indigenous youth are being left behind', ACER Occasional Essays, February 2014.

295. Victoria Tauli Corpuz, UN Human Rights Council, *Report of the Special Rapporteur on the rights on*

*indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 54.

296. Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (Australian Government, 2017), 7.

297. Australian Curriculum, Assessment and Reporting Authority, 'Cross-curriculum Priorities' (2016), <https://www.acara.edu.au/curriculum/cross-curriculum-priorities>



# Over-representation of Aboriginal and Torres Strait Islander children in out of home care

## 17.1 Growing numbers of children removed from their families

### ARTICLES 2 & 5

Aboriginal and Torres Strait Islander children are over-represented at every point in the child protection system that is measured at a national level, including placement in out-of-home care (OOHC).<sup>298</sup>

As at 30 June 2016, Aboriginal and Torres Strait Islander children represented 36.3 per cent of all children in statutory OOHC,<sup>299</sup> and were 9.8 times more likely to be residing in OOHC than non-Indigenous children.<sup>300</sup> The population of Aboriginal and Torres Strait Islander children in OOHC is projected to triple by 2035 if today's conditions remain the same.<sup>301</sup> Over-representation itself, and the resulting disconnection from family, community, culture and country that often occurs, impinge on Aboriginal and Torres Strait Islander children and families' entitlement to the equal enjoyment of social and cultural rights.

The over-representation of Aboriginal and Torres Strait Islander children in child protection and OOHC raises further concerns given the inextricable link between the child protection and youth justice systems,<sup>302</sup> such as the

increased likelihood of simultaneous contact with both systems,<sup>303</sup> and youth or adult criminal justice involvement after leaving care.<sup>304</sup> This is a national human rights crisis that requires an urgent revision of legislation, policy, and practice and genuine collaboration with Aboriginal and Torres Strait Islander communities and organisations.

The removal and placement of Aboriginal and Torres Strait Islander children in OOHC severs and disrupts connections to family, community, culture, and country that are critical to positive self-identity, and often occurs without proper and effective efforts to support and strengthen families or to maintain and promote connections. In this context, the recent policy trend towards expedited legal permanency – the transfer of parental responsibility away from parents by long-term guardianship orders or permanent care orders – is concerning.<sup>305</sup>

The Aboriginal and Torres Strait Islander Child Placement Principle exists as a key policy measure to ensure connection with family and culture is prioritised in decision-making. However, its narrow conceptualisation and poor implementation is failing Aboriginal and Torres Strait Islander children. Even on a proxy measure of compliance with the Principle (the placement element only, as opposed to all five interconnected elements of

298. SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 9; Australian Institute of Health and Welfare 2017, *Child protection Australia 2015–16*. Child Welfare series no. 66. Cat. no. CWS 60. Canberra: AIHW.

299. Australian Institute of Health and Welfare, *Child protection Australia 2014–15* (2016), child welfare series no. 63, cat. no. CWS 57, Canberra; and Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2017), child welfare series no. 66, cat. no. CWS 60, Canberra: AIHW.

300. Australian Institute of Health and Welfare, *Child protection Australia 2015–16* (2017), child welfare series no. 66, cat. no. CWS 60. Canberra: AIHW.

301. SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 23.

302. Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017), 2.

303. Australian Institute of Health and Welfare 2016. Young people in child protection and under youth justice supervision 2014–15. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW; Wise, S. and Egger, S. (2007) *The Looking After Children Outcomes Data Project: Final Report*, Australian Institute of Family Studies, 15; and Katherine McFarlane, *Care-criminalisation: The involvement of children in*

out-of-home care in the NSW criminal justice system (2015), UNSW.

304. S Raman and, B Inder and C Forbes, C., *Investing for Success: The economics of supporting young people leaving care* (2005), Centre for Excellence in Child and Family Welfare, Melbourne; and J McDowall, *Report Card: Transitioning from Care* (2008), CREATE Foundation, Sydney; J McDowall, *Report Card: Transitioning from Care: Tracking Progress* (2009), CREATE Foundation, Sydney.

