



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Consideration of reports submitted by States  
parties under article 40 of the Covenant**

**Sixth periodic reports of States parties due in 2013**

**Australia<sup>\*</sup>, <sup>\*\*</sup>**

[Date received: 2 May 2016]

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\* The present document is being issued without formal editing.

\*\* The annexes to the present report are on file with the Secretariat and are available for consultation.

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## Introduction

1. Australia is pleased to present its sixth periodic report to the Human Rights Committee (the Committee) on the implementation of the ICCPR, in accordance with article 40 of the ICCPR.<sup>1</sup>
2. Australia's response includes federal law and policies, and examples from the states and territories. It has not incorporated examples from all jurisdictions due to length considerations.<sup>2</sup>
3. Australia implements its international obligations through a range of measures; including through legislation, policies and programs at federal and state levels, and through common law. Australia notes that there is no requirement for a single national law to implement the ICCPR and notes that this would be inappropriate for Australia's federal system of government.

## Legal and institutional frameworks

4. *Human Rights (Parliamentary Scrutiny) Act 2011* (Commonwealth): The Act came into force on 4 January 2012. The Act requires that all Bills and disallowable legislative instruments are accompanied by a Statement of Compatibility with Human Rights.<sup>3</sup> A Parliamentary Joint Committee on Human Rights was established on 13 March 2012 with the sole focus of human rights scrutiny. This Committee examines Bills, Acts and disallowable legislative instruments for compatibility with human rights and can conduct inquiries into any matter relating to human rights referred to the Committee by the Attorney-General. These scrutiny processes are designed to encourage early and ongoing consideration of human rights issues in policy and legislative development. They also aim to improve parliamentary scrutiny of new laws for consistency with rights and freedoms in the seven core human rights treaties to which Australia is a party.
5. *Increased monitoring of compliance with international human rights obligations*: The Australian Government maintains a public online database of recommendations from the UN human rights system, which includes recommendations made by UN human rights treaty bodies and through the Universal Periodic Review.
6. *Human Rights Commissioner*: On 17 February 2014, a new Human Rights Commissioner was appointed to the Australian Human Rights Commission (AHRC) to focus on civil and political rights and common law rights and freedoms.
7. *National Children's Commissioner*: On 25 February 2013, Australia's first National Children's Commissioner was appointed as a dedicated advocate for children and young people at the federal level. The Commissioner promotes public discussion and awareness of issues affecting children, conducts research and education programs and consults directly with children and representative organisations.
8. *Age Discrimination Commissioner*: On 30 July 2011, Australia's first Age Discrimination Commissioner was appointed. The Age Discrimination Commissioner raises awareness and educates the community about age discrimination and advocates for

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<sup>1</sup> The List of Issues is at Appendix A.

<sup>2</sup> Further information about Australia's political system can be found in Australia's Common Core Document.

<sup>3</sup> Under the Act, "human rights" is defined as the rights and freedoms recognised or declared by the seven core human rights treaties ratified by Australia, including the International Covenant on Civil and Political Rights.

the elimination of age discrimination across all areas of public life. On 26 June 2015, the Age Discrimination Commissioner was also appointed as Australia's first ambassador for Mature Age Employment. The position complements the Australian Government's drive to encourage business to hire more mature age employees.

9. *Office of the Aged Care Complaints Commissioner*: The Aged Care Complaints Commissioner provides an independent review mechanism for the decisions and processes of the Aged Care Complaints Scheme and the processes of the Australian Aged Care Quality Agency.

10. *Review of Commonwealth laws for consistency with traditional common law rights and privileges*: The Australian Law Reform Commission (ALRC) was tasked with conducting a critical examination of federal laws to identify any that encroach upon rights, freedoms and privileges recognised in Australian common law and whether encroachments on these freedoms are appropriately justified. The review was a significant undertaking and may inform potential legislative amendments to enhance individual civil liberties for the Australian community. The ALRC released an issues paper on 10 December 2014 and its Interim Report on 3 August 2015. The final report was published in March 2016.

