

Written Response of the Australian Government to Concluding Observations of the United Nations Human Rights Committee – December 2010

In its Concluding Observations concerning Australia's Fifth report under the International Covenant on Civil and Political Rights (the Covenant), issued in April 2009, the Human Rights Committee requested that, in accordance with rule 71, paragraph 5 of the Committee's rules of procedure, the State party provide, within one year, relevant information on its implementation of the Committee's recommendations in paragraphs 11, 14, 17 and 23.

The Australian Government has given careful consideration to the Committee's comments and recommendations and is pleased to provide to the Committee the following information in response to these recommendations.

Paragraph 11 – Counter-Terrorism Measures:

In paragraph 11, the Committee expressed concern that some provisions of the Anti-Terrorism Act (No. 2) 2005 and other counter-terrorism measures adopted by the State party appear to be incompatible with the Covenant rights, including with non-derogable provisions. The Committee expressed particular concern over: (a) the vagueness of the definition of terrorist act; (b) the reversal of the burden of proof contrary to the right to be presumed innocent; (c) the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the Crimes Act, and; (d) the expanded powers of the Australian Security Intelligence Organization (ASIO), including so far unused powers to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.

The Committee recommended that:

The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant. In particular, it should address the vagueness of the definition of terrorist act in the Criminal Code Act 1995, in order to ensure that its application is limited to offences that are indisputably terrorist offences. The State party should in particular: (a) guarantee the right to be presumed innocent by avoiding reversing the burden of proof; (b) ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release a bail; and (c) envisage to abrogate provisions providing Australian Security Intelligence Organization (ASIO) the power to detain people without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.

Response:

The Australian Government notes that Australia's counter-terrorism laws have been extensively reviewed. Reviews have been conducted by the Security Legislation Review Committee (SLRC), the Parliamentary Joint Committee on Intelligence and Security (PJCIS)

and the Australian Law Reform Commission. Further, the counter-terrorism laws enacted in 2005 will be comprehensively reviewed by the Council of Australian Governments in 2010.

The Government also notes that on 15 November 2010 the Australian Parliament passed the National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010. The reforms will:

- clarify and improve the operation of the treason and sedition offences in the *Criminal Code*
- establish a maximum seven day limit on the amount of time that may be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence
- enhance and clarify law enforcement powers to investigate terrorism under the *Crimes Act 1914*
- improve the terrorist organisation listing regimes in both the *Criminal Code* and the *Charter of the United Nations Act 1945*
- improve the processes for protecting national security information in court proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, and
- extend the role of the Inspector-General of Intelligence and Security to inquire into an intelligence or security matter relating to any Commonwealth department or agency.

The reforms also established the Parliamentary Joint Committee on Law Enforcement, which will replace the Parliamentary Joint Committee on the Australian Crime Commission. The new committee will be responsible for oversight of the Australian Crime Commission and the Australian Federal Police (the AFP).

In response to the Committee's comments and recommendations, the Government provides the following information:

Definition of terrorist act

The definition of terrorist act focuses on the intent associated with a terrorist act that distinguishes such violence from other non-terrorist acts. The definition contained in section 100.1 of the Criminal Code provides that actions or threats of action must be made with the intention of advancing a political, religious or ideological cause and with the intention of coercing or intimidating an Australian or foreign government or the public. It includes actions or threats of action involving serious harm to people, damage to property, endangerment of life, serious risk to the public's health or safety, or seriously interfering with an electronic system including telecommunications, financial and essential government services systems, essential public utilities and transport providers. Action

which is advocacy, protest, dissent or industrial action, not intended to cause serious harm, death, endangerment of life, or serious risk to the health or safety of the public, is expressly excluded from being a 'terrorist act'. This ensures the definition is appropriately targeted to terrorist activity.

There is a high level of rigor associated with satisfying the components of the definition. The prosecution must satisfy, beyond reasonable doubt, two levels of 'intention' in relation to the definition of terrorist act — that there was an intention to advance a political, religious or ideological cause by the action or threat of action and, further, that there was an intention to coerce or intimidate a government or to intimidate the public.

The fault elements of the terrorist act and terrorist organisation offences ensure that only conduct associated with a terrorist motive is criminalised. In recent counter-terrorism prosecutions, the offences in relation to which defendants were charged and convicted involved conduct which was directly related to terrorist activity, such as intentionally being a member of a terrorist organisation or doing acts in preparation for, or planning, a terrorist act. For example, in the case of *R v Lodhi* [2006] NSWSC 691, Mr Lodhi was convicted of a number of offences relating to the possession and collection of documents connected with preparation for a terrorist act. He was sentenced to 20 years imprisonment.

Burden of proof

It is a fundamental principle of Commonwealth criminal law that a defendant is presumed to be innocent and that the prosecution must prove every element of an offence relevant to the guilt of the person charged. However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence or exception, thereby placing the onus on the defendant. A defence or exception is created by expressing the matter to be a defence or expressing it as an exception of the offence or by providing that the offence does not apply, or a person is not guilty of the offence, in specified circumstances. To discharge a 'legal burden', the defendant is required to prove the matter in question to a civil standard of proof (that is, on the balance of probabilities). If this is done, this creates a presumption that the matter exists which the prosecution must refute beyond reasonable doubt.

For example, section 102.3 of the Criminal Code criminalises membership of a terrorist organisation. A person can only be found guilty of being a member of a terrorist organisation if the prosecution first proves, beyond reasonable doubt, that the person intended to be a member of an organisation, that the organisation is in fact a terrorist organisation and the person knows that the organisation is a terrorist organisation.

However, a person will not be taken to have committed the offence if he or she can prove, on the balance of probabilities, that 'he or she took all reasonable steps to cease to be a

member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation’.

The defendant is in a better position to establish that reasonable steps were taken to ensure contact was severed with an organisation as soon practicable after he or she knew the organisation to be a terrorist organisation. Placing a legal burden on the defendant in this limited respect in no way derogates from the principle of the presumption of innocence.

