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SUBMISSION TO THE UN  
COMMITTEE ON THE  
ELIMINATION OF RACIAL  
DISCRIMINATION

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**AMNESTY**  
INTERNATIONAL



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## INTRODUCTION

Amnesty International submits the following information for consideration by the United Nations (UN) Committee on the Elimination of Racial Discrimination (the Committee) in advance of its examination of Australia's combined 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> reports, submitted under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).<sup>1</sup> This briefing summarizes Amnesty International's assessment of Australia's implementation of the Convention.

Amnesty International notes a number of positive developments, including:

- Commitments made during the Government's electoral 2007 platform which provide for principled support for human rights and for Australia's obligations under human rights treaties;
- A Parliamentary apology to Indigenous victims of the Stolen Generations, an undertaking to close the gap in Indigenous health and life expectancy within a generation, endorsement of the Declaration on the Rights of Indigenous Peoples, and the announcement of the National Congress of Australia's First Peoples National Indigenous peoples' consultative body;
- The holding of a national consultation on a human rights protection mechanism for Australia.

However, Amnesty International regrets that in a number of fundamental respects Australia has failed to honour its obligations under the Convention. The present briefing focuses on the following concerns:

- There is still **no entrenched protection for rights**, even non-derogable rights such as freedom from discrimination.<sup>2</sup> Amnesty International also has concerns regarding certain provisions of the Constitution.
- With regard to **Indigenous people**, Amnesty International is concerned that:
  - No legal or policy framework has so far been put in place to implement the UN Declaration on the Rights of Indigenous People (Article 2);
  - The Northern Territory Emergency Intervention (also known as the Northern Territory Emergency Response, hereinafter referred to as the Intervention) continues to operate inconsistently with

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<sup>1</sup> Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention: Combined fifteenth, sixteenth and seventeenth periodic reports of States parties due in 2008: Australia, UN Doc. CERD/C/AUS/15-17, 7 January 2010.

<sup>2</sup> See Human Rights Committee, General comment No. 29: States of emergency (article 4), (2001), para. 8.

- Convention and other human rights obligations (Articles 1, 2, 5 and 6);
- Imprisonment and deaths in custody continue to impact on Indigenous people disproportionately (Article 5);
  - With regard to **refugees, asylum seekers and migrant workers** (Articles 1 and 5),<sup>3</sup> Amnesty International is concerned that:
    - Australia's policy of mandatory, indefinite detention for undocumented asylum seekers is leading to prolonged and arbitrary detention and can be denied full access to justice, undermining equality before the law (Articles 1 and 5);
    - Stateless persons are subjected to an onerous visa regime and may be administratively detained indefinitely (Articles 1 and 5);
    - The excising of some Australian islands for migration purposes means that some asylum seekers are denied full protect of application and review procedures available to others, which may constitute discrimination on the basis of nation of origin and lead to prolonged arbitrary detention of such asylum seekers (Articles 1 and 5);
    - The Government has decided to continue the suspension of processing refugee claims of asylum seekers from Afghanistan in response to political concerns about the impact of unauthorised arrivals by boat, constituting discrimination on the basis of nation of origin (Article 1);
    - Migrant workers continue to face discrimination and exploitation, including undertaking dangerous work and receiving lower wages (Article 5).

Analysis of these issues of concern follows.

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<sup>3</sup> As interpreted by the Committee in General Comments No. 22 (1996) and 30 (2004).

# 1. INADEQUATE LEGAL FRAMEWORK FOR PROTECTION OF CONVENTION RIGHTS (ARTICLE 2)

## 1.1 LACK OF ENTRENCHED PROTECTION OF TREATY RIGHTS

The need for constitutional protection of the rights under the Convention was demonstrated in 2007, when legislation<sup>4</sup> that constitutes the Northern Territory Emergency Intervention was enacted. This legislation, which necessitated overriding the *Racial Discrimination Act* (Cth) 1975 (RDA), led to a number of violations of the Convention and other international human rights treaties. These are discussed in Section 2 below.

Developments in Australian jurisprudence since the Committee's last consideration of Australia imply an increasingly narrow role for internationally recognised human rights standards that have not been explicitly legislated by the Parliament or into policy by the Executive Government.<sup>5</sup>

## 1.2 PROBLEMATIC SECTIONS OF THE AUSTRALIAN CONSTITUTION

The Australian Constitution contains two provisions that are, *prima facie*, inconsistent with obligation to amend, rescind or nullify laws which create or perpetrate racial discrimination under Article 2. Section 51(xxvi) of the Constitution empowers the Commonwealth Parliament to "make laws for the peace, order, and good Government of the Commonwealth with respect to", *inter alia*:

The people of any race for whom it is deemed necessary to make special laws.<sup>6</sup>

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<sup>4</sup> The Northern Territory National Emergency Response Act 2007 (Cth); the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth); the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); the Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007) (Cth); and the Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 (2007) (Cth).

<sup>5</sup> The principle that treaty ratification might give rise to a legitimate expectation that the principles in the treaty will be applied by domestic courts unless there is a clear legislative intention to the contrary was expressed in the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; <http://www.austlii.edu.au/au/cases/cth/HCA/1995/20.html> (accessed 19 November 2008). The principle seems to be called into question in the judgement given by a differently constituted High Court in *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; <http://www.austlii.edu.au/au/cases/cth/HCA/2003/6.html> (accessed 19 November 2008).

<sup>6</sup> Australian Constitution at <http://wopared.parl.net/senate/general/constitution/par3cha1.htm>

This provision is not accompanied by any requirement that such laws be exclusively beneficial, and jurisprudence on this issue is not settled.<sup>7</sup>

Section 25 of the Constitution, concerning the calculation of the number of State representation in the Commonwealth Parliament, is premised on the possibility of race-based disenfranchisement by one of the States:

...if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted.

Amnesty International believes that these provisions are inconsistent with the Convention and should accordingly be removed or amended.

### 1.3 CONSULTATION ON A RIGHTS PROTECTION MECHANISM

On the 60th anniversary of the adoption of the UN Declaration of Human Rights by the UN General Assembly, the Government announced that it would hold a consultation on options for protecting human rights<sup>8</sup> stipulating, however that it would not consider constitutional entrenchment:

The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.<sup>9</sup>

In its report the independent committee commissioned to conduct the consultation recommended, *inter alia*, a Human Rights Act to promote and protect rights recognised in the international human rights treaties ratified by Australia.<sup>10</sup>

Despite a very high degree of popular support for a Human Rights Act,<sup>11</sup> the

(accessed 11 December 2008).

<sup>7</sup> The most recent case on the interpretation is *Kartinyeri and Anor v. The Commonwealth of Australia (The Hindmarsh Island Bridge Case)* (1998) ACA 22, 56. See summary of judgment in [1998] AILR 15 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/AILR/1998/15.html?query=^Kartinyeri> (accessed 11 December 2008).

<sup>8</sup>

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference\\_TermsOfReference](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference) (accessed 16 December 2008) (hereafter, Consultation Terms of Reference).

<sup>9</sup> *Ibid.*

<sup>10</sup>

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReport](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport) (accessed 15 June 2010) (hereafter Consultation Report).