## States and territories

11. Victoria and the Australian Capital Territory (ACT) have statutory Charters of Rights based on a "dialogue model" which protect civil and political rights. Both Acts provide that the executive is required to act, and make decisions, in a manner consistent with human rights and the judiciary is required to interpret legislation in a manner consistent with human rights.

12. ACT: In 2009, the ACT amended its Human Rights Act 2004 (ACT) to include an obligation on public authorities to act, and make decisions, consistently with human rights and to provide a direct right of action for individuals who believe that their rights under the Act have been breached. On 1 January 2013, the right to education became one of the rights protected under the Human Rights Act.

13. The ACT Human Rights and Discrimination Commissioners provide a range of educational materials on the Act including factsheets on each right, online e-learning and face-to-face training for public servants and the legal profession. To celebrate ten years of the Act, the Commissioner also jointly held a conference with the Australian National University on 1 July 2014 and convened a discussion on the future of the Act on 10 December 2014, which included input from the UN Special Rapporteur on Housing.

14. *Victoria: The Victorian Charter of Human Rights and Responsibilities Act 2006* (VIC) requires two periodic reviews of the Charter – one after four years of operation and the other after eight years of operation. These reviews provide an opportunity to improve protection for human rights and to make the operation of the Charter clearer, simpler and more accessible. The second review was tabled in Parliament on 17 September 2015.

## Case Law

15. A number of Australian court decisions have considered civil and political rights during the reporting period. Some of the decisions are outlined below.

16. In *DPP v. Kaba* the Supreme Court of Victoria found that the police officers' questioning of the defendant, Mr. Kaba, disproportionately limited his rights to privacy and freedom of movement under the Victorian Charter. The case raises important issues about police powers and human rights. The Supreme Court found that police acted incompatibly

with the human rights to privacy and freedom of movement when they coercively questioned a person during a vehicle stop with no legal authority to do so. The decision highlights the obligations on Victorian Police to act compatibly with human rights in the performance of these duties and exercise of their powers. To fulfil this obligation police must ensure they have legal authority for all conduct.

17. In *AB v. Western Australia* the High Court affirmed the right of transgender people to have their gender officially recognised after undergoing medical or surgical procedures. The Court emphasised that the purpose of the *Gender Reassignment Act 2000* (WA) was to alleviate the discrimination transgender people face in society by providing legal recognition of their self-identification and perception of gender.

18. In *Rowe v. Electoral Commissioner* the High Court found that amendments made to the *Commonwealth Electoral Act 1918* (Cth) in 2006, which prevented updates to the electoral roll from the day on which the electoral writ is issued for new or re-enrolling voters and three days after the writ is issued for voters updating enrolment details, were unconstitutional. The amendments were found to be unconstitutional because they were incompatible with the requirements of sections 7 and 24 of the Constitution, which provide that the Houses of Parliament comprise of members “directly chosen by the people”. The Government gave effect to this decision in the *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* (Cth), which restored the close of rolls period to seven days following the issue of writs.

19. In *Owen v. Menzies and Ors* the Court of Appeal held that Queensland’s vilification laws did not breach the implied freedom of political communication provided by the Australian Constitution. The case is significant for confirming that laws which prohibit vilification on the basis of homosexuality, or other protected attributes, can constitute an acceptable constraint on the right to freedom of speech for the purposes of domestic law, provided the laws are drafted appropriately.

20. In *NSW Registrar of Births, Deaths and Marriages v. Norrie* the High Court unanimously held that the *Births, Deaths and Marriages Registration Act 1995* (NSW) permits the Registrar to register a person’s sex as “non-specific”. In this case Norrie, a person who had undergone a “sex affirmation procedure”, applied to the Registrar under the Act to register a change of sex to “non-specific”. The Registrar issued Norrie a Change of Sex certificate which recorded Norrie’s sex as “not specified” but later advised that it was invalid. The High Court of Australia found that the Act recognises that a person may be neither male nor female, and so permits the registration of a person’s sex as “non-specific”. The High Court of Australia ordered Norrie’s applications be remitted to the Registrar for determination in accordance with its reasons and otherwise dismissed the appeal.