A range of criminal offence provisions impose a burden on the defendant to prove certain matters. The requirement for a defendant to discharge a legal burden is reflected, for example, in offence provisions in the Commonwealth Criminal Code relating to explosives and lethal devices and dealing with property suspected of being the proceeds of crime.

Availability of bail

Section 15AA of the Crimes Act 1914 provides that there is a presumption against the granting of bail where a person has been charged with terrorism or other offences relevant to terrorist activity. A person who has been charged with the offence is required to persuade a bail authority that ‘exceptional circumstances’ exist justifying their release on bail.

However, section 15AA is not an ‘automatic obstacle’ to the person being released on bail. In accordance with the presumption of innocence, the magistrate always has the discretion to determine whether it is appropriate for a person who has been charged with a terrorism offence to be released on bail. These provisions reflect the serious nature of the offences.

There have been defendants released on bail notwithstanding the presumption against bail in section 15AA of the Crimes Act 1914, for example, in *Vinayagamoorthy and Yathavan* [2007] VSC 265.

‘Exceptional circumstances’ is not defined in the provisions. It is a phrase that is well known and understood by the courts. Given the variable circumstances which may militate against or support the granting of bail, it would impose practical constraints if ‘exceptional circumstances’ was defined. Firstly, the term is not easily subject to general definition as circumstances may exist as a result of the interaction of a variety of factors which, of themselves, may not be special or exceptional, but taken cumulatively, may meet this threshold. Second, a list of factors said to constitute ‘exceptional circumstances’, even if stated in broad terms, will have the tendency to restrict rather than expand the factors which might satisfy the requirements for ‘exceptional circumstances’.

ASIO Powers

The Committee’s observations state that questioning and detention warrants under Subdivision C of Division 3, Part III of the ASIO Act enable persons to be detained ‘without

access to a lawyer and in conditions of secrecy for up to seven-day renewable periods'. This statement is misleading, as it does not consider the provisions within the context of the rest of Part III Division 3 of the ASIO Act, which contains significant safeguards and accountability mechanisms to protect the rights of a person who is the subject of a questioning, or questioning and detention, warrant. The limitations on access to lawyers and on disclosing certain information are not absolute restrictions, and only apply to the extent necessary to protect national security.

Questioning and detention warrants

The legislation requires that questioning, and questioning and detention warrants are only available if the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence and as a matter of last resort where other methods of collecting that intelligence would be ineffective.

Furthermore, there are additional requirements that must be satisfied in the case of a questioning and detention warrant. A questioning and detention warrant may only authorise the subject to be taken into custody and detained where there are reasonable grounds to believe that the person will fail to appear for questioning, will alert a person involved in a terrorism offence that is being investigated, or will destroy, damage or alter a record or thing required to be produced under the warrant.

Access to a lawyer

The only circumstance in which a person may be denied access to their lawyer of choice is if the Prescribed Authority (an independent person with judicial experience who presides over the questioning) is satisfied, on the basis of circumstances relating to that particular lawyer, that there is a risk that a person involved in a terrorism offence may be alerted about the investigation, or a record or thing that the person is required to produce under the warrant may be destroyed, damaged or altered. The Act specifically provides that if their first lawyer of choice is denied, the subject of the warrant may contact another lawyer of choice. Section 34ZP provides that, for the avoidance of doubt, a person may be questioned in the absence of a lawyer. For example, a person may be questioned in the absence of a lawyer if they have indicated they do not want a lawyer present. They might also be questioned in the absence of a lawyer if they have requested a particular lawyer and access to that lawyer has been denied on the grounds outlined above, but the person refuses to have any other lawyer against their wishes.

Section 34ZP is a declaratory provision, and does not authorise ASIO to refuse a person access to a lawyer. The only grounds on which access to a lawyer can be refused are on the security grounds relating to that particular lawyer outlined above. As noted above, the questioning process is overseen by a Prescribed Authority, who has authority to direct that questioning not take place until the subject has legal representation. Therefore, while there

is scope to deny a person access to a particular lawyer of choice, there are also sufficient safeguards to ensure that a person is not denied access to a lawyer.

Conditions of secrecy

The limitations on the subject of a questioning and detention warrant from contacting people and disclosing information about the warrant are not absolute. Those restrictions that do apply are necessary and tailored to protect national security. Importantly, the restrictions on disclosing information about the warrant do not prevent a person from disclosing information to a relevant complaints handling body, or to a lawyer for the purpose of obtaining legal advice about the warrant or seeking a remedy relating to the warrant or the person's treatment in connection with a warrant. The Prescribed Authority, or the warrant itself, may also permit the person to contact persons and disclose information about the warrant, and the person may request the presence of an interpreter.

Renewable periods

While it is theoretically possible that a subsequent questioning and detention warrant could be sought, there are stringent requirements that must be met before a person could be subject to a questioning and detention warrant for renewed periods of seven days. Importantly, before the Attorney-General consents to a further request for a questioning, or a questioning and detention warrant, or the Issuing Authority issues another questioning, or questioning and detention, warrant, he or she must take into account that the individual has been the subject of a previous questioning, or questioning and detention, warrant. A subsequent questioning and detention warrant would need to satisfy the relevant tests again, and would also need to be justified on the basis of new information that is additional to or materially different to that known at the time the first warrant was sought.

It is also important to note that warrants are issued by an independent Issuing Authority (a Judge or Federal Magistrate).

Since the laws commenced in 2003, there have not been any warrants issued that authorise detention. This demonstrates that these powers have been used in the way intended – as measures of last resort. The experience to date, combined with the strict legislative tests that must be satisfied before a warrant may authorise detention, and the independent oversight and accountability mechanisms that apply, mean that it is highly improbable that a person would be detained under these powers 'for renewable periods of seven days'.