<sup>11</sup> In an opinion poll commissioned by Amnesty International in March 2009, there was significant public support for a Human Rights Act. The Nielson survey found that 81 per cent of people surveyed supported the introduction of a law to protect human rights. The report by

Government rejected this recommendation and has responded by announcing a “Human Rights Framework” including the establishment of a Parliamentary committee to scrutinise new legislation for compliance with human rights obligations.<sup>12</sup>

**Amnesty International has recommended that the Australian Government ensure that domestic law is in conformity with the State’s obligations under the Convention and, in particular, that it provides entrenched protection against discrimination on the grounds of race, colour, descent, or national or ethnic origin.**

## **2. DISCRIMINATION AGAINST INDIGENOUS AUSTRALIANS (ARTICLES 1, 2, 5, AND 6)<sup>13</sup>**

### **2.1 NO FRAMEWORK FOR IMPLEMENTATION OF UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

Amnesty International welcomed the Government’s public endorsement of the UN Declaration on the Rights of Indigenous Peoples (the Declaration) in April 2009. However, the Government has yet to develop, in consultation with the Indigenous peoples of Australia, a framework for implementing the principles of the Declaration into law, policy and practice. Given that the Declaration provides internationally accepted minimum standards on Indigenous rights, adoption of its principles would be of great assistance to the State party in its attempts to bridge the gap between the enjoyment of human rights by Indigenous and non-Indigenous Australians respectively, and would help address violations of Convention rights such as those described below.

**In particular, Amnesty International is concerned that consistent failure to facilitate the active participation of Indigenous peoples of Australia in the development of policies that affect them, and to give or withhold their free-prior and informed consent to such policies, deprives them of an important protection against discrimination.**

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the National Human Rights Consultation Committee also noted that of the 35,014 people who made submissions to the consultation process, 29,153 were in favour of a Human Rights Act. See Consultation Report.

<sup>12</sup> See Australia’s Human Rights Framework at <http://www.ag.gov.au/humanrightsframework> (accessed 15 June 2010).

<sup>13</sup> As interpreted by the Committee in General Comment No. 23 (1997).



## 2.2 LEGISLATED DISCRIMINATION - NORTHERN TERRITORY INTERVENTION

The Intervention has affected most aspects of the lives of Aboriginal residents in prescribed areas, as it included:

- Law and order: putting more police in communities to make people safe;
- Health: providing health checks and follow-up treatment for children;
- Welfare and jobs: changing welfare payments, so that benefits intended to help children are in fact spent for that purpose and creating jobs in communities;
- Community improvements: putting in managers who would look after Government business, and cleaning up communities;
- Land and permits: acquiring five-year leases over townships and opening up communities by changing the permit system so people can go into the common areas in communities;
- Education: ensuring all Aboriginal children attend school.<sup>14</sup>

It also included removal of customary law as a factor in bail or sentencing<sup>15</sup> and gave the Australian Crime Commission the mandate to investigate claims of paedophile rings operating in Indigenous communities.

Despite its stated purpose of urgent action to protect children from abuse, the Intervention does not appear adapted to that aim. The enabling acts<sup>16</sup> contained provisions that, on the one hand, describe all measures as “special measures” within the meaning of the RDA, whilst, on the other, exempting them from the application of Part II of that Act, which prohibits racial discrimination.<sup>17</sup> The terms

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<sup>14</sup> See

[http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about\\_response/overview/communitiesprescribed/Pages/default.aspx](http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/Pages/default.aspx). The initial changes announced by the Government of the time, including quarantining of 50 per cent of welfare payments to parents/guardians, abolition of the permit system, and compulsory acquisition of leases over townships on Indigenous land, are summarized in Indigenous Land Rights News, August 2007, p.12 at [www.nlc.org.au/html/files/p12&13.pdf](http://www.nlc.org.au/html/files/p12&13.pdf) (as at 24/02/08).

<sup>15</sup> [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport07/chap3.html#part2](http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap3.html#part2) (accessed 10 June 2010).

<sup>16</sup> 16 These were: Northern Territory National Emergency Response Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 2007 (Cth); and Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008 2007 (Cth).

<sup>17</sup> Racial Discrimination Act 1975 (Cth) (hereafter the RDA) Section 9 of Part II of the RDA defines racial discrimination, prohibits it and references the Convention; section 8 provides an exception for special measures.

of this exemption are very broad, encompassing the provisions of each Act as well as “any acts done under or for the purposes of those provisions”.<sup>18</sup> The Intervention was also exempted from the application of Northern Territory anti-discrimination law.<sup>19</sup>

Intervention measures are racially targeted, as they are applied regardless of individual circumstances, to all residents of “prescribed areas and communities,” which are all Aboriginal towns, communities, outstations or town camps.<sup>20</sup>

Nearly all measures under the Intervention apply for five years unless the Minister acts to remove areas from its application.<sup>21</sup>

### 2.2.1 ORIGIN OF THE INTERVENTION

In August 2007 the Australian Government introduced the measures that constitute the Intervention, which continue to affect Indigenous peoples<sup>22</sup> living in remote communities within the Northern Territory. They impact on almost every aspect of life, including management of income, compulsory acquisition of leases on Indigenous land and appointment of Government Business Managers. The Intervention was prompted by the findings of *Little Children Are Sacred (2007)*,<sup>23</sup> the report of an independent inquiry into child sexual abuse in Indigenous communities commissioned by the Northern Territory Government. The inquiry itself was a response to media reports of child sexual abuse in Indigenous communities in 2006.<sup>24</sup> Amnesty International recognizes the gravity of the situation, in particular concerning children, which prompted the Intervention and acknowledges the government’s obligation to protect children and others from abuse. However, this must be done without violating key human rights, including freedom from discrimination as provided by the Convention, which the Government failed to uphold. The Intervention was developed and implemented very rapidly, without

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<sup>18</sup> See for example section 132 of the Northern Territory National Emergency Response Act 2007 [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ntnera2007531/s132.htm](http://www.austlii.edu.au/au/legis/cth/consol_act/ntnera2007531/s132.htm)

<sup>19</sup> For example, S.4 of the Northern Territory National Emergency Response Act 2007 (Cth).

<sup>20</sup> ‘Prescribed communities’ are the 73 Indigenous communities specifically named in the Northern Territory National Emergency Response Act 2007. These communities generally have more than 100 residents and include the 64 communities subject to five-year leases.” See [http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about\\_response/overview/communitiesprescribed/Pages/default.aspx](http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/communitiesprescribed/Pages/default.aspx)

<sup>21</sup> An action that could be disallowed by the Senate.

<sup>22</sup> “Indigenous peoples” is the term used here to describe Australians who identify as Aboriginals or Torres Strait Islanders Australians. They also refer to themselves as First Peoples.

<sup>23</sup> Ampe Akelyernemane Meke Mekarle (Little Children Are Sacred) Report, Northern Territory Government, 2007, 41 at [http://www.inquirysaac.nt.gov.au/pdf/bipacsa\\_final\\_report.pdf](http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf) (accessed 6 July 2010).

<sup>24</sup> Ibid.

consultation with affected communities or more broadly, in response to what was described as the “crisis of child abuse in Australian Indigenous communities.”<sup>25</sup>

Following a change of Government at the end of 2007, the new Minister for Families, Housing, Community Services and Indigenous Policy said that the Intervention goals were twofold, namely to:

- protect children and make communities safe, and
- create a better future for Aboriginal people in the Northern Territory.<sup>26</sup>

Since then the Intervention has been increasingly characterised by the Commonwealth Government as part of the “Closing the Gap”<sup>27</sup> initiative. This is a cross-jurisdictional undertaking to “close the gap in Indigenous disadvantage” through cooperative action in seven interrelated domains, including education, health, economic participation, safe communities and housing.<sup>28</sup>

The Intervention has thus changed from a high profile<sup>29</sup> exercise of Commonwealth Constitutional power<sup>30</sup> justified by the need to protect children at risk, into a lower profile component of an inter-Governmental agreement, between the Commonwealth and Northern Territory Governments, on strategies to achieve the social integration of Australia’s Indigenous peoples. However, the essentially discriminatory nature of major elements of the Intervention remains in place.