## **Education for judicial officers, lawyers and prosecutors**

21. Consistent with the independence of the judiciary from the executive arm of government, provided under the Australian Constitution, federal judicial officers voluntarily participate in professional development programs in Australia.

22. The Chief Justices of the High Court, the Federal Court and the Family Court of Australia, and the Chief Judge of the Federal Circuit Court of Australia, are responsible for ensuring that arrangements are in place to provide judges with appropriate access to judicial education. Professional development programs and educational events for judges may be organised and delivered within the courts or by organisations such as the National Judicial College of Australia (NJCA) and the Australasian Institute of Judicial Administration (AIJA), which are both partly funded by the Australian Government.

23. The NJCA and AIJA provide training on a needs basis and as requested by the courts. Human rights is a theme that runs through all of NJCA's training, even if a particular course is on a different subject.

24. Registration and training of lawyers falls under the jurisdictions of the states and territories. Lawyers in each state and territory are required to complete continuing legal education annually, including mandatory education on legal ethics. Completing this educational requirement is necessary to maintain a current practising certificate.

### **Dissemination of recommendations**

25. The Committee's Concluding Observations in relation to Australia's fifth periodic report were published on the website of the Attorney-General's Department and circulated to all relevant Commonwealth departments and state and territory governments at the time of their release. A formal request for consideration and response was subsequently circulated to all Australian government agencies and the states and territories. The Government also invited public comments in relation to the recommendations of the Committee, which were then provided to relevant areas of government and factored into the Government's consideration of the recommendations. Resulting developments and information obtained through the review process has been taken into account in the development of this Report.

26. The Government also established a public online database of recommendations from the UN human rights system, including recommendations made by UN human rights treaty bodies to Australia, and Universal Periodic Review (UPR) recommendations.

27. Australia also responded to follow up questions in relation to paragraphs 11, 14, 17 and 23 of the fifth Covenant Report on 17 December 2010,<sup>4</sup> 3 February 2012<sup>5</sup> and in August 2012.

### **Domestic implementation of the ICCPR**

28. The Australian Government considers that existing domestic laws and institutions adequately implement the ICCPR at the domestic level. Human rights in Australia are protected by our constitutional system, strong democratic institutions and specific legal protections. State and territory governments incorporate rights under the ICCPR through legislation, policies and programs, including statutory Charters of Rights in the ACT and Victoria. Robust democratic institutions and specific legal protections are an important part of the promotion and protection of civil and political rights in Australia. Among these institutions and laws are the following:

29. *Constitutional Protections:* Australia is a constitutional democracy with a parliamentary system of government based on the rule of law. The Australian Constitution contains a number of express guarantees of rights and immunities. These include:

- Any property acquired by the Commonwealth Government must be acquired on just terms (section 51 (xxxi))
- Trial on indictment of any offence against any law of the Commonwealth shall be by jury (section 80)

<sup>4</sup> Australia responded on 17 December 2010 in its response to the concluding observations. <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx>.

<sup>5</sup> Australia responded on 3 February 2012 in the state party's follow up report.

- The Commonwealth Government shall not make any law to establish any religion or to interfere with religious freedom (section 116) and
- Citizens are not to be subjected to any discrimination in any State by reason of residence in another State (section 117)

30. The High Court of Australia has found implied rights from sections 7 and 24 of the Constitution including freedom of communication on political matters<sup>6</sup> and the right to vote.<sup>7</sup>

31. The Constitution confers on the High Court of the Australia jurisdiction in all matters for which a writ of mandamus, prohibition, or an injunction is sought against an officer of the Commonwealth. This constitutionally entrenched jurisdiction cannot be removed by the Parliament. It secures a basic element of the rule of law by enabling the High Court of Australia to compel the performance of duties to prevent power being exceeded or to restrain unlawful behaviour by Commonwealth officers. The Constitution embodies a strict separation of federal judicial power from legislative and executive power. Only the courts can exercise judicial power. This supports the rule of law and the independence of judges, helping to uphold public confidence in the administration of justice.