Oversight and review of ASIO powers

The Government keeps all its counter-terrorism legislation under review to ensure the laws remain appropriate. The Inspector-General of Intelligence and Security (IGIS), who is an independent statutory office-holder, provides oversight of ASIO, and has specific powers to

oversee the use of the questioning and detention powers. The IGIS may be present at the questioning or taking into custody of a person pursuant to a questioning, or a questioning and detention, warrant and may request the suspension of the exercise of powers under the warrant if he or she is concerned about any illegality or impropriety in connection with the exercise of those powers. Additionally, the Government will shortly establish an Independent National Security Legislation Monitor, which will be able to review a range of counter-terrorism and national security legislation, including the ASIO questioning powers.

Experience with the ASIO questioning powers has shown that ASIO's use of questioning warrants has been effective in yielding valuable information in an environment of stringent safeguards and accountability mechanisms, and that questioning warrants are a useful tool in the fight against terrorism. The laws will be reviewed by the PJCIS before they are due to sunset in 2016.

Paragraph 14 – Northern Territory Emergency Response:

At paragraph 14, the Committee noted that it considered that certain of the Northern Territory Emergency Response (NTER) measures adopted by the State party to respond to the findings of the report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in the Northern Territory ("Little Children are Sacred" of 2007) are inconsistent with Australia's obligations under the Covenant. The Committee expressed particular concern at the negative impact of the NTER measures on the enjoyment of the rights of Indigenous peoples and at the fact that they suspend the operation of the Racial Discrimination Act 1975 and were adopted without adequate consultation with Indigenous peoples.

The Committee recommended that:

The State party should redesign NTER measures in direct consultation with the Indigenous peoples concerned, in order to ensure that they are consistent with the 1975 Racial Discrimination Act and the Covenant.

Response:

The Government is doing much to address the unacceptably high level of disadvantage experienced by Indigenous Australians, both through the Northern Territory Emergency Response (NTER) and its broader policy agenda on Indigenous Affairs. The Government recognises the need for Indigenous and non-Indigenous Australians to work together in trust and good faith to advance human rights and close the gap in real life outcomes. The Government also recognises that in order for the NTER measures to be effective, it is essential that they be implemented in consultation with Indigenous persons.

The Government has:

- undertaken extensive consultation with Indigenous people in all affected communities about the future direction of the NTER
- passed the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth) reinstating the *Racial Discrimination Act 1975* (RDA) (which implements the Convention on the Elimination of All Forms of Racial Discrimination domestically in Australian law) in relation to the NTER and redesigning a number of the NTER measures to ensure that they are special measures or non-discriminatory within the terms of the RDA, and
- committed to significant investment through the NTER for new initiatives to improve the conditions of Indigenous peoples, including women and children, in key areas such as housing, health, education, employment, family safety and police protection.

Following receipt of the report of the independent NTER Review Board on 23 October 2008, the Government accepted and acted on all three of the Board's overarching recommendations to:

- 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
- address these needs through a reformed approach to engagement with Indigenous Australians, based on the principles of mutual respect, cooperation and mutual responsibility, and
- undertake actions affecting the Aboriginal communities in a way that respects Australia's human rights obligations and conforms with the RDA.

In response to these recommendations, the Government announced that it would continue and improve the key NTER measures, and passed legislation on 21 June 2010 to remove the suspension of the RDA, effective from 31 December 2010.

The Government's work on the NTER should be considered within its broader policy agenda on Indigenous Affairs. The NTER is one part of the package of initiatives necessary to close the gap in real life outcomes in the Northern Territory. Since the 2007 election, the Government has strengthened and expanded the allocation of resources to the NTER, investing an additional \$1.2 billion to help overcome decades of government failure.

Through the NTER, the Government has delivered extra police, safe houses, a mobile child protection team, remote Aboriginal family and community workers, crèches, school nutrition programs, improvements to the operation of remote stores, including new stores

and store upgrades, child health checks and follow-up surgery. Over 2,200 Community Development Employment Project (CDEP) positions have been converted into properly paid jobs with superannuation and entitlements. CDEP provides activities for unemployed Indigenous people that meet community needs and gives them a stepping stone to employment outside CDEP. All of these changes complement the Government's "Closing the Gap" strategy, which is delivering unprecedented investment in early childhood development, education, health, housing, jobs and remote service delivery.

Consultation with Indigenous people concerned

The Australian Government conducted extensive consultations over many months in 2009 with Indigenous people living in communities and town camps affected by the NTER. The consultations followed the release of a Discussion Paper, *Future Directions for the Northern Territory Emergency Response* (the Discussion Paper), and involved:

- a multifaceted engagement process, involving communities, community leaders and regional representatives, and a broad range of stakeholders. This included 109 whole-of-community meetings, over 400 less formal meetings between Government Business Managers and individuals and groups in communities, and 11 workshops with community and regional leaders and service provider and major stakeholder organisations. The majority of workshop participants were Indigenous people who either nominated as individuals or were selected by their community or organisation to speak on the community's or the organisation's behalf
- widespread use of interpreters in consultation meetings, and
- an open and transparent approach, including the publication of the outcomes of the consultations, feedback to communities in a way that was consistent with community direction, and the use of independent monitors.

The consultations were conducted in the spirit of genuine engagement with Indigenous people. The aim was to provide people with a range of opportunities to participate and to provide their views on a range of matters, including problems as well as benefits, how key measures could be improved, and whether there were other ways of achieving the same aim.

The four 'tiers' of consultation (described in the *Report on the Northern Territory Emergency Response Redesign Consultations*) and the diversity of people who participated in each tier reflects the wide scope and reach of the consultations. The planning of the engagement process incorporated strategies to provide opportunities for vulnerable, shy and hard to reach people to convey their views in a way that was comfortable, safe and flexible for them. In particular, the open-door Tier 1 meetings with local Government Business Managers (GBMs) enabled anyone in the community to come and talk with a GBM at any

time during the three-month consultation period. There were over 400 such meetings, showing that many people took up this opportunity.

An electronic template was developed to collect the feedback and views from the consultation meetings. The feedback reports for the whole-of-community meetings were taken back to communities for verification. In the case of the workshops, the key points were summarised and agreed with the participants during the course of the workshop or shortly afterwards.