## 2.2.2 INTERVENTION MEASURES FOUND DISCRIMINATORY (ARTICLES 1, 2, 5)

The UN Special Procedures and treaty bodies have consistently found that the Intervention as conceived and implemented violated the internationally recognised and non-derogable right to freedom from racial discrimination and called for

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<sup>25</sup> Kevin Rudd speaking on ABC Radio’s PM on Thursday, 21 June 2007, See transcript “Indigenous child abuse a ‘national emergency’” at [www.abc.net.au/pm/content/2007/s1958368.htm](http://www.abc.net.au/pm/content/2007/s1958368.htm) (as at 22/02/08).

<sup>26</sup> Northern Territory Emergency Response - Fact Sheet 1 [www.facsia.gov.au/nter/docs/factsheet\\_01.htm](http://www.facsia.gov.au/nter/docs/factsheet_01.htm)

<sup>27</sup> See [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport05/chap2.html#conclusion](http://www.hreoc.gov.au/social_justice/sj_report/sjreport05/chap2.html#conclusion) (accessed 9 June 2010).

<sup>28</sup> [http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/docs/IGA\\_FFR\\_ScheduleF\\_National\\_Indigenous\\_Reform\\_Agreement.pdf](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_FFR_ScheduleF_National_Indigenous_Reform_Agreement.pdf) (accessed 9 June 2010).

<sup>29</sup> The first stage of the Intervention even involved the use of Commonwealth troops, prompting some residents to describe it as an “invasion.” See Guy Rundle “Unanswered questions abound in NT ‘invasion’ ” 27 June 2007, Crikey at <http://www.crikey.com.au/2007/06/27/unanswered-questions-abound-in-nt-invasion/> (accessed 29 June 2010).

<sup>30</sup> Section 122 Australian Constitution at <http://www.aph.gov.au/senate/general/constitution/index.htm> (accessed 9 Jun 2010).

revising it, in consultation with Indigenous communities.<sup>31</sup>

In 2008, the Government appointed a Northern Territory Emergency Response Review Board (the Review Board) to review the first 12 months of the Intervention.<sup>32</sup> The Review Board's three overarching recommendations were that:

- The Commonwealth and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory.
- In addressing these needs both Governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.
- Government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the RDA.<sup>33</sup>

The Government declared that it accepted the Review Board's recommendations, but stated that legislative amendments to bring the scope of the Intervention into line with them would not be introduced for another 12 months because living conditions were still such as to constitute a national emergency.<sup>34</sup>

Following his visit to Australia last year the Special Rapporteur on indigenous people found that:

These [Intervention] measures overtly discriminate against aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities.<sup>35</sup>

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<sup>31</sup> See for instance Concluding Observations of the Human Rights Committee: Australia, UN Doc. CCPR/C/AUS/CO/5, 7 May 2009, para 14; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, UN Doc. E/C.12/AUS/CO/4, 12 June 2009, para 15.

<sup>32</sup> Report of the Review Board on the Northern Territory Emergency Intervention October 2008, available at <http://www.terreview.gov.au/report.htm> (accessed 2 August 2010).

<sup>33</sup> Report of the Review Board on the Northern Territory Emergency Intervention, October 2008, Summary of Recommendations, at [http://www.terreview.gov.au/docs/report\\_ter\\_review/summrec.htm](http://www.terreview.gov.au/docs/report_ter_review/summrec.htm) (accessed 14 June 2010).

<sup>34</sup> Media release by Minister for Families, Housing, Community Services & Indigenous Affairs, 23 October 2008, available at [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter\\_measure\\_23oct08.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nter_measure_23oct08.htm) (accessed 10 January 2009).

<sup>35</sup> Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia Canberra/Geneva, 27 August 2009 available at <http://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf> (accessed 29 January 2010).

In his report of this mission, the Special Rapporteur, having noted the nature of the Intervention and their racial targeting and drawing attention to article 46(2) of the Declaration found that:

The differential treatment of indigenous peoples in the Northern Territory involves impairment of the enjoyment of various human rights, including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property and cultural integrity.<sup>36</sup>

### 2.2.3 PROMISE TO REINSTATE RACIAL DISCRIMINATION ACT DISHONoured

On 29 June 2010 an Australian Government Act came into force<sup>37</sup> which purports to make the Intervention legislation compliant with the RDA, following a dialogue between the Committee and the Government under the early warning and urgent action procedure.<sup>38</sup>

The amended legislation provides for continuation of each Intervention measure, some with amendments that ameliorate, but do not entirely remove their discriminatory effects. A Bill introduced earlier by the Australian Greens Party would have provided unqualified restoration of RDA protection to members of prescribed communities by stipulating that the provisions of the RDA would apply “notwithstanding” any provision of the old or amended legislation that might be inconsistent with them<sup>39</sup>. However, the Government did not list the Bill for debate.

In the amended legislation, the following are intended to be “special measures”.

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<sup>36</sup> Human Rights Council, 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, Human Rights Council, 15th Session, UN Doc. A/HRC/15/ 4 March 2010, at <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf> (accessed 14 June 2010).

<sup>37</sup> Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth) [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/99C45F208C01F243CA2577580018ECF0/\\$file/0932010.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/99C45F208C01F243CA2577580018ECF0/$file/0932010.pdf) (accessed 21 July 2010).

<sup>38</sup> Correspondence from the Committee and the State Party on the Committee’s Early-Warning Measures and Urgent Procedures site at 28 /9/09 and 13/3/09 at <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm> (accessed 14 June 2010).

<sup>39</sup> Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009 at [http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s738\\_first/toc\\_pdf/0921920.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s738_first/toc_pdf/0921920.pdf;fileType=application%2Fpdf) (accessed 14 June 2010).

#### 2.2.4 COMPULSORY ACQUISITION OF 5 YEAR LEASES<sup>40</sup>

Under the Intervention the Commonwealth compulsorily acquired leases on land in 64 Aboriginal communities, with provision for the Minister to acquire additional leases by legislative instrument. The High Court ruled in February 2009 that, although compulsory acquisition was Constitutional, it would have to be made under “just terms”, interpreted as payment of “reasonable compensation”.<sup>41</sup> As of December 2009 only one community had received any compensation,<sup>42</sup> but on 25 May 2010 the Minister announced that the Government had commenced payment of rent to 45 out of 64 communities and would shortly finalise payments to the others.<sup>43</sup> The Government has not acknowledged widespread community resentment of lease acquisition and the amended legislation seeks only to clarify misunderstandings about the purpose of the acquisition.<sup>44</sup>

Although the Government announced in February 2009 that the total area acquired under compulsory five-year leases had been halved,<sup>45</sup> Amnesty International remains concerned about the maintenance of Australian Government control over Indigenous land and delays in the payment of compensation.

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<sup>40</sup> Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010 (Cth) [http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4265\\_aspassed/toc\\_pdf/09251b01.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4265_aspassed/toc_pdf/09251b01.pdf;fileType=application%2Fpdf) (accessed 23 June 2010).

<sup>41</sup> In *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009) the Court confirmed the compulsory acquisition of leases but found that the Constitution required acquisition on just terms. Judgement available at <http://www.austlii.edu.au/au/cases/cth/HCA/2009/2.html> (accessed 10 June 2010). In a dissenting judgement, Kirby J argued on the basis of principles derived from international law that a broader consideration of “just terms” beyond mere monetary value should be applied where Aboriginal land was concerned. See analysis in Greenwood B, *The Commonwealth Government’s Northern Territory Emergency Response Act: Some Constitutional Issues* at <http://eview.anu.edu.au/cross-sections/vol5/pdf/02.pdf> (accessed 12 June 2010).

<sup>42</sup> Australian Government, *Future Directions of the Northern Territory Emergency Response; A Community Guide to Proposed Changes*, December 2009, p 9, available at [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/fd\\_nter\\_comm\\_guide/Documents/future\\_directions\\_nter\\_community\\_guide.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/fd_nter_comm_guide/Documents/future_directions_nter_community_guide.pdf) (accessed 12 June 2010).