305. SNAICC – National Voice for our Children, *Achieving Stability* (2016).

# CASE STUDY

## Aboriginal Child and Family Centres strengthening Aboriginal and Torres Strait Islander families

A young boy, 'Luke' was asked to leave kindergarten at a primary school due to 'disruptive behaviour' and an inability to cope with the school environment. His mother, a single parent, was incredibly distressed and turned to her local Aboriginal Child and Family Centre (**ACFC**).

The ACFC worked with Luke's family to reach an agreement with the school that Luke have another year at home with the support of ACFC before recommencing school. An assessment revealed that language delay was hindering Luke's transition to school. Luke was linked to the supports he needed and was able to progress to a long day care program at the ACFC. ACFC also helped Luke and his family prepare for his return to the school the following year with appropriate supports. Upon recommencing at school, Luke settled in well and his mother reported significant improvements in his communication at home.

prevention, partnership, placement, participation, and connection) it is clear that Australia is failing, with only 50.9 per cent of Aboriginal and Torres Strait Islander children in OOHC placed with Aboriginal and Torres Strait Islander kin or other family.<sup>306</sup>

### 17.2 Lack of access to services and participation in decision making

There are significant service availability and access gaps in early intervention and other family support services that could prevent children being put at risk and placed in OOHC in the first place.<sup>307</sup> In 2015-2016, only 16.6 per cent of overall child protection spending in Australia was invested in support services for children and families, a relative percentage that has fallen over the past four

years.<sup>308</sup> There is a lack of access to quality, culturally safe, universal services, including antenatal and postnatal care and early childhood education and care, and targeted services for vulnerable families. These should be designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations (**ATSICCOs**). Consistent with self-determination and the broad base of evidence demonstrating improved outcomes from Indigenous-led service design and delivery,<sup>309</sup> Australia needs to properly recognise and prioritise supporting and resourcing of ATSICCO services. Similarly, the participation of Aboriginal and Torres Strait Islander children, families, and communities in all stages of child protection decision-making is essential for improving safety and wellbeing outcomes.<sup>310</sup>

306. Australian Institute of Health and Welfare 2017. *Child protection Australia 2015-16*. Child Welfare series no. 66. Cat. no. CWS 60. Canberra: AIHW.

307. SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016).

308. Steering Committee for the Review of Government Service Provision (2017). Table 16A.1 'Volume F: Community Services' in *Report on Government Services 2017*. Canberra, ACT: Productivity Commission.

309. Australian National Audit Office. (2012). Capacity development for Indigenous service delivery, No

26, Canberra, p17; Cornell, S., and Taylor J. (2000). Sovereignty, devolution, and the future of tribal-state relations, Cambridge: Harvard University, pp6-7 retrieved on 29 September 2016 from: <http://hpaied.org/sites/default/files/publications/PRS00-4.pdf>; Denato, R., and Segal, L. (2013). 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?', *Australian Health Review*, 37(2), May, 232; Chandler, M., and Lalonde, C. (1998). Cultural continuity as a hedge against suicide in Canada's First Nations; Lavoie, J. et al. (2010). 'Have investments in on-reserve health services and initiatives promoting community control improved First

Nations' health in Manitoba?', *Social Science and Medicine*, 71(4), August, 717.

310. SNAICC – National Voice for our Children, *The Family Matters Roadmap* (2016); and SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016).

## 17.3 Need for a coordinated approach

An integrated approach across all levels of government is necessary to redress the complex causes of child removal, which are influenced by issues falling under state, territory, and federal powers, including family support; homelessness; social security; family violence; drug and alcohol misuse; health; early childhood education and care; and child protection.<sup>311</sup>

The Council of Australian Governments (COAG) has noted the imperative for coordinated approaches to early intervention efforts and the benefits of collaboration across jurisdictions.<sup>312</sup> At the recent meeting of Community Services Ministers, Ministers agreed to support ATSICCOs to provide supports for Aboriginal and Torres Strait Islander children and families and to ensure culturally appropriate placements, and committed to improving early intervention investment for children and families.<sup>313</sup>