The engagement process was monitored by the Cultural and Indigenous Research Centre Australia (CIRCA). CIRCA observed a sample of Tier 2 community consultation meetings and one Tier 3 workshop to assess whether people attending the meeting were given a fair opportunity to put forward their views and whether the consultations were open and accountable. CIRCA also reviewed the feedback reports from those meetings for assurance that they were a fair representation of the discussion and the views expressed. At the end of the consultation period CIRCA provided a report (the *Report on the NTER Redesign Engagement Strategy and Implementation*) which concluded that the consultation meetings had been conducted in a way that was open and fair. CIRCA noted that facilitators encouraged open discussion and emphasised the importance of people having their say. CIRCA commented that the feedback reports from meetings accurately reflected the content of the consultations. CIRCA also pointed out areas where the consultations could have been improved and these suggestions were incorporated into the consultations where possible.

The *Report on the Northern Territory Emergency Response Redesign Consultations* (the Consultation Report) provides a summary of the feedback received in community and stakeholder consultations on future directions for the NTER. The Consultation Report shows the breadth of views expressed in the consultations. The *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (the Policy Statement) shows the way in which the consultations informed policy development.

The Government listened carefully to what people had to say and all of the Government's decisions about the future of the NTER were actively informed by the consultations. After considering the views expressed in the consultations, the Government changed several proposals including income management, amending the alcohol restriction laws, the pornography measure and the business management areas powers. This is documented in the Policy Statement.

The Australian Parliament passed the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* on 21 June 2010, restoring the operation of the RDA in relation to the NTER legislation and redesigning

a number of the NTER measures to make them sustainable for the transition to the long-term development phase.

The legislative amendments have also been subject to public scrutiny through the Australian Parliamentary Committee process. The legislation was referred to the Senate Standing Committee on Community Affairs, which reported in March 2010 on the proposed amendments after receiving public submissions and holding public hearings.

Redesigned NTER measures

In summary, the following major changes have been approved:

- All new and redesigned NTER measures being implemented from July 2010 are designed to conform with the RDA. The legislation provides for the current suspension of the RDA in relation to the NTER to be lifted from 31 December 2010, allowing the necessary time for the redesigned measures to be put in place and for an effective transition from existing to new arrangements.
- Between 1 July 2010 and 31 December 2010, a new, targeted scheme of income management is being rolled out across the Northern Territory – in urban, regional and remote areas – as a first step in a future national roll out of income management to disadvantaged regions. The targeted categories are not based on race. The scheme is targeted at:
 - disengaged youth who are not working or studying
 - long-term recipients of unemployment benefits and parenting payments
 - people assessed by Centrelink as requiring income management for reasons including vulnerability to financial crisis, domestic violence or economic abuse, and
 - people referred for income management by child protection authorities.

If individuals are not income managed, they can ask to participate in voluntary income management. Around sixty percent of people exiting from compulsory income management have chosen to take up the voluntary option.

The categories provide an objective basis for targeting the benefits of income management that is independent of race, and as a result, is intended to be non-discriminatory. The RDA has applied in relation to the new scheme of income management from the commencement of implementation in July 2010.

Following collection and evaluation of evidence from the NT in 2011, the scheme will be extended to other disadvantaged regions of Australia beyond the NT. This new scheme is part of the Government's significant welfare reform agenda.

- Alcohol restrictions will be continued, but the restrictions will be varied to meet the specific needs of individual communities based on careful analysis of evidence about each community’s circumstances, and implemented in consultation with the community. Existing alcohol restrictions will remain in place in a particular area until an assessment of alcohol-related harm and other matters and appropriate consultations have taken place. The Government will also work with the Northern Territory Government and Indigenous communities to look at ways to make the alcohol and prohibited materials road signs more acceptable to local people. The provisions giving NT police the power to enter a private residence in a prescribed area as if it were a public place will be repealed and will only be available in a particular area through a Ministerial declaration in response to a request from a community resident and after community consultation.
- In light of the strength of community views expressed during the consultations against the availability of sexually explicit and very violent material, the current pornography restrictions will remain in place. However, communities can ask to have the restrictions lifted in their community. Decisions on these requests will consider evidence about the prevalence of sexually explicit and very violent material in the community, the well-being of people in the community and the views of those in the community. The advice of the relevant law enforcement authority will also be sought. The Government will work with the Northern Territory Government and individual communities to look at ways to make the road signs more acceptable to local people.
- The purpose and operation of the five-year leases are clarified by:
 - making it clearer that the objectives of the five-year leases are to enable special measures to be taken to improve the delivery of services in Indigenous communities in the NT and promote economic and social development in those communities
 - defining the permitted use of leases as being directly related to achieving those objectives
 - clarifying that exploration and mining are not permitted uses of the five-year leases
 - requiring the five-year leases to be administered with regard for Aboriginal culture
 - facilitating the Government’s commitment to move to voluntary leases by requiring the Government to negotiate the terms and conditions of voluntary leases in good faith where requested, and
 - developing clear guidelines to better explain the land use approval process to ensure the transparent allocation of lots.

Separately, the Government is compensating land owners for the acquisition of these leases.

- The Australian Crime Commission's (ACC) special law enforcement powers have been amended to make it clear that these powers are in relation to serious violence or child abuse committed *against* an Indigenous person, which is a change from the existing provision which applies to serious violence or child abuse by or against, or involving, an Indigenous person.

In November 2009, the Northern Territory Government announced an inquiry into the Northern Territory child protection system (the Bath Inquiry). The report from this inquiry highlights a system which is not coping with the high numbers of children neglected and abused each year.

The Australian Government's response to the Bath Inquiry builds on the new non-discriminatory income management system being rolled out in the Northern Territory, as well as providing additional investments to support children and families at risk.

The Government is committed to supporting the NT Government in developing and implementing the recommendations of the Inquiry in order to improve its child protection system.