<sup>43</sup> Rent payments for NTER five-year leases, joint media release by Minister for Families, Housing, Community services and Indigenous Affairs, and Warren Snowdon MP, 25 May 2010, available at [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/rent\\_nter\\_25may10.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/rent_nter_25may10.aspx) (accessed 21 July 2010).

<sup>44</sup> Australian Government, *Future Directions of the Northern Territory Emergency Response; A Community Guide to Proposed Changes*, December 2009, p 6, available at [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/fd\\_nter\\_comm\\_guide/Documents/future\\_directions\\_nter\\_community\\_guide.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/fd_nter_comm_guide/Documents/future_directions_nter_community_guide.pdf) (accessed 12 June 2010).

<sup>45</sup> J Macklin, ‘Government finalises five-year lease boundaries in NT Indigenous communities’ (Media Release, 27 February 2009). Available at [http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/lease\\_boundaries\\_27feb09.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2009/Pages/lease_boundaries_27feb09.aspx) (viewed 10 June 2010).

### 2.2.5 LACK OF ADEQUATE CONSULTATION

Amnesty International welcomes amendments to the Intervention regime that will offer communities the chance to play an active role in the development of arrangements to increase safety and welfare. However, the organization notes that most measures remain restrictive, and could be implemented by communities themselves if they did see them as beneficial. Above all, they oblige community members to demonstrate that they are worthy of being treated on an equal basis with members of non-Indigenous communities.

In claiming that revised measures are “special measures”, the Government relies on “consent” obtained through the consultations it carried out. Amnesty International believes that the consultations carried out fell short of providing Indigenous communities with a genuine opportunity to either give consent to the amendments or deny such consent in accordance with international standards. The Minister had already announced her intention of maintaining and “strengthening” all elements of the Intervention.<sup>46</sup> Communities were presented with a very limited number of options on which to comment – options were either a simple continuation of the status quo, or involved the addition of a system of exemptions which individuals or communities would be obliged to seek<sup>47</sup> There have also been reported shortcomings in the consultation process, including gaps in the provision of translators, and indications from some communities that the consultation report failed to reflect their stated views.<sup>48</sup>

The following measures continue without modification and make no claim to be “special measures”.

### 2.2.6 WEAKENING OF PERMIT SYSTEM

The Intervention introduced changes to the permit system governing access to Aboriginal controlled land to allow access without a permit to “common areas”. Such changes were strongly opposed by professional groups with substantial experience of working in these communities on the grounds that there was no evidence linking Aboriginal control of land to child sexual abuse.<sup>49</sup> The Police

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<sup>46</sup> Australian Government, Future Directions for the Northern Territory Emergency Response, Commonwealth of Australia, 2009 available at [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/future\\_directions\\_discussion\\_paper/Documents/discussion\\_paper.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Documents/discussion_paper.pdf) (accessed 22 July 2010).

<sup>47</sup> Consultation on welfare quarantining for example provided, two options as a “starting point’ for discussion - one, compulsory income quarantining with individuals permitted to apply for exemptions, and two, continuation of blanket imposition of quarantining without exemption. See Future Directions above, pp 10-12.

<sup>48</sup> See “Will They Be Heard? A Response to the NTER Consultations, June to August 2009” at <http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf> (accessed 23 June 2010).

<sup>49</sup> See for example this submission from a group of medical specialists and clinicians to the Inquiry into the Appropriation (Northern Territory National Emergency Response) Bill (No. 2)

Federation of Australia opposed alterations to the permit system on the grounds that there was no evidence that it was necessary to protect children and fears that it might be counter-productive.<sup>50</sup> The Government attempted a limited restoration of the permit system in 2008, but its Bill was blocked in the Senate.<sup>51</sup>

#### 2.2.7 COMPULSORY WELFARE QUARANTINING – MADE “NON-DISCRIMINATORY”

By the Government's own admission, welfare quarantining, also known as income management, is the most highly contested of all Intervention measures. Under the original Intervention 50 per cent of welfare payments could only be accessed via special payment arrangements made through Centrelink or through a special card, that clearly identified the holder as a welfare beneficiary,<sup>52</sup> and could only be spent on “priority needs” food, clothing, rent, utility payments etc.<sup>53</sup> One hundred per cent of lump sum and family payments other than welfare payments are quarantined.<sup>54</sup>

Although the stated purpose was to ensure that parents meet the needs of children, quarantining applied to all welfare recipients, whether or not they had children and whether or not they had a personal history of demonstrated capacity to manage their finances.<sup>55</sup> The imposition of quarantining was originally not subject to normal administrative appeal rights, but these were reinstated in June 2009.<sup>56</sup>

The Government's Review Board recommended that:

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2007-2008 by the Senate Legal and Constitutional Affairs Committee, August 2007 at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/nt\\_emergency/submissions/sub48.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sub48.pdf) (accessed 12 June 2010).

<sup>50</sup> Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Northern Territory National Emergency Response and Associated Bills, 9 August 2007, at [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2004-07/nt\\_emergency/submissions/sub24.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sub24.pdf) (accessed 13 June 2010).

<sup>51</sup> [http://www.aph.gov.au/Senate/Committee/clac\\_ctte/NT\\_emerg\\_response\\_08/tor.htm](http://www.aph.gov.au/Senate/Committee/clac_ctte/NT_emerg_response_08/tor.htm) (accessed 13 June 2010).

<sup>52</sup>

[http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Documents/nt\\_eval\\_rpt/1\\_background.htm](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/1_background.htm) (accessed 23 June 2010).

<sup>53</sup> Income managed funds were then directed to the appropriate place by Centrelink – Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Guide to Social Security Law , Version 1.159 - Released 4 January 2010.

[http://facs.gov.au/guides\\_acts/ssg/ssguide-11/ssguide-11.4/ssguide-11.4.5/ssguide-11.4.5.40.html](http://facs.gov.au/guides_acts/ssg/ssguide-11/ssguide-11.4/ssguide-11.4.5/ssguide-11.4.5.40.html)

(Accessed 21/1/10).

<sup>56</sup>

[http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Documents/nt\\_eval\\_rpt/1\\_background.htm](http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Documents/nt_eval_rpt/1_background.htm) (accessed 22 June 2010).



- The current blanket application of income management in the Northern Territory cease.
- Income management be available on a voluntary basis to community members who choose to have some of their income quarantined for specific purposes, as determined by them;
- Compulsory income management should only apply on the basis of child protection, school enrolment and attendance and other relevant behavioural triggers;
- These provisions should apply across the Northern Territory;
- All welfare recipients should have access to external merits review.<sup>57</sup>

Under the amended legislation, compulsory welfare quarantining is directed away from prescribed communities, which are almost exclusively Indigenous, to “disadvantaged”, or low socio-economic status, communities. Most communities with a high proportion of Indigenous residents are severely disadvantaged.

The criteria for the application of compulsory income quarantining will disproportionately affect Indigenous Australians, as they are much more likely than non-Indigenous Australians to fall into the target categories:

- Category 1: Young people dependent on welfare payments<sup>58</sup> for more than 13 weeks in last 26 weeks);
- Category 2: Working age people (between 25 and pension age) who are long term recipients of unemployment and single parent payments;<sup>59</sup>
- Category 3: People assessed by a Centrelink worker (Secretary’s delegate) – as requiring income management because of vulnerability to financial crisis, domestic violence or economic abuse;
- Category 4: People referred to income management by child protection authorities.

Persons falling into the above categories will be subject to income quarantining unless they can establish that they warrant an exemption.<sup>60</sup> By directing the revised measure to the most disadvantaged individuals in the most disadvantaged communities, the Government has ensured that it will extend to a very high

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<sup>57</sup> Report of the NTER Review Board October 2008, Summary of recommendations, at [http://www.nterreview.gov.au/docs/report\\_nter\\_review/summrec.htm](http://www.nterreview.gov.au/docs/report_nter_review/summrec.htm) (accessed 1 July 2010).