The Special Rapporteur on the rights of Indigenous peoples has recently called for the urgent implementation of a national target to reduce child removal incidence and a national strategy to eliminate over-representation, which prioritises community-led early intervention and family support programs.<sup>314</sup> The Special Rapporteur also recommended that a Commissioner for Aboriginal and Torres Strait Islander children be appointed in each jurisdiction – a recommendation made by the United Nations Committee on the Rights of the Child in 2012.<sup>315</sup>

Further, a nationally consistent mandatory notification and referral system should be established to refer Aboriginal and Torres Strait Islander families in the child protection system to culturally appropriate services, especially where family violence is a factor. Family violence is one of the primary drivers of the disproportionate and escalating rates of Aboriginal and Torres Strait Islander child removal and out of home care placement. Access to independent, culturally safe, preventative legal services at the earliest possible stage would support families to understand their legal rights and take proactive action.

Australia should, through the Council of Australian Governments (COAG), establish a national target to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out of home care by 2040, supported by a resourced national strategy developed in partnership with Aboriginal and Torres Strait Islander peoples.<sup>316</sup>

Australia should:

- increase investment for family support services to 30 per cent of all state and territory annual child protection expenditure;<sup>317</sup>
- commit to an Aboriginal and Torres Strait Islander community controlled organisation capacity building and investment strategy to ensure organisations can provide child and family support services, universal services including early childhood education and care, and representative participation;
- prioritise and resource processes for the genuine participation of Aboriginal and Torres Strait Islander children, families, and communities in child protection decision-making, such as through the process of Aboriginal and Torres Strait Islander Family-Led-Decision-Making;<sup>318</sup> and
- establish and resource Commissioners for Aboriginal and Torres Strait Islander children in each state and territory.<sup>319</sup>

311. Ibid.

312. Council of Australian Governments, *COAG meeting Communiqué*, 9 December 2016, <https://www.coag.gov.au/meeting-outcomes/coag-meeting-communicu%C3%A9-9-december-2016>.

313. The Hon Christian Porter MP, Minister for Social Services, 'Community Services Ministers' Meeting Communiqué' (Media Release, 25 August 2017).

314. United Nations Human Rights Office of the High Commissioner, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (3 April 2017).

315. Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 22 of the Convention: Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012).

316. SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016) 21.

317. Ibid.

318. Ibid.

319. Ibid.

# 18

# Lack of compensation for Stolen Generations and Stolen Wages

ARTICLE 6

## 18.1 Stolen Generations

'Stolen Generations' refers to the forcible removal and attempts to assimilate Aboriginal and Torres Strait Islander children, as a State-sanctioned policy throughout the 20th Century until the 1970s. Children who were part of the Stolen Generations experienced loss of identity, connection to family and country, and many were abused in institutional care.<sup>320</sup> The impact of this trauma has been inter-generational, and has manifested in mental illness, substance abuse and family breakdown, with one-third of members of the Stolen Generation having their own children removed by governments.<sup>321</sup>

In 1997, the Australian Human Rights and Equal Opportunity Commission's landmark *Bringing Them Home* report, recommended payment of reparations to those who were forcibly removed as children, to family members who suffered as a result of their removal, and descendants.<sup>322</sup> It also recommended the establishment of a joint National Compensation Fund by the Council of Australian Governments.<sup>323</sup> Similar recommendations have been made by the UN Human Rights Committee and Special Rapporteur on the rights of Indigenous peoples.<sup>324</sup>

In the twenty years since the release of *Bringing Them Home* only three of Australia's eight jurisdictions (Tasmania, South Australia and New South Wales) have established limited compensation or schemes.<sup>325</sup>

Australia should establish a nationally consistent mechanism for adequate and fair compensation to members of the Stolen Generations and their descendants and implement all recommendations contained in the *Bringing Them Home* Report, especially in relation to current child removal practices.

## 18.2 Stolen Wages

'Stolen Wages' refers to the systematic withholding and mismanagement of Aboriginal and Torres Strait Islander people's wages and entitlements from the late 19th Century until the 1980s.<sup>326</sup> Limited reparation schemes, which vary drastically in quantum of payment and eligibility, exist only in Western Australia, New South Wales and Queensland.<sup>327</sup> Other Australian jurisdictions including Victoria,<sup>328</sup> South Australia, Tasmania, the Northern Territory and the Australian Capital Territory have not, to date, implemented compensation schemes for Stolen Wages.