In addition, the Government will continue to support the NT Government in implementing:

- alcohol restrictions
- expanding the coverage of the identification (ID) system
- providing enhanced parenting and home skills development to families on child protection Income Management, and
- expansion of Remote Aboriginal Family and Community Workers and Mobile Child Protection Team.

Further information on the Government's investment and strategies directed towards closing the gap in the Northern Territory can be found in the Government's Policy Statement. A copy of the Policy Statement, the Consultation Report, CIRCA's *Report on the NTER Redesign Engagement Strategy and Implementation*, and the Discussion paper, all referred to above, is at:

http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/default.aspx.

Paragraph 17 – Violence Against Women:

At paragraph 17, the Committee noted with concern that, despite the efforts recently undertaken by Australia to address violence against women, including its zero tolerance approach and its intention to conduct a National Survey on Community Attitudes to Violence against Women in 2009, disturbing levels of domestic violence persist in Australia.

The Committee was particularly concerned at the higher number of reports of violence against Indigenous women in proportion to reports of violence against non-Indigenous women.

The Committee recommended that:

The State party should strengthen its efforts towards the elimination of violence against women, especially perpetrated against Indigenous women. The State party is encouraged to promptly implement its National Plan of Action to Reduce Violence against Women and their Children, as well as the recommendations of the 2008 Family Violence and Homeless report.

Response:

The Australian Government's position on sexual assault and domestic and family violence remains one of zero tolerance. Despite Australia's effort to date, around one-in-three Australian women have experienced physical violence and almost one-in-five have experienced sexual violence since the age of 15 (Personal Safety Survey 2005). Unfortunately the level of family violence in Australia's Indigenous communities also remains disproportionately high. The Australian Institute of Health and Welfare found in 2003 that Indigenous women were 28 times more likely than non-Indigenous women to be victims of family violence and other assaults. Indigenous women report higher levels of physical violence during their lifetime, and are more likely to experience sexual violence and sustain physical injury (ABS 2002 National Aboriginal and Torres Strait Islander Social Survey). In 2009, Indigenous people were hospitalised as a result of spouse or partner violence at 34 times the rate of non-Indigenous people. Indigenous females and males were 35 and 21 times as likely to be hospitalised due to family violence related assaults as non-Indigenous females and males (Overcoming Indigenous Disadvantage report 2009).

The Australian Government announced the Indigenous Family Safety Agenda on 17 July 2010 to address the high rates of family violence in Indigenous communities. The Australian Government will fund innovative family safety community initiatives focussed on:

- addressing alcohol abuse
- more effective police protection to reduce incidents of violence
- strengthening social norms against violence, and
- coordinating support services to aid in the recovery of people who experience violence, including children who experience or witness violence.

These priorities address key factors contributing to Indigenous violence and have been identified as priority action areas by Indigenous Australians.

A Ministerial Forum has been established to develop the National Plan to Reduce Violence against Women and their Children. Ministers from a range of portfolios from the Federal and State and Territory Governments are involved in the Ministerial Forum. This reflects the critical importance of engaging a broad range of portfolios, including housing, community services, attorney generals', women's, policing, health and education, in tackling this issue. This Ministerial Forum has held discussions four times since its inception. The National Plan will set the direction for government and community action to help Australian women and their children live free of violence and in safe communities. The new National Plan will be a 12-year long term, joint plan of action for the Australian Government and all States and Territories to coordinate efforts to reduce violence against women. Endorsement of the National Plan will be sought from the Council of Australian Governments in the coming months.

In August 2010 the Australian Government released the draft National Plan with a commitment to fund a \$44.5 million package of initiatives, including:

- \$3.75 million to establish a grants program for local community projects that prevent domestic violence and encourage respectful relationships, and to support sporting codes to establish zero tolerance projects in local clubs
- \$8.8 million for telephone support for frontline workers through the 1800 RESPECT: Domestic and Sexual Violence National Counselling Service
- \$4.8 million to improve services for victims of domestic violence through a series of reform projects
- \$4.6 million to promote best practice to stop perpetrators committing acts of violence through a reward/incentive payment to States and Territories
- \$0.75 million to expand counselling services for male victims of domestic violence through Mensline
- \$6.9 million to establish a National Centre of Excellence to undertake research to evaluate the effectiveness of strategies, improve best practice and support workforce development, and
- \$14.9 million to conduct the Personal Safety Survey and a National Community Attitudes Survey to track the impact of the National Plan on a four-year cycle.

The National Plan builds on the expert advice and recommendations of the National Council to Reduce Violence against Women and their Children, who presented their report *Time for Action* to the Australian Government in April 2009. In response to that report, the former Prime Minister immediately invested \$42 million for a range of measures including a new online and telephone counselling service, respectful relationships education programs, 'the Line' social marketing campaign and a series of law and justice measures. The law and

justice measures include exploring options for a national register of domestic violence orders and an inquiry by the Australian and New South Wales Law Reform Commissions into the interaction of State and Territory domestic violence and federal family laws. The Government is also developing a multi-disciplinary training package for professionals to help them better understand family violence and its impacts. These measures are all progressing.

As part of its commitment to close the gap between Indigenous and non Indigenous Australians, the Australian government has provided funding to reduce overcrowding, homelessness and housing shortages in remote Indigenous communities.

The *Women, Domestic and Family Violence and Homelessness Report: A Synthesis Report*, referred to in the Committee's recommendation, was released on 30 September 2008.

The Australian Government has considered the recommendations and supports the broad strategic vision in the report that domestic and family violence related homelessness requires a commitment from all levels of Governments to a long-term integrated approach for addressing the safety and security of women and their children.