<sup>58</sup> Youth allowance, Newstart allowance, Special Benefit, Parenting Payment.

<sup>59</sup> Newstart and Parenting Payments respectively.

<sup>60</sup> See Future Directions of the Northern Territory Emergency Response; A Community Guide to Proposed Changes, December 2009, Australian Government, pp 3-4 for categories and exemptions at [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/fd\\_nter\\_comm\\_guide/Documents/future\\_directions\\_nter\\_community\\_guide.pdf](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/fd_nter_comm_guide/Documents/future_directions_nter_community_guide.pdf) (accessed 12 June 2010).

proportion of Indigenous Australians.

#### 2.2.9 FAILURE TO REINSTATE THE RACIAL DISCRIMINATION ACT IN FULL

Amnesty International considers that through its amended Intervention the Government has largely failed to reinstate the RDA and ensure the modified Intervention's compliance with the Convention for the following reasons:

- It does not bring to an immediate halt all Intervention measures that are racially targeted and thus protect rights as required by Articles 2 (1) and Article 5 of the Convention;
- It excludes discriminatory actions already taken under the Intervention from the scope of the RDA;
- It claims that continuing measures, are now "special measures" in view of two considerations. First, because the Government considers them to be beneficial. And second, that it has engaged in a large scale consultation process. However, the process of consultation did not meet the requisite standard of free, prior and informed consent;
- It ignores evidence concerning rights based programs to address family violence and child abuse in Indigenous communities;<sup>61</sup>
- It authorises continuation of compulsory welfare quarantining based on race until the middle of 2011, and follows this by the introduction of a "trial" of compulsory welfare quarantining targeted on the basis of geographic disadvantage. This amounts to a change from direct to indirect discrimination against Indigenous Australians. It also constitutes a retrogressive measure in relation to the right to social security, in violation of Article 5(e)(iv) of the Convention;
- It does not make it clear that the RDA is intended to prevail over the amended Intervention enactments, thus leaving individuals uncertain legal protection against discrimination under the Intervention;
- It does not provide remedies for on-going discrimination or avenues for redress for damage suffered as a result of discrimination;
- It fails to implement the Principles of the Declaration on the Rights of Indigenous Peoples, in particular through its failure to facilitate the exercise of the right to free, prior and informed consent;

#### **Amnesty International has recommended that the Government of Australia:**

- **Ensure that all measures under the Intervention comply with the RDA and Australia's international human rights obligations;**

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<sup>61</sup> See Chapter 2, Social Justice Report, Commissioner for Social Justice, Australian Human Rights Commission, 2007, at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport07/chap2.html#\\_ftn50](http://www.hreoc.gov.au/social_justice/sj_report/sjreport07/chap2.html#_ftn50) (accessed 28 June 2010).

- **Any acquisition of Indigenous lands is carried out with the free, prior and informed consent of the communities affected, and accompanied by the payment of reasonable compensation.**

## 2.3 INDIGENOUS PEOPLES AND CRIMINAL JUSTICE (ARTICLES 2 AND 5)

Amnesty International is concerned that the Australian Government has failed to address issues related to the extreme over-representation of Australia's Indigenous peoples in arrest and imprisonment statistics and in the related rates of deaths in custody.

The rate of imprisonment for Indigenous adults is 14 times that of non-Indigenous adults.<sup>62</sup> The over-representation is even more extreme for Indigenous juveniles, who make up only five per cent of the juvenile population, but 40 per cent of those under criminal justice supervision, 50 per cent of those in juvenile detention, and 60 per cent of those in detention awaiting sentence.<sup>63</sup> Indigenous juveniles are 30 times more likely than their non-Indigenous counterparts to be in detention.<sup>64</sup> This state of affairs is largely due to underlying and long-term discrimination against Indigenous people in the enjoyment of Convention and other human rights (without ignoring individuals' responsibility for their own actions), but also from direct discrimination within the criminal justice system, as detailed below.

### 2.3.1 DISCRIMINATION, CRIMINAL JUSTICE AND UNDERLYING CAUSES OF OFFENDING

The Western Australian Law Reform Commission has noted the under-representation of Indigenous children in diversionary programs<sup>65</sup> contributes to their disproportionately high rate of detention.<sup>66</sup> Research in other States is consistent with this finding: a study of Victorian Police Statistics for 2001 found that the

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<sup>62</sup> "Prisoner numbers rise by 6%: ABS" Australian Bureau of Statistics Media Release at <http://www2008.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/1F2BD14CF87EE4AFCA25751B001AC5FA?OpenDocument> (accessed 19 June 2010).

<sup>63</sup> Juvenile justice in Australia 2007–08, Australian Institute of Health and Welfare, November 2009, p vii at <http://www.aihw.gov.au/publications/juv/juv-5-10853/juv-5-10853.pdf> (accessed 20 June 2010).

<sup>64</sup> Ibid.

<sup>65</sup> "[D]iversion involves any process that prevents young people from entering or continuing in the formal criminal justice system, it typically involves pre-court processes such as police cautioning or conferencing" Australian Institute of Criminology, "Police diversion of young offenders and Indigenous overrepresentation", (2010) available at <http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi390/view%20paper.aspx> (accessed 2 August 2010).

<sup>66</sup> Western Australian Law Reform Commission (2006) Aboriginal Customary Laws Final Report, Chapter 5 Aboriginal People and the Criminal Justice System, p 83 available at [www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter\\_5.pdf](http://www.lrc.justice.wa.gov.au/2publications/reports/ACL/FR/Chapter_5.pdf) (accessed 18/10/2007).

overall cautioning rate (a type of diversion) for Indigenous juveniles<sup>67</sup> was 13.3 per cent compared with 30.8 per cent for non-Indigenous juveniles.<sup>68</sup>

### 2.3.2 NEED TO ADDRESS FACTORS AFFECTING RATES OF OFFENDING AND RE-OFFENDING

To address the economic and social factors underpinning high contact with the criminal justice system and disproportionate incarceration rates, it would be necessary to enable Indigenous peoples of Australia to enjoy the full range of human rights – economic, social and cultural, as well as civil and political – on a basis of substantive equality with their non-Indigenous counterparts. This is in effect what Chief Justice of Western Australia (WA) Wayne Martin told the WA Department of Corrective Services in 2009 when talking about the high cost and low effectiveness of the current approach to crime prevention as it affects Indigenous offenders:

The causes of Aboriginal crime are as many and varied as the circumstances of Aboriginal offenders. But there are some common themes which will be obvious to this audience. They include all those aspects of the 'gap' between the living conditions of Aboriginal people and those of non-Aboriginal people in our community. They include the lower standards of health enjoyed by the Aboriginal peoples, lower and often inadequate standards of accommodation, poor participation rates in education and employment, social and family dysfunction, cultural dislocation, dispossession, substance abuse, despair and high levels of mental illness. Unless and until these massive and multi-faceted issues are addressed and resolved, the over-representation of Aboriginal people within the criminal justice system of Western Australia is likely to continue. And obviously there is a limit to which agencies like courts and corrective services can address these deep seated issues, which have defied resolution for many years now. But that is no excuse for not trying.<sup>69</sup>

Not only are Indigenous offenders less likely to be given non-custodial sentences, but they are less likely to have access to culturally appropriate rehabilitation programs<sup>70</sup> within the prison system, and are more likely than their non-Indigenous counterparts to re-offend on release. Western Australia, which spends less than

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<sup>67</sup> That is children over the age of 10 but under 18.