Australia should make adequate and fair reparations for Stolen Wages relating to the underpayment, non-payment and mismanagement of wages held in trust on behalf of Aboriginal and Torres Strait Islander workers.

320. Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home* (1997).

321. Ibid.

322. Ibid, Recommendation 4.

323. Ibid, Recommendation 15.

324. See, James Anaya, Special Rapporteur, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Addendum – The Situation of Indigenous Peoples in Australia (Advanced unedited version)*, 50th sess, UN

Doc A/HRC/15 (4 March 2010) [19]; Human Rights Committee, *Concluding Observations: Australia*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [15].

325. The first scheme was announced by Tasmania in 2006. A total of \$5 million was made available. The South Australian Government announced its reparations scheme in 2015, ex gratia payments capped at \$50,000 per person. In 2016, the New South Wales Government announced a \$73 million scheme,

including for one-off payments to survivors of up to \$75,000.

326. Standing Committee on Legal and Constitutional Affairs, Commonwealth of Australia, *Unfinished Business: Indigenous stolen wages* (2006) 1.15.

327. In 2012 the Western Australian Government implemented a scheme enabling one-off payments of up to \$2,000 to former pastoral and Government workers; in 2015 the Queensland Government committed \$21M to a revised reparations fund, to enable lump



# 19

# Northern Territory Emergency Response & Stronger Futures

ARTICLES 2, 5 & 6

## 19.1 Northern Territory Emergency Response

In 2007, the Australian Government passed legislation, known as the 'Northern Territory Intervention' or 'Northern Territory Emergency Response'.<sup>329</sup>

The package suspended the operation of the federal *Racial Discrimination Act 1975 (RDA)* and was condemned by the CERD Committee as discriminating on the basis of race, including through the use of 'so-called "special measures."'<sup>330</sup> The Committee noted the discriminatory impact in relation to a broad range of rights such as, land, property, social security, adequate standard of living, cultural development, work and remedies.<sup>331</sup> The RDA was reinstated in 2010.

## 19.2 Ongoing discrimination under 'Stronger Futures'

In 2012, the *Stronger Futures in the Northern Territory Act 2012 (Stronger Futures)* replaced the Northern Territory Emergency Response legislation and continues to discriminate against Aboriginal and Torres Strait Islander people. The Stronger Futures laws continue to have

harmful effects on Aboriginal and Torres Strait Islander peoples, impairing various rights, including privacy, social security, an adequate standard of living and freedom of movement.<sup>332</sup>

Under the broader Stronger Futures package, the following measures are maintained or introduced:

- income management measures (see section 16.5);
- alcohol restrictions;
- suspension of social security payments for parents whose children do not attend school regularly;
- increased policing and law enforcement powers;
- the removal of customary law and cultural practice considerations from bail applications and sentencing; and
- prohibited materials provisions.<sup>333</sup>

In 2017, the Special Rapporteur on the rights of Indigenous peoples noted that Stronger Futures laws:

stigmatise Aboriginal communities by subjecting them to compulsory income management, forced participation in work for the dole schemes that pay individuals far less than an average reward rate as well as fines and welfare reductions for parents whose children are truant in school.<sup>334</sup>

sum payments of up to \$9,200 and top-up payments of \$2,200 and in 2016 the New South Wales Government expanded eligibility for its Australian Trust Fund Repayment Scheme to enable payment of lump sums of up to \$11,000.

328. A preliminary investigation was conducted by Victoria in 2009 in response to the Senate Committee report but a compensation scheme was not established: [http://www.vic.gov.au/system/user\\_files/Documents/av/Indigenous-Stolen-Wages-Preliminary-Investigation.pdf](http://www.vic.gov.au/system/user_files/Documents/av/Indigenous-Stolen-Wages-Preliminary-Investigation.pdf)

329. *Northern Territory National Emergency Response Act 2007 (NT)*.

330. UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on Australia*, UN Doc CERD/C/AUS/CO/15-17, 16.

331. *Ibid.*

332. See further North Australian Aboriginal Justice Agency, Submission No 20 to Parliamentary Joint Committee on Human Rights, *Review of Stronger Futures in the Northern Territory Act 2012 and Related Legislation*, 7 November 2014, 7. It notes 'We have witnessed customers being publicly humiliated by supermarket staff and noticed a marked difference in the treatment given to Aboriginal customers paying

with a BasicsCard and the treatment of non-Basics-Card customers'.