The recommendations also informed the White Paper on Homelessness which outlines the Government's strategic agenda towards reducing homelessness. The Australian Government has entered into a National Partnership Agreement on Homelessness with all States and Territories. Each State and Territory has prepared an Implementation Plan on their priorities, service response and timeframes to address homelessness. Issues of addressing domestic and family violence are a priority. One of the outputs of the Agreement is 'Support for women and children experiencing domestic and family violence to stay in their present housing where it is safe to do so'. A range of different service responses have been put in place in the States and Territories, depending on the needs of the individual jurisdictions. At the Australian Government level a number of responses are in place which will help victims of family and domestic violence from becoming homeless, or assist in finding new homes in a timely manner. These include:

- More than 80,000 new or refurbished homes added to social housing stock nationally by 2013 to provide alternative housing options for priority groups, including victims of domestic violence
- In January 2010, Centrelink introduced a 'homelessness indicator' on customer records which will mean people (including victims of domestic violence) who are homeless or at risk of homelessness are identified and receive additional help from Centrelink Community Engagement Officers or social workers, including referrals to necessary support services, and
- From 29 April 2010 income support payments became available weekly (rather than on a fortnightly basis) for those vulnerable people who cannot manage their funds across a

fortnight period. This assists them to have funds available to meet essential expenses including rent so they do not become homeless as a result of falling behind in rental payments.

A wide range of initiatives are also being taken at the State and Territory level to eliminate violence against women, including particular measures to address violence against Indigenous women.

For example, in New South Wales (NSW):

- In June 2010, the NSW Government released a five year Domestic and Family Violence Action Plan: Stop the Violence, End the Silence, in relation to which significant consultation with Indigenous communities was undertaken. The Action Plan is closely aligned to the National Plan
- Key projects have been established including *Staying Home Leaving Violence*, a specialised domestic violence program aimed at promoting victims' housing stability and preventing their homelessness
- The NSW Police Force is in the process of appointing 35 new specialist Police Officers to deal with Domestic Violence and has created a Domestic and Family Violence Team in Police Headquarters
- The *Start Safely* initiative, a new \$16 million rental subsidy scheme which will help domestic violence victims into private rental accommodation, has been established. It will house around 1,650 women with children in private rental accommodation over the next four years, and
- The Violence Prevention Coordination Unit in the NSW Department of Premier and Cabinet is administering a \$2.9 million grants program and has provided funding to a range of non-government organisations for projects that address violence against women. \$900,000 of this funding is specifically quarantined for Aboriginal projects. Projects funded include the South Coast Medical Service Aboriginal Corporation's *Koori Kids Strong Booris* project, which is a collaborative project involving schools, families and Aboriginal health and welfare services to respond to the ongoing needs of children who live in families with domestic violence and who show violent behaviour or are at risk of intergenerational violence.

In Western Australia (WA), initiatives include:

- The *WA Strategic Plan for Family and Domestic Violence 2009-2013*, which was approved by the WA Government in 2009. The WA Strategic Plan was developed by a Senior Officer's Group comprised of officials from relevant WA and Commonwealth Government agencies and community groups. The Strategic Plan seeks to achieve the

three main outcomes of prevention and early intervention; safety for victims; and accountability for perpetrators. Key elements of the *Strategic Plan* include:

- strengthening community understanding and awareness that domestic and family violence is unacceptable
 - supporting Indigenous and new and emerging communities to develop greater awareness and understanding of family and domestic violence
 - the implementation of an evidence based, integrated response across all key WA Government agencies and the non-Government sector that are involved in responding to family and domestic violence
 - focusing domestic and family violence prevention on children and young people and healthy, respectful relationships, and
 - ensuring access to short and long term specialist support and counselling services to victims of family and domestic violence.
- To support this reform process, work has commenced to develop information sharing mechanisms; a common risk assessment and management framework; standards of practice for working with adult victims, children and perpetrators of family and domestic violence; and case coordination and case management guidelines and procedures
 - The WA Department for Child Protection is undertaking an initiative with the WA Police to co-locate Senior Field Workers in local Police Family Protection Units. This will allow work to be done directly with families, victims and perpetrators of family and domestic violence. Seventeen Senior Field Workers will be co-located with local Police throughout WA. This initiative recognises the strong link/co-occurrence between the need for child protection and family and domestic violence, and
 - The WA Department for Child Protection is providing funding of \$17.7 million per annum (2009-10) through the joint Commonwealth/State National Affordable Housing Agreement (NAHA) for 37 domestic violence refuges and domestic violence outreach services throughout the State.

In the Australian Capital Territory (ACT) measures include:

- The ACT Government has committed to provide approximately \$2.8 million additional funding over the next four years for community and legal services responding to family violence. The funding will assist in the delivery of victim support services by the community sector, enhancing support for the Domestic Violence Crisis Service and the Canberra Rape Crisis Centre, and advocacy support for homeless women

- These initiatives meet the key priorities of the ACT Women’s Plan (2010-2015), which includes the objective to prevent violence against women and their children and instil an anti-violence culture in the community
- Recurrent funding totally \$100,000 will be provided to the Women’s Legal Centre in 2010/2011 to support Indigenous women accessing legal and support services for victims of family violence, and
- The ACT Government has also committed to the development of an ACT Aboriginal and Torres Strait Island Drug and Alcohol Rehabilitation Centre, known locally as the ‘bush healing farm’ to assist families suffering the effects of substance abuse, including domestic violence.

In Victoria initiatives include:

- *A Right to Respect: Victoria’s Plan to Prevent Violence Against Women 2010–2020*, a sustained, cross-sectoral policy addressing the underlying causes of violence against women. *A Right to Respect* will help to influence social norms, promote community leadership and embed a stronger culture of equal and respectful relationships between men and women
- Over \$140 million has been invested by the Victorian Government since 2005 to better respond to violence against women. Reforms have included the provision of men’s behaviour change programs and prison-based violence prevention programs (this includes programs to assist Indigenous men); the provision of judicial education, and ongoing training for sexual assault counsellors; and the development, in partnership with the Indigenous community, of *Strong culture, Strong peoples, Strong Families*, the Indigenous Family Violence 10 Year Plan, and
- A strengthened police and justice response has seen a 212% increase in the intervention orders sought by Victoria Police and a 178% increase in charges laid. Reporting of family violence has increased, reflecting growing confidence in the system to respond effectively and compassionately to women’s situations.