<sup>68</sup> Victorian Aboriginal Legal Service Co-operative Ltd. (2002) *Koori Young People, Diversion and Police Cautioning*, available at <http://vals.org.au/news/submissions/42%20Koori%20Young%20People%20Diversion%20%20Police%20Cautioning.pdf> (accessed 30 June 2010).

<sup>69</sup> Martin, The Hon Wayne, Chief Justice of Western Australia, 'Corrective Services for Indigenous Offenders - Stopping the Revolving Door' at [http://www.supremecourt.wa.gov.au/publications/pdf/Joint\\_Development\\_Day\\_DCS.pdf](http://www.supremecourt.wa.gov.au/publications/pdf/Joint_Development_Day_DCS.pdf) (accessed 7 May 2010) (hereafter, Martin).

<sup>70</sup> Western Australian Inspector of Custodial Services cited in Martin, p 9.

other mainland states on rehabilitation and re-integration<sup>71</sup> has particularly high rates of re-offending:

About 40 per cent of male adult non-Aboriginal prisoners leaving prison between 1 July 1998 and 30 June 2008 had returned to prison before early May 2009. However, in the case of Aboriginal prisoners, the equivalent figure was just under 70 per cent. In the case of female prisoners the rate of return to prison for non-Aboriginal prisoners over the same period was about 30 per cent, compared to about 55 per cent for Aboriginal prisoners. In the case of juveniles the rate of return to custody over the same period for female Aboriginal detainees was about 64 per cent, and for male Aboriginal detainees about 80 per cent.<sup>72</sup>

Justice reinvestment, as described in the 2009 Social Justice Report,<sup>73</sup> is a criminal justice policy which advocates diversion of a proportion of the funds that would otherwise be spent on incarceration to measures that address the underlying causes of offending and recidivism in the most needy communities, where crime rates are highest. Imprisonment is retained as an option for dangerous offenders and the most serious offences.

The need to address high imprisonment rates by tackling the underlying causes of crime – the entrenched social and economic disadvantage and the on-going effects of dispossession and discrimination experienced by Indigenous peoples of Australia was clearly identified in the 1991 Report of the Royal Commission into Aboriginal Deaths in Custody.<sup>74</sup>

Amnesty International is concerned that nearly 20 years after that wide reaching inquiry, there has been no systematic review of the implementation of its recommendations. It is also concerned about the manifest inadequacy of services to address high rates of drug and alcohol dependency,<sup>75</sup> as a preventive measure in Indigenous communities, as diversionary programs to keep down the imprisonment rate, and as an essential part of rehabilitation programs in prisons.

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<sup>71</sup> *ibid*

<sup>72</sup> Martin, p 5.

<sup>73</sup> Available at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport09/pdf/sjr\\_2009\\_web.pdf](http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf) (accessed 12 May 2010).

<sup>74</sup> <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/#underlying> (accessed 25 June 2010).

<sup>75</sup> at [http://www.antar.org.au/sites/default/files/nidac\\_bridges\\_and\\_barriers.pdf](http://www.antar.org.au/sites/default/files/nidac_bridges_and_barriers.pdf) (accessed 25 June 2010).

### 2.3.3 CUSTOMARY LAW NOT TO BE CONSIDERED AS A FACTOR IN BAIL OR SENTENCING<sup>76</sup>

Under the common law tradition, community norms are taken into account in the interpretation and application of the law. However, the prohibition included in the Crimes Amendment (Bail and Sentencing) Act 2006 (Cth) discriminates against the indigenous community because they are prevented from using their customs and norms as a factor in bail hearings or sentencing.

The prohibition has been strongly opposed by the Law Council of Australia, by the Australian Human Rights Commission<sup>77</sup> and by Indigenous legal organisations.<sup>78</sup> A Government review of the impact of such prohibitions was provided to the Attorney General in November 2009, but has not yet been released.<sup>79</sup>

### 2.3.4 INDIGENOUS DEATHS IN CUSTODY

Amnesty International welcomes the fact that Indigenous deaths in prisons have declined in numbers and rates since their peak in 1995, when there were 18 deaths, a rate of nearly six per thousand Indigenous prisoners. In 2007 there were five Indigenous deaths in prison and 45 non-Indigenous deaths.

The total number of deaths in police custody fell from 27 in 2004 to 20 in 2005, mostly as a result of a fall in non-Indigenous deaths from 22 to 12.<sup>80</sup> In 2007 the overall number had risen to 29, four of them Indigenous, but the ratio of Indigenous to non-Indigenous deaths dropped to its lowest since 2001.<sup>81</sup>

Two Indigenous deaths in custody, the death of Mr Doomagee at Palm Island in 2004, and of Mr Ward, in Western Australia in 2008 provide tragic testimony to the

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<sup>76</sup> See <http://www.austlii.edu.au/au/journals/AILR/2006/77.html> (accessed 10 June 2010). Also see

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=E3FB1407-1E4F-17FA-D2D0-D480B8D9A19E&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=E3FB1407-1E4F-17FA-D2D0-D480B8D9A19E&siteName=lca) (accessed 13 June 2010).

<sup>77</sup> See submission from the then Equal Opportunity and Human Rights Commission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006, at [http://www.hreoc.gov.au/legal/submissions/crimes\\_amendment.html](http://www.hreoc.gov.au/legal/submissions/crimes_amendment.html) (accessed 13 June 2010).

<sup>78</sup>

[http://www.aph.gov.au/senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/report/report.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/report.pdf) , pp 77-78 (accessed 10 June 2010).

<sup>79</sup>

[http://www.aph.gov.au/Senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/report/c04.htm#c04f13](http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/c04.htm#c04f13)

<sup>80</sup> Jane Curnow & Jacqueline Joudo Larsen Deaths in custody in Australia: National Deaths in Custody Program 2007 Australian Institute of Criminology, 2009, p iii at <http://www.aic.gov.au/documents/D/6/D/%7BD6D9BCDF-E937-4C71-B7BC-A52C853E5A67%7Dmr03.pdf> (accessed 20 Jun 2010).

<sup>81</sup> Ibid.

effects of over-policing and to defects in the administration of justice in places of detention that result in the most grave of rights violations. Although Mr Doomagee died during the previous reporting period, the Coroner's report on the death was not published until September 2006, and the issues raised by that report have not yet been resolved. In June 2010, the Queensland anti-corruption watchdog, the Crime and Misconduct Commission, released a scathing report into the investigation of Mr Doomagee's death. The report found serious flaws in the initial police investigation and the subsequent internal probe into the investigation. It recommended that six police officers involved in the investigations face disciplinary action.<sup>82</sup> At the time of writing the Queensland Supreme Court was still deliberating an application by the officers for an injunction.

Amnesty International is concerned that the Australian Government has not taken all possible steps to increase the protection of individuals held in police custody or State or Territory prisons. It has not **implemented all relevant recommendations of the Royal Commission into Aboriginal Deaths in Custody, particularly those designed to:**

- rectify systemic bias in the criminal justice system that makes it more likely that an Indigenous Australian who comes into contact with the criminal justice system will spend time in custody compared with a non-Indigenous Australian (in particular Recommendations 89-91 concerning bail, and Recommendation 92 prescribing the use of imprisonment as a sanction of last resort);
- improve standards of continuous monitoring to ensure the health and well-being of Indigenous prisoners (Recommendations 122-167, in particular Recommendation 139(a) which expresses the need for in-person inspections at regular intervals); and
- place Indigenous prisoners in institutions as close as possible to their families and provide a right of appeal against transfer to more remote locations (Recommendation 168).

Amnesty International regrets that the Australian Government has signed, but not yet ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, thereby denying individuals deprived of their liberty the benefits of both a national and an international inspection and monitoring schemes which would also address discriminatory practices. **The organization has recommended that the Australian Government:**

- **Halt the escalating imprisonment rate of Indigenous peoples through addressing the social and economic factors underpinning crime, including by adopting of a justice reinvestment strategy.**

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<sup>82</sup> Crime and Misconduct Commission, Review of the Queensland Police Service's Palm Island Review, June 2010, available at <http://www.cmc.qld.gov.au/data/portal/00000005/content/13053001276649217949.pdf> (accessed 22 July 2010).