32. *Anti-discrimination legislation:* Australia's federal anti-discrimination laws make it unlawful to discriminate on the basis of age, race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, marital or relationship status, pregnancy, breastfeeding, family responsibilities or disability.<sup>8</sup> Anti-discrimination laws also prohibit racial hatred and sexual harassment. The *Fair Work Act 2009* (Cth) complements these acts by preventing an employer from taking adverse action against an employee or prospective employee for a range of discriminatory reasons. Australian state and territory governments have also enacted legislation that provides additional protections from discrimination.

33. In 2013, the *Sex Discrimination Act 1984* (Cth) was amended to provide protection from discrimination on the grounds of sexual orientation, gender identity and intersex status. Australia is one of the first States to provide specific anti-discrimination protection to people who are intersex.

34. *Common law:* The recognition and protection of many basic rights and freedoms derive from centuries of interpretive guidance, provided by judges as part of the common law of Australia. Over time, the common law has recognised particular human rights, including the right of an accused to a fair trial.<sup>9</sup> The right to a fair trial is protected by a number of procedural safeguards including the privilege against self-incrimination,<sup>10</sup>

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<sup>6</sup> *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v. Power* (2004) 220 CLR 1; *Wotton v. Queensland* (2012) 246 CLR 1.

<sup>7</sup> *Roach v. Electoral Commissioner* (2007) 233 CLR 162; *Rowe v. Electoral Commissioner* (2010) 243 CLR 1. In *Roach* the High Court held that a complete ban on prisoners voting was unconstitutional, as it was inconsistent with the principles of representative government.

<sup>8</sup> Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Race Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth).

<sup>9</sup> In *Dietrich v. The Queen* (1992) 177 CLR 292 the High Court recognised the right to a fair trial and held that, where a person is charged with a serious criminal offence but cannot afford legal representation, the absence of any legal representation will be relevant to the fairness of the trial.

<sup>10</sup> See *Sorby v. Commonwealth* (1983) 152 CLR 281.

immunity from search without warrant,<sup>11</sup> and the requirement for proof beyond reasonable doubt in criminal proceedings.<sup>12</sup>

35. The common law has also developed rules in relation to the interpretation of legislation to protect human rights. A key rule is that when interpreting legislation the courts will presume that Parliament did not intend to interfere with fundamental rights unless an intention is “clearly manifested by unmistakable and unambiguous language”.<sup>13</sup> Further, where international human rights law has not been incorporated through legislation, it can still influence domestic law.<sup>14</sup> The High Court of Australia has accepted a wider principle that, even if a law was not enacted to give effect to treaty obligations, an interpretation that is consistent with international law is to be preferred.<sup>15</sup> This reflects a presumption that Parliament did not intend to violate international law. A treaty may also be relevant to administrative decision-making, both in interpreting a law or deciding to use discretionary powers.

36. *Administrative law*: Australia’s administrative law system protects individual rights by providing for merits review and judicial review of government decisions and promoting transparency in government processes. The primary pieces of Commonwealth legislation are the *Judiciary Act 1903* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Legislative Instruments Act 2003* (Cth).

37. *Statutory charters of rights*: The ACT has a Human Rights Act and Victoria has a Charter of Rights. These statutory charters identify the basic rights and freedoms, based on the ICCPR, that belong to all ACT and Victorian residents.

38. The Victorian Equal Opportunity and Human Rights Commission reports annually on the operation of the Charter, including on compliance by government and government agencies with the Charter, the compatibility of new statutory provisions and the Charter’s interaction with the common law.

39. The ACT Human Rights Commission has undertaken a number of thematic reviews, auditing the impact of Government policy and practice on Convention rights, particularly focused on closed environments. These have included adult remand centres, adult jail, juvenile detention centres and psychiatric institutions. The ACT Commissioner recently completed a Human Rights Audit on the conditions of detention of women. The Commission also undertakes a range of related functions in advising the ACT Government on Convention rights including submissions on policy development, submissions to relevant parliamentary committees, media commentary and interventions in court proceedings.

40. *Parliamentary Committees*: Parliamentary Committees play an important role in scrutinising government activity and proposed laws. At the federal level, the Parliamentary Joint Committee on Human Rights examines bills, acts and legislative instruments for compatibility with human rights and can inquire into any matter relating to human rights referred by the Attorney-General.