In Queensland (QLD), developments include:

- In 2009, the Qld Government released *For our sons and daughters: A Queensland Government Strategy to reduce violence against women 2009–2014*. The intent of the Strategy is to provide greater coordination of responses with a focus on ensuring the safety of the people affected by domestic and family violence, including children, and holding perpetrators of violence accountable for their behaviour. Implementation of the Strategy will result in better support for women and children and places a high priority on reducing harm to women and children in Indigenous communities, and

- The Qld Police Service is involved in a number of individual and joint initiatives relevant to the achievement of the program of action for the Strategy. These initiatives include participation in the establishment of a Domestic Violence Death Review Panel to oversee a review of current coronial processes and practices; testing of an integrated response model in Rockhampton; reviewing the *Domestic and Family Violence Protection Act 1989*; a review of all domestic and family violence training delivered in the Qld Police Service; examining and evaluating the introduction of evidence kits for first response officers; and undertaking a joint research project with the Australian Institute of Criminology to identify risk factors associated with domestic related homicide.

In Tasmania:

- An innovative strategy *Safe at Home* has been continued since 2004. *Safe at Home* is an integrated, whole-of-government service delivery system that is pro-arrest, pro-charge and pro-prosecution in its approach to family violence. *Safe at Home* provides protection to adult and child victims of family violence via the provision of Family Violence Orders issued by Police or the courts, and an opportunity for high risk offenders to address their offending behaviour by way of the Family Violence Offender Intervention program. Under this program:
 - A 24/7 Family Violence Response and Referral Line is operated by Tasmania Police and provides access a range of responses including immediate police call out where violence is occurring or threatened
 - Police officers throughout the State have received specialist family violence training in order to enable them to respond appropriately and effectively to victims of family violence
 - Each of the four Tasmanian police districts has a dedicated Victim Safety Response Team that provides initial crisis support for victims
 - An integrated case coordination system supports and fosters service-provider collaboration , encourages cross-discipline learning, sharing of information and a multi-disciplinary approach to meeting victim's needs, and
 - An Aboriginal advisory group, *ya palingina kani*, is funded as the consultative body in relation to Aboriginal family violence.

Paragraph 23 – Immigration Detention:

In paragraph 23, while noting with satisfaction Australia's commitment to use detention in immigration detention centres only in limited circumstances and for the shortest practicable period, the Committee remained concerned at its mandatory use in all cases of illegal entry,

the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken to Christmas Island. The Committee also expressed its concern at the lack of an effective review process available with respect to detention decisions.

The Committee recommended that:

The State party should: (a) consider abolishing the remaining elements of its mandatory immigration detention policy; (b) implement the recommendations of the Human Rights and Equal Opportunity Commission made in its Immigration Detention Report of 2008; (c) consider closing down the Christmas Island detention centre; and (d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.

Response:

a) Mandatory immigration detention policy

The Australian Government is committed to upholding human rights while maintaining strong border protection.

The Australian Government does not consider that mandatory detention in all cases of unauthorised entry, in and of itself, raises concerns of compliance with Australia's obligations under the Covenant. The Human Rights Committee itself has stated that it is not per se arbitrary to detain individuals requesting asylum (*A v Australia*, CCPR/C/59/D/560/1993) and the Government considers that there are legitimate reasons why it is necessary to utilise mandatory detention for management of health, identity and security risks to the community.

In line with the Government's approach to immigration detention, people are detained and are held in immigration detention in accordance with law and are held in an immigration detention centre for the shortest practicable time. Under the Government's Key Immigration Detention Values, mandatory immigration detention applies to three groups of people:

1. all unauthorised arrivals, for management of health, identity and security risks to the community
2. unlawful non-citizens who present unacceptable risks to the community, and
3. unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

The retention of mandatory detention of unauthorised arrivals for the purpose of health, identity and security checks is a sound and responsible public policy, as it assists in properly managing the risks posed to the Australian community.

The Government's intention is that any immigration detention will be subject to transparency and accountability. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention are subject to regular review.

The Government remains committed to the policy that irregular maritime arrivals are initially processed on Christmas Island. The Australian Government has a variety of flexible accommodation options available for use on Christmas Island to manage this process.

In accordance with the Government's Key Immigration Detention Values, children and their families will not be held in immigration detention centres either on Christmas Island or the Australian mainland. Instead these clients and other vulnerable groups are promptly placed in alternative detention or residence determination arrangements on mainland Australia.

Where Government policy permits, minors and their accompanying family members are prioritised for Refugee Status Assessment (RSA) processing.

On 18 October 2010 the Prime Minister and the Minister for Immigration and Citizenship announced that the Australian Government had decided to expand its existing residence determination program and will begin moving unaccompanied minors and vulnerable family groups out of immigration detention facilities and into community-based accommodation.

This announcement recognises the importance of balancing the government's policy of mandatory detention for irregular maritime arrivals with the humane treatment of those seeking asylum in our country. This is especially important for children, for whom protracted detention can have negative impacts on their development and mental health.

The Government will maintain its policy of mandatory detention for all irregular maritime arrivals while giving effect to the expansion of the community detention program. To this end the Minister will use existing powers under the *Migration Act 1958* to make 'residence determinations' in respect of selected unaccompanied minors and vulnerable families who are not considered to be a risk to the Australian community.

A person who is subject to a residence determination (placed in community detention) remains in immigration detention and has conditions attached to their placement. These conditions include a requirement to live at the address specified and to engage with the department as directed. All unaccompanied minors receive adequate adult supervision and care and health care commensurate with community standards.

The Government considers that this measured approach recognises that the best interests of minors are a primary consideration in managing the reception of persons arriving in Australia without authority. It also addresses the need to maintain integrity in Australia's border controls and to conduct basic checks to protect the Australian community.

b) Australian Human Rights Commission Immigration Detention Report of 2008

The Government recognises the important role of the Australian Human Rights Commission (AHRC) in providing independent oversight of Australia's immigration detention system, and is committed to continuing this relationship. The Department of Immigration and Citizenship works actively to facilitate the AHRC's annual program of visits to all immigration detention facilities and welcomes the feedback provided by AHRC.