Australia

- **Implement outstanding recommendations of the Royal Commission into Aboriginal Deaths in Custody;**
- **Ratify and implement the Optional Protocol to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment;**
- **Refocus prison systems to ensure that they provide an environment conducive to rehabilitation, provide culturally relevant programs and services, particularly programs for drug and alcohol addiction.**

## **3. MIGRATION RELATED VIOLATIONS (ARTICLES 1 AND 5)**

Several aspects of current Australian Government migration policy are of concern to Amnesty International in relation to Australia's obligations under the Convention with respect to refugees, asylum seekers and migrant workers.

### **3.1 MANDATORY DETENTION OF UNDOCUMENTED ASYLUM SEEKERS (ARTICLES 1 AND 5)<sup>83</sup>**

Amnesty International considers that Australia's policy of mandatory, indefinite detention of asylum seekers who arrive without authorisation is a breach of its obligations. Such asylum seekers are likely to remain in detention for the entirety of their application process, including periods required for merits or judicial review. Detention periods vary but can be prolonged. The present situation facing Afghan and Sri Lankan asylum seekers (addressed below) gives rise to even more lengthy periods of detention. As of 10 June 2010 there were 107 asylum seekers held in detention for a period of at least 128 days.<sup>84</sup>

### **3.2 STATELESSNESS AND REMOVAL PENDING BRIDGING VISAS**

Notwithstanding Australia's obligations under international human rights treaties, including the Convention, the Australian High Court has found it lawful for a stateless person to be detained indefinitely, which amounts to arbitrary detention.<sup>85</sup>

Amnesty International believes that Australia's failure to protect stateless persons from arbitrary detention violates obligations under the Convention, as articulated under General Recommendation 30. Mandatory detention of stateless persons, which was also approved by the Court, is similarly unnecessary and arbitrary.

One of the few avenues available to stateless people who have not received

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<sup>83</sup> As interpreted by the Committee in General Recommendation 30.

<sup>84</sup> Information provided by the Department of Immigration & Citizenship, 22 July 2101.

<sup>85</sup> *Al Kateb v Goodwin* (2004) 219 CLR 562.



protection in Australia is the Removal Pending Bridging Visa (RPBV). The Migration Regulations state that the Minister may invite a person to apply for an RPBV after all visa applications are finalised (refused) and if that person is in immigration detention and if the Minister is satisfied that the person will do everything possible to facilitate their removal.

Amnesty International believes that RPBVs fail to meet the responsibilities of states parties as interpreted by the Committee to reduce statelessness and lead to discrimination in access to citizenship for long-term stateless residents, who are effectively prevented from accessing citizenship procedures.

Amnesty International remains opposed to the RPBV system as it does not properly address the plight of stateless people. The Australian Government must develop a proper mechanism to address the protection needs of stateless people in Australia.

### 3.3 EXCISED OFFSHORE PLACES

In 2001, the Migration Act 1958 (Cth) was amended to statutorily classify certain islands to the north and north-west of Australia as distinct from the Australian 'mainland' for migration purposes. The Australian Government gives the title 'Excised Offshore Places' (EOP) to these designated islands. The effect of excisions from the migration regime is that an asylum seeker entering Australia at an EOP without a valid visa is deemed to be an 'unlawful non-citizen' and denied access to the full protections of the application and review procedures available on the mainland in relation to applications for asylum under the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention). Amnesty International is concerned that this arrangement discriminates against those asylum seekers who are not able to apply for asylum via more traditional routes.

EOP asylum seekers without a valid visa must apply to the Department of Immigration and Citizenship (DIAC) for permission to apply for a protection visa by way of a non-statutory process called the Refugee Status Assessment (RSA) conducted by the Department. The RSA is a screening process, by which Departmental officers assess an asylum seeker's claim to ascertain whether they qualify as refugees under the Refugee Convention. If it is determined that they do, the individual is then permitted to apply for refugee status.

Amnesty International is concerned that the RSA process is not subject to normal administrative and judicial review processes, unlike applications for refugee protection under the Migration Act. Although the High Court has original jurisdiction over all administrative decisions made by the Department, even those made on "excised" places, it is extremely difficult for asylum seekers held in remote places of detention to access it.

Amnesty International strongly advocates a uniform regime of assessment and review for all claims from asylum seekers, regardless of country of origin or mode of entry. In 2001 at the policy's inception, the people most affected by it were primarily Afghans and Iraqis. In the past three years it has been Afghans and Sri

Lankans. The countries that these people pass through en-route to Australia are almost invariably not parties to the Refugee Convention, making it virtually impossible to apply for asylum prior to arriving in Australia. The EOP policy discriminates against these people and in doing so is at odds with Australia's obligations under Article 1 of the Convention, in addition to violating its Refugee Convention obligations.

### 3.3.1 DISCRIMINATION FACED BY ASYLUM SEEKERS DETAINED ON CHRISTMAS ISLAND AND IN REMOTE MAINLAND LOCATIONS

Asylum seekers detained on Christmas Island are significantly disadvantaged in terms of their applications for recognition as refugees and related protection visas compared with on-shore applicants. The Minister has discretion to accept applications for refugee status from EOP applicants and they have no access to independent merits review (by the Refugee Review Tribunal) of decisions. They are also disadvantaged in terms of their treatment and wellbeing in comparison to detainees in metropolitan facilities. The principal reason for this is the enormous physical distance between the detainees and the services which are regularly available to asylum seekers on the mainland. Curtin Immigration Detention Centre (Curtin) is 22 hours by road from Adelaide; the nearest town is Derby, some 40km away. An alternative detention arrangement for families recently utilised by the Australian Government is in the remote town of Leonora, a town of approximately 1500 people, nine hours by road from Perth. The people held on Christmas Island and now in Curtin Detention Centre are those primarily affected by the EOP policy, and in many cases, also affected by the cessation of processing policy.

Christmas Island detainees in particular:

- Are initially placed in isolated detention facilities — where they are entitled to one phone call but are not informed of their right to claim asylum or provided with legal or migration assistance — until DIAC has determined whether the detainee wishes to make a claim for refugee protection;
- Are detained in either inappropriately prison-like conditions (which are particularly hazardous to the mental health of torture or other trauma victims) or simply inappropriate accommodation;
- Do not have access to appropriate medical, psychiatric, counselling and dental services, while many specialist medical services are not available at all as evidenced by the transportation of ill detainees to Perth for treatment, impacting on the right to health care; and
- Increasingly limited phone services (satellite phones are most reliable on Christmas Island), including bans on mobile phones, unlike other detainees in mainland immigration detention centres.

Detainees in both Curtin and Christmas Island:

- Do not have access to the same decision-making and independent review system afforded on-shore applicants for refugee status;

- Despite entitlement to Government legal and migration assistance, have far less readily-available access to that assistance and to legal and migration services provided by community organisations;
- Have little or no access to appropriate cultural or religious support services; and
- In reality do not have access to community release as there is no effective 'community' into which they can be released.

These conditions contrast unfavourably in most respects with those afforded mainland applicants and represent clear discrimination against them.

### 3.3.2 PROPOSED REGIONAL PROCESSING CENTRE FOR ASYLUM SEEKERS

The Government has announced that it will work toward the establishment of a regional off-shore processing centre for undocumented asylum seekers. Negotiations are under way with Timor Leste as a possible location, as it is a signatory to the Refugee Convention.<sup>86</sup>

The details of such a policy have yet to be announced, but Amnesty International is concerned that it will involve retention of the excision regime as well as mandatory indefinite detention, and that it will not provide access to appeal processes as rigorous as those available to asylum seekers who are processed in Australia nor offer adequate safeguards against refoulement.