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<sup>11</sup> See *George v. Rockett* (1990) 170 CLR 104.

<sup>12</sup> See *Woolmington v. DPP* [1935] AC 462.

<sup>13</sup> See *Coco v. The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>14</sup> This discussion is based on Sir G Brennan, “Human rights, international standards and the protection of minorities”, in P Cane (ed.), *Centenary Essays for the High Court of Australia* (2004).

<sup>15</sup> See, for example, *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Al-Kateb v. Godwin* (2004) 219 CLR 562 at [63]-[65] per McHugh J.

41. *National Human Rights Institution:* The AHRC is an “A status” national human rights institution, reflecting international recognition of compliance with the legitimacy and independence requirements of the UN Paris Principles. The AHRC has a defined statutory role to protect and promote human rights and to conciliate human rights and discrimination complaints. The AHRC also has an inquiry and reporting role and can intervene in court proceedings that involve human rights matters and examine laws relating to certain rights. Further, the AHRC provides human rights education.

42. *State and Territory Commissions:* Each state and territory in Australia has its own body dedicated to promoting human rights, non-discrimination and equal opportunity. Together with the AHRC, these bodies constitute the Australian Council of Human Rights Agencies.

43. *Ombudsman:* The Office of the Commonwealth Ombudsman investigates complaints about the administrative actions of Commonwealth Government officials, departments, agencies and their service providers. The Ombudsman can investigate matters on his or her own motion, undertake compliance audits, report on the cases of long-term immigration detainees and conduct visits to detention centres. States and territories have also established Ombudsman Offices.

44. *Privacy Commissioner:* The Privacy Commissioner investigates complaints from individuals about the handling of personal information by the Commonwealth, Norfolk Island and ACT government agencies as well as the private sector organisations covered by the *Privacy Act 1988* (Cth). Most states and territories also have privacy commissioners.

45. *A free media:* Australia has a free and independent press. The rights to freedom of expression, association and assembly are recognised as fundamental human rights in Australia. Political speech is particularly protected by the implied constitutional freedom of political communication. Fundamental rights and freedoms, such as the freedom of expression, are also protected by the general common law presumption that in the absence of clear and unambiguous legislation to the contrary, parliaments do not intend to interfere with fundamental rights and freedoms.

46. *Civil society:* A strong civil society, which includes an active and innovative non-government sector, makes an important contribution to the protection and promotion of rights in Australia, including by contributing to public debate and informing government policy. The Australian Government holds an annual Forum on Human Rights with non-government organisations to ensure a comprehensive and ongoing consultation mechanism for discussion about domestic and international human rights issues.

## **Reservations**

47. Australia periodically reviews its reservations to treaties to determine whether they remain necessary. The Australian Government does not intend to withdraw its reservations to the ICCPR at this time. The Government notes that its reservations to the ICCPR are consistent with the Vienna Convention on the Law of Treaties and no objections to the reservations have been made. Consistent with previous correspondence with the Committee, the Government considers that the existing reservations to Articles 10, 14(6) and 20 are justified and consistent with the object and purpose of the ICCPR.

48. Australia is committed to promoting equality. Australia’s laws include prohibitions on, and redress for, racial discrimination as well as offences for behaviour that disrupt public order. Australia’s reservation to Article 20 reserves the right not to introduce further legislative provisions regarding the prohibition of propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This reflects Australia’s commitment to articles in the ICCPR related to freedom

of expression, the right of peaceful assembly and freedom of association, while not precluding the introduction of further legislation if Australian parliaments were to consider this necessary or desirable to protect the rights of any persons.

### **Communications under the First Optional Protocol**

49. The Australian Government actively engages with the substance of communications made under the First Optional Protocol to the ICCPR, and has processes in place to consider Committee views raised under that Protocol. The Government's policy is to consider any views on individual communications issued by the Committee on a case-by-case basis. Upon receipt of the views, the Attorney-General's Department notifies the government department and state or territory responsible for the action that is the subject of the views. Where the Committee has issued adverse views in a communication, the department conducts a detailed legal analysis before responding to the Committee. The text of the Committee's views and, where adverse views have been received, the Australian Government's response, are published on the Attorney-General's Department website.