The AHRC Immigration Detention Report of 2008 highlighted a number of areas of immigration detention which require improvement. The Government has already indicated in its response to this report that it is working to address a large number of these issues and will give active consideration to many of the report's recommendations in the ongoing reform process. The Government's comprehensive response to the report, with details of action taken in relation to the recommendations, can be found on the AHRC website at: http://www.humanrights.gov.au/human_rights/immigration/idc2008_DIAC.html.

c) Christmas Island detention centre

The Government is committed to strong border control and the orderly entry and stay of non-citizens in Australia as integral elements of Australia's national security. The Government's risk-based detention policy seeks to support the integrity of Australia's immigration, humanitarian and refugee programs and to signal a strong anti-people smuggling stance. The Government believes that robust border security and humane and risk-based detention policies are not incompatible.

The Government is committed to maintaining the initial processing on Christmas Island of irregular maritime arrivals. This system is designed to strengthen the integrity of Australia's immigration processes.

A number of changes have been made to improve transparency and accountability in the RSA process used on Christmas Island. RSA policy guidelines have been developed with input from a range of stakeholders.

All asylum seekers are provided with publicly funded migration agent assistance and have access to independent review of refugee status decisions. There is external scrutiny of the RSA process, including by the Commonwealth and Immigration Ombudsman.

All irregular maritime arrivals on Christmas Island are treated fairly and humanely and have their asylum claims assessed as expeditiously as possible in line with Government policy. As

at 3 November 2010, the Government is completing its assessment of asylum claims on Christmas Island in an average of around 160 days from the day of arrival (irregular maritime arrivals data 04/11/2010). There are adequate processes in place to ensure that asylum seekers on Christmas Island are assessed against all of Australia's *non-refoulement* obligations. Those who engage these obligations will not be returned to a place where they face such harm.

On 11 November 2010, the High of Australia handed down its decision in the matter of *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41 (*Plaintiff M61/2010E v Commonwealth*). In that case, the High Court examined the RSA process for irregular maritime arrivals. The effect of the High Court's judgement was to confirm the validity of the process. The High Court held that the RSA process is subject to judicial review and that decisions may be set aside on procedural fairness and error of law grounds.

The Australian Government is currently in the process of examining the implications arising out of the High Court judgment.

It is Government policy that no child be held in an immigration detention centre (IDC) – there are no minors detained in the Christmas Island IDC. Where it is necessary to accommodate minors in low security facilities and alternative places of detention, all officers will be sensitive to the best interests of the child principle as a primary consideration. Independent observers from *Life Without Barriers* are available on Christmas Island to support unaccompanied minors as required.

The recent expansion of community detention arrangements have been made in conjunction with a number of community organisations. While arrangements will take some time to implement, the Government's preference is for children and family members to be accommodated in the community as soon as possible. This does not mean they will be granted a visa to remain in Australia, rather these arrangements will allow families to engage in normal community activities while their claims for asylum are assessed.

The department will continue to treat people with dignity and respect in accordance with the policy framework developed over recent years.

All people in immigration detention have access to appropriate health care commensurate with the level of care available to the broader community.

d) Comprehensive immigration legislative framework in compliance with the Covenant

Australia has a comprehensive immigration system enacted in legislation which has been developed in accordance with relevant human rights obligations. While treaties to which Australia is a party do not automatically become part of Australia's domestic law, the

obligations under international law that those treaties give rise to are considered when developing policy, in making amendments to migration legislation, and, where appropriate, when making decisions under that legislation.

Apart from some very minor exceptions (that relate to the movements of the traditional inhabitants of the Torres Strait), all non-citizens wishing to enter and remain in Australia lawfully require a visa. Visas are available for a range of purposes, including family reunion, humanitarian, employment, study and tourism purposes. The number of persons entering Australia without a valid visa, or who remain in Australia after their visa ceases is very low as a proportion of all non-citizens who enter Australia. Non-citizens not holding a valid visa are liable to be detained and removed from Australia.

In line with the Government's new detention values, new three month senior departmental officer and six month Commonwealth Ombudsman's reviews have been introduced to consider the appropriateness of a person's detention, their detention arrangement and other matters relevant to their ongoing detention and case resolution. Under these reforms, a departmental decision maker will have to justify why a person should continue to be detained.

In addition, a person in immigration detention may currently seek merits and judicial review of most visa decisions that resulted in them becoming an unlawful non-citizen and being liable for detention or of a decision to refuse a Bridging visa once detained. They may also seek judicial review of the lawfulness of their detention with the Federal or High Courts. A person in immigration detention on Christmas Island is also entitled to independent merits review of a negative RSA. As noted above, on 11 November 2010, the High Court of Australia held in *Plaintiff M61/2010E v Commonwealth* that the RSA process is subject to judicial review and that decisions may be set aside on procedural fairness and error of law grounds.

The Government is interested in determining the effectiveness of the new detention review arrangements before considering further avenues for judicial review of the decision to detain.

Other issues:

The Australian Government would also like to respectfully draw to the Committee's attention an additional issue which it was unable to have addressed prior to the public release of the Committee's Concluding Observations.

The Government would like to assure the Committee, in relation to its comment at paragraph 20, that it is not the case that the Attorney-General retains a residual power to allow the extradition of a person where he or she may face the death penalty. Under the *Extradition Act 1988*, where extradition is sought for an offence punishable by the death

penalty, the Attorney-General can **only** surrender the person if the Attorney is satisfied that an undertaking has been given by the requesting country that either the person will not be tried for the offence, the death penalty will not be carried out, or the death penalty will not be imposed. The Attorney has **no** discretion to extradite the person in relation to an offence for which the death penalty may be imposed in the absence of such an undertaking. The Attorney-General's general discretion under paragraph 22(3)(f) of the Extradition Act to surrender a person does not override the mandatory ground of refusal in respect of the death penalty set out in paragraph 22(3)(c) of the Extradition Act.