### 3.4 SUSPENSION OF PROTECTION VISA PROCESSING BASED ON COUNTRY OF ORIGIN (ARTICLES 1 AND 5)

On 9 April 2010 the Australian Government announced that it had suspended processing of protection visas from Afghan asylum seekers for six months and of Sri Lankan asylum seekers for three months. On 6 July it announced that it would continue to review the suspension with respect to Afghan applicants, and lift that on Sri Lankans immediately "in light of the continuing improved security and human rights situation in Sri Lanka."<sup>87</sup>

#### **Amnesty International believes that suspension of processing based on country of origin is discriminatory and violations Article 5 of the Convention.**

The Australian Government's policy, claimed to have a basis in the evolving circumstances in these two countries, fails to acknowledge the need to assess asylum claims on a case by case basis in order to discharge Australia's obligations

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<sup>86</sup> "Gillard Government Strengthens Australia's Border Protection" Julia Gillard, 6 July 2010, Australian Labor Party, at <http://www.alp.org.au/news/gillard-government-strengthens-australias-border-protection> (accessed 6 July 2010).

<sup>87</sup> "Gillard Government Strengthens Australia's Border Protection" Julia Gillard, 6 July 2010 at <http://www.alp.org.au/news/gillard-government-strengthens-australias-border-protection> (accessed 6 July 2010).

under international law.

A further discriminatory element of this processing suspension is that Afghan male asylum seekers who arrived after 9 April 2010 are to be detained at the remote Curtin Immigration Detention Centre.<sup>88</sup> The remainder of the post April 9 arrivals face the remote and harsh conditions of the Christmas Island facility and the recently opened new detention facility in the remote community of Leonora to hold the increased number of Afghan and Sri Lankan detainees. Not only has Article 5 of the Convention been breached by this policy, the following section highlights concerns and issues particular to remote detention, which compound the impact of the suspension of processing on Afghan and Sri Lankan asylum seekers.

### 3.5 NEED FOR PROTECTION OF RIGHT TO NON-REFOULEMENT (ARTICLE 5(B))<sup>89</sup>

Australia remains without domestic legislation to prevent refoulement. This fact has resulted in criticism from the Committee against Torture, the Human Rights Committee, the UN Special Rapporteur on counter-terrorism and a Committee of the Australian Senate.

Amnesty International welcomes the Migration Amendment (Complementary Protection) Bill 2009 (Cth) presently before Parliament. However, it notes that the Bill does not provide statutory protection against refoulement for stateless persons and for those who enter Australia through into excised places.

### 3.6 MIGRANT WORKER RIGHTS (ARTICLE 5(E))

Migrant workers who have come to Australia to fill skills gaps or to satisfy unskilled labour demands are among the most vulnerable groups in the country. The Australian Human Rights Commission has expressed concern that many migrant workers are:

"vulnerable to workplace exploitation, including discrimination, due to a limited knowledge and understanding of Australian workplace rights, limited English language, and the ongoing reliance on a sponsor for their visa status".<sup>90</sup>

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<sup>88</sup> Curtin is on mainland Australia. An unauthorised arrival whose first landfall is in an EOP, however, is processed under that regime even when taken to Australia.

<sup>89</sup> As interpreted by the Committee in General Comments No. 30 (2004).

<sup>90</sup> Australian Human Rights Commission Submission to the United Nations Committee on Economic Social and Cultural Rights, 17 April 2009, p 17 at [http://www.hreoc.gov.au/legal/submissions/2009/20090417\\_icescr\\_review.pdf](http://www.hreoc.gov.au/legal/submissions/2009/20090417_icescr_review.pdf) (accessed 25 June 2010)

While the current Australian Government has introduced a number of reforms, particularly for those coming on short term skilled migration visas (including the 457 visa),<sup>91</sup> concerns remain that these individuals continue to face discrimination and exploitation, including undertaking dangerous work and receiving lower wages than Australian citizens. Australia is yet to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This remains one of the only major UN human rights treaties that Australia has refused to join.

**Amnesty International has recommended that the Australian Government:**

- **End its policy and practice of mandatory detention of asylum seekers and ensure, through all necessary legislative and administrative measures, that the detention of asylum seekers is always a measure of last resort, is limited by statute to the shortest time reasonably necessary, and avoid all forms of arbitrary detention;**
- **Legislate to ensure protection for stateless people in accordance with the State Party's obligations under the Convention as well as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;**
- **Put an end to the EOP regime and provide all asylum seekers who enter Australian territory or jurisdiction equal rights to apply for protection as a refugee in Australia and to access independent review of any decisions made, regardless of how the asylum seeker arrived in Australia and regardless of country of origin;**
- **Immediately close all detention facilities at Christmas Island and remote mainland detention centres such as the Curtin Detention Centre;**
- **Immediately remove the suspension on processing visa applications from asylum seekers from Afghanistan, and review policies and procedures regarding asylum seekers to eliminate any discrimination in the visa application process;**
- **Immediately legislate to incorporate all of Australia's obligations of non-refoulement under international law into domestic law;**
- **Ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.**

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<sup>91</sup> This provides for business-sponsored temporary entry of up to 4 years. See Temporary Business (Long Stay) - Standard Business Sponsorship (Subclass 457) at Department of Immigration & Citizenship at <http://www.immi.gov.au/skilled/skilled-workers/sbs/> (accessed 21 July 2010)

## SUMMARY OF RECOMMENDATIONS

Regarding the legal framework for the protection of rights Amnesty International has recommended that the Australian Government:

- Ensure that domestic law is in conformity with the State's obligations under the Convention and, in particular, that it provides entrenched protection against discrimination on the grounds of race, colour, descent, or national or ethnic origin.

Regarding discrimination against Indigenous Australians, Amnesty International has recommended that the Australian Government:

- Facilitate the active participation of Indigenous peoples of Australia in the development of policies that affect them, ensuring that they are able to give or withhold their free, prior and informed consent to such policies;
- Ensure that all measures under the Intervention comply with the RDA and Australia's international human rights obligations;
- Any acquisition of Indigenous lands is carried out with the free, prior and informed consent of the communities affected, and accompanied by the payment of reasonable compensation. Indigenous peoples of Australia should be able to access and maintain control over their traditional lands, in accordance with international human rights law and standards;
- Ratify and implement the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Halt the escalating imprisonment rate of Indigenous peoples through addressing the social and economic factors underpinning crime, including by adopting of a justice reinvestment strategy;
- Implement all relevant recommendations of the Royal Commission into Aboriginal Deaths in Custody;

Regarding asylum seekers, refugees and migrants, Amnesty International has recommended that the Australian Government:

- End its policy and practice of mandatory detention of asylum seekers and ensure, through all necessary legislative and administrative measures, that the detention of asylum seekers is always a measure of last resort, is limited by statute to the shortest time reasonably necessary, and avoid all forms of arbitrary detention;
- Legislate to ensure protection for stateless people in accordance with the State Party's obligations under the Convention as well as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;

- **Put an end to the EOP regime and provide all asylum seekers who enter Australian territory or jurisdiction equal rights to apply for protection as a refugee in Australia and to access independent review of any decisions made, regardless of how the asylum seeker arrived in Australia and regardless of country of origin;**
- **Immediately close all detention facilities at Christmas Island and remote mainland detention centres such as the Curtin Detention Centre;**
- **Immediately remove the suspension on processing visa applications from asylum seekers from Afghanistan, and review policies and procedures regarding asylum seekers to eliminate any discrimination in the visa application process;**
- **Immediately legislate to incorporate all of Australia's obligations of non-refoulement under international law into domestic law;**
- **Ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.**

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