333. Australian Human Rights Commission, *Guidelines to understanding 'Special Measures' in the Racial Discrimination Act 1975 (Cth)* (2011), 2.

334. United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpus of her visit to Australia, 3 April 2017.

Further, the Parliamentary Joint Committee on Human Rights, in its 2016 review of Stronger Futures, found that the blanket application of policies, lack of consultation and lack of review mechanisms for Aboriginal and Torres Strait Islander peoples breached human rights.<sup>335</sup> The Federal Government has yet to address these concerns.

In addition, serious concerns have been raised about the processes of consultation that guided the development of Stronger Futures, including failures to provide proper notice prior to the consultations, to ensure consistent use of interpreters and to make clear to participants how information collected would be used.<sup>336</sup> As a result of the above failings, many communities were not provided with a meaningful opportunity to influence or design policies that underpin Stronger Futures. In the absence of genuine community consultation, the Stronger Futures legislation exists as a suite of top down laws and policies that do not properly acknowledge or address the complex underlying causes of disadvantage experienced by Aboriginal and Torres Strait Islander people in the Northern Territory.

**Australia should abolish the Stronger Futures legislation and work with Aboriginal and Torres Strait Islander representatives in the Northern Territory to implement policies which uphold their rights including the right to self-determination.**

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335. Parliamentary Joint Committee on Human Rights, '2016 Review of Stronger Futures Measures' (Final Report, 16 March 2016) [http://www.aph.gov.au/Parliamentary\\_Business/Committees/](http://www.aph.gov.au/Parliamentary_Business/Committees/)

Joint/Human\_Rights/Committee\_Inquiries/strongerfutures2/Final\_report

336. See North Australian Aboriginal Justice Agency, Submission No 20 to Parliamentary Joint Committee on Human Rights, *Review of Stronger Futures in the*

*Northern Territory Act 2012 and Related Legislation*, 7 November 2014.



# Native Title

ARTICLE 6

## 20.1 Standard of proof

Native title is a fundamental element of cultural obligation and identity for Aboriginal and Torres Strait Islander people. Under the *Native Title Act 1993 (Cth)*, Aboriginal and Torres Strait Islander people have to prove a continuous connection to the land since colonisation in order to prove their native title (a form of land title that recognises rights to land and waters). This ongoing connection is difficult to prove, given that in the absence of a written tradition, there are often no documentary records proving the existence of laws and customs prior to British sovereignty over Australia.<sup>337</sup>

Onerous requirements under the *Native Title Act* are incompatible with Article 26 of UN DRIP, as they deny and limit the ability for Aboriginal and Torres Strait Islander people to enjoy the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used. In addition, the CERD Committee has called upon States to:

recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories and traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those land and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation.<sup>338</sup>

Native title organisations have been calling for the introduction of a rebuttable presumption of continuity, reversing the onus of proof, so that the State (or other respondent party to a claim) has the responsibility of rebutting such a presumption.

Given that in many instances (particularly in remote locations) there is little foundation for dispute over native title applicants' continuous connection to their traditional lands, the adoption of a rebuttable presumption would help reduce the resource burden on the native title system and facilitate faster resolution of native title claims. Moreover, the evidentiary burden would be placed more appropriately with the State, which, by virtue of its 'corporate memory', is in a better position to explain how it colonised or asserted its sovereignty over a claim area.

Australia should lower the standard of proof for native title claims by introducing a rebuttable presumption of continuity to relieve the burden on Aboriginal and Torres Strait Islander peoples in native title processes.

## 20.2 Use of land, economic development and free, prior and informed consent

Native title holders and Aboriginal and Torres Strait Islander land owners should have the right to determine whether land is used for economic or cultural purposes and 'there should be no weakening of existing land rights or winding back of hard won gains in the recognition of land rights.'<sup>339</sup>

337. Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* Report No 126 (2015).

338. The Committee on the Elimination of Racial Discrimination, *General Comment No 23: Indigenous*

*Peoples*, 51st sess, UN Doc A/52/18, annex V (18 August 1997) 5.

339. Department of Premier and Cabinet, Parliament of Australia, *COAG Investigation into Land Administration and December 2015*, 5 – 7.

As noted by the Expert Indigenous Working Group to the Council of Australian Governments' investigation into land administration and use:

any approach on Indigenous land and waters that does not properly recognise and respect traditional ownership of that land (whether or not that ownership is fully recognised at law) will only lead to ill-feeling, project uncertainty and delays. Such an approach has the effect of diminishing hard fought gains in this area and well-established principles around the human rights of traditional owners...The Expert Indigenous Working Group is confident that where they are treated as equals, development on Indigenous land and water will become more efficient and will provide economic benefits for all stakeholders.<sup>340</sup>

One of the key tenets of the Australian Government in relation to native title is that Aboriginal and Torres Strait Islander peoples' land should be used for economic development purposes to benefit Aboriginal and Torres Strait Islander peoples. There is however, no specific right for traditional owners to deny mining on Native Title land, consistent with the UN DRIP requirement for free, prior and informed consent.

Effective investment in Aboriginal and Torres Strait Islander peoples' land will not occur without the full and proper participation of Aboriginal and Torres Strait Islander peoples. In order for Aboriginal people to fulfil their economic potential using their land, Australia needs to strengthen mechanisms to ensure Aboriginal and Torres Strait Islander people are able to fully and properly participate in decisions about their land and resources, including through free, prior and informed consent in decision making.

**Australia should strengthen mechanisms to ensure Aboriginal and Torres Strait Islander people are able to fully and properly participate in decisions about their land and resources, including through free, prior and informed consent in decision making.**

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340. Ibid.



# Counter-terrorism

## 21.1 Counter-terrorism measures and racial or ethnic profiling risks

### ARTICLES 2 & 5

Australia has a large, complex and disjointed web of counter-terrorism laws, many of which infringe on human rights.<sup>341</sup> The practical application of these laws can give rise to significant concerns of racial and ethnic profiling of some minority communities.

The Australian Government has indicated that the ‘pilot’ introduction of biometric testing in relation to people applying for visas to Australia in 10 countries at the time of Australia’s last review has been expanded to operate in more than 20 countries with further expansion plans in 2018.<sup>342</sup>

The Australian Government justifies its approach on the grounds of national security and denies any aspect of racial discrimination or targeting within the program. However, this and other counter-terrorism measures, have disproportionately targeted some Australian ethnic and religious minorities.<sup>343</sup> For example, travel to “declared” areas of foreign countries where terrorist organisations operate is banned, and the onus of proof reversed, violating the presumption of innocence, the right to a fair trial and freedom of movement.<sup>344</sup> Further, in 2015, the short-lived Operation Fortitude in Melbourne enabled Australian Border Force and Victoria Police to stop and question individuals about visa eligibility and led to grave concerns about racial and ethnic profiling.<sup>345</sup>

Australia should ensure that:

- counter-terrorism measures comply with international human rights law obligations and do not discriminate either directly or indirectly on the basis of race, colour, descent, or national or ethnic origin; and
- all relevant agencies, including federal, state and territory police services, receive training and are subject to oversight measures that aim to prevent racial and ethnic profiling in the context of counter-terrorism law enforcement.

341. See further, Australian NGO Coalition, Australia’s Compliance with the International Covenant on Civil and Political Rights (Report to the UN Human Rights Committee, September 2017), ch 3.

342. UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Eighteenth to Twentieth Periodic Reports of States Parties due in 2014 – Australia*, UN Doc CERD/C/AUS/18-20 (17 February 2016) [34]-[37].

343. For example, Francis Keany and Jane Norman, ‘Operation Fortitude: Immigration, Australian Border Force Apologise for Media Release that Triggered

Melbourne Protests’ *ABC News* (online) 19 October 2015 <<http://www.abc.net.au/news/2015-10-19/immigration-border-force-chiefs-apologise-operation-fortitude/6864982>>.

344. *Criminal Code Act 1995* (Cth), s 119.2(1). The Minister for Foreign Affairs may declare part of a foreign country as a “declared area” where she or he is satisfied that a terrorist organisation is engaged in hostile activity in that area: *Criminal Code Act 1995* (Cth), s 11.4.

345. Public protest relating to Operation Fortitude led to its cancellation and a public apology by the Secretary of the Department of Immigration and Border Protection and the Australian Border Force

Commissioner. See for example, Tammy Mills et al, ‘Border Force fiasco: Operation Fortitude cancelled as protest shuts down Melbourne streets’, *The Age* (Melbourne), 28 August 2015 <http://www.theage.com.au/victoria/border-force-fiasco-operation-fortitude-cancelled-as-protest-shuts-down-melbourne-streets-20150828-gjah7n.html>

# 22

# Actions of Australian corporations overseas

## 22.1 Australian corporations impairing Indigenous rights overseas

ARTICLES 2, 4, 5 & 6

Australia is home to some of the world's largest and most prolific mining companies. In 2013, a report by Oxfam Australia found that one quarter of the extractive companies listed on the Australian Stock Exchange were the subject of allegations by Indigenous peoples' groups or NGOs that they had negatively impacted on the rights of Indigenous peoples.<sup>346</sup>

Australia does not have a legal framework to regulate the human rights obligations of Australian corporations overseas.<sup>347</sup> Few successful claims have been brought through the courts in Australia regarding abuses by Australian companies operating abroad and those brought have often been defeated on the basis of technical legal defences (for example time limits or issues of jurisdiction) rather than on their merits.<sup>348</sup> The Australian Government's multi-stakeholder Advisory Group on Business and Human Rights recommended in August 2017 that the Government develop a National Action Plan to address this problem. However, the Government announced in October 2017 that it would not pursue a National Action Plan.

The Australian Organisation for Economic Co-Operation and Development (OECD) National Contact Point (ANCP) is the primary non-judicial avenue for individuals and communities negatively affected by Australian businesses activities overseas. An independent academic report released in June 2017 found that the ANCP is currently under-resourced and failing to follow the OECD Guidelines

for Multinational Enterprises (never having issued a single determination of breach), thereby denying affected individuals and communities the opportunity to have their grievances addressed.<sup>349</sup> The Australian Government recently announced a review of the ANCP.<sup>350</sup>

Australia should:

- strengthen and properly resource the ANCP to enable it to operate in accordance with international best practice standards of visibility, accessibility, transparency and accountability; and
- implement a National Action Plan on Business and Human Rights, including a legal framework for the regulation of extra-territorial activities by Australian corporations.

346. Christina Hill et al, Oxfam Australia and CAER, 'The Rights to Decide: Company Commitments and Community Consent' (May, 2013) 2.

347. See Committee on Economic, Social and Cultural Rights, *Concluding observations of the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017). Whilst the *Criminal Code Act 1995* (Cth) enables criminal prosecution of corporations in relation to the most serious international crimes, to date, there has been no such prosecution of a corporation.

348. In July 2017, the Committee on Economic, Social and Cultural Rights recommended that Australia take necessary measures to ensure the legal liability of Australian companies regarding violations of economic, social and cultural rights by their activities conducted abroad, or resulting from activities of their subsidiaries where they failed to exercise due diligence. See Committee on Economic, Social and Cultural Rights, *Concluding observations of the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) [14(b)].

349. Kristen Zornada, *The Australian OECD National Contact Point: How it can be reformed* (Non-Judicial Redress Mechanism Report Series No 20, Non-Judicial Human Rights Redress Mechanisms Project, 2017) [https://corporateaccountabilityresearch.net/report-xx-ancp#\\_ftn1](https://corporateaccountabilityresearch.net/report-xx-ancp#_ftn1).

350. Treasury, Australian Government, *The Australian National Contact Point* [http://www.ausncp.gov.au/content/Content.aspx?doc=2017\\_review.htm](http://www.ausncp.gov.au/content/Content.aspx?doc=2017_review.htm).



# Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

AUSTRALIAN NGO COALITION SUBMISSION  
TO THE UN COMMITTEE ON THE ELIMINATION  
OF RACIAL DISCRIMINATION

October 2017