### **Consistency of terrorism offences with international obligations**

50. Australian criminal law includes several offences directed to terrorism, consistent with Australia's international obligations in respect of counter-terrorism.<sup>16</sup> These offences are designed to protect the public from the devastating consequences of a terrorist act by interrupting its preparatory stages, rather than merely punishing perpetrators of a completed attack.<sup>17</sup> Australia's terrorist offences adhere to established principles of criminal law and procedure. This includes the usual requirements, processes and safeguards available under Australian criminal law in respect of arrest, charge, trial, proof, conviction and sentence.<sup>18</sup>

51. On 21 April 2011, the Australian Government appointed the inaugural Independent National Security Legislation Monitor under the *Independent National Security Legislation Monitor Act 2010* (Cth) for a period of three years. The Monitor reviews the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation including assessing whether the laws remain necessary, considering whether the laws contain appropriate safeguards for protecting the rights of individuals and assessing whether the laws remain proportionate to any threat of terrorism or national security. The Monitor's annual reports are provided to the Prime Minister, who is required to table them in Parliament.

52. The Australian Government appointed the second Independent National Security Legislation Monitor, commencing in that role on 7 December 2014.

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<sup>16</sup> See especially SC/Res/1373 (2001).

<sup>17</sup> Criminal Code s 101.1. These offences are: providing or receiving training connected with terrorist acts (s 101.2); possessing things connected with terrorist acts (s 101.4); collecting or making documents likely to facilitate terrorist acts (s 101.5); other acts done in.

<sup>18</sup> For example, the right to silence, the presumption of innocence, the criminal burden and standard of proof, trial by jury, judicial sentencing, rights of appeal, and eligibility for parole.

## The Committee's concluding observations in CCPR/C/AUS/CO/5

53. Australia notes the Committee's recommendations at paragraph eleven of CCPR/C/AUS/CO/5. Australia has not amended the laws defining the scope of the definition of terrorist act in s 100.1 of the *Criminal Code 1995* (Cth), the burden of proof in respect of some terrorist offences in Part 5.3 of the Criminal Code and certain conditions of questioning and detention warrants issued under the *Australian Security Intelligence Organisation Act 1979* (Cth). Further information addressing the concluding observations is at Appendix B.

### Intelligence powers

54. Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) provides for warrants under which the Australian Security Intelligence Organisation (ASIO) can question<sup>19</sup> or, if necessary, question and detain<sup>20</sup> persons for the purpose of obtaining intelligence information in relation to a terrorism offence.<sup>21</sup> Safeguards in the statutory issuing criteria and processes for these two warrants include the following measures:

- Both types of warrants are issued by an independent Issuing Authority<sup>22</sup> upon receipt of an application by ASIO (with the prior approval of the Attorney-General).<sup>23</sup>
- Both types of warrants are issued subject to fixed statutory criteria which require:
  - Reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence,<sup>24</sup> and
  - For questioning and detention warrants enabling a person to be detained for the purpose of questioning, there are reasonable grounds to believe that other methods of collecting that intelligence would be ineffective,<sup>25</sup> that the person may fail to appear for questioning, may alert a person involved in a terrorism offence that the crime is being investigated, or may destroy the evidence required to be produced under the warrant,<sup>26</sup> or
  - For questioning warrants, reasonable grounds for issuing a warrant in all the circumstances, having regard to other methods (if any) of collecting the intelligence.<sup>27</sup>

<sup>19</sup> Referred to as Questioning Warrants (ASIO Act, Part III, Division 3, Subdivision B).

<sup>20</sup> Referred to as Questioning and Detention Warrants (ASIO Act, Part III, Division 3, Subdivision C).

<sup>21</sup> Division 3 of Part III of the ASIO Act will remain in force until 7 September 2018. See ASIO Act s 34ZZ (as amended by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014).

<sup>22</sup> A judge appointed by the Attorney-General in a personal capacity.

<sup>23</sup> ASIO Act ss 34D, 34 E (questioning warrants), 34F, 34G (questioning and detention warrants).

<sup>24</sup> ASIO Act s34 D(4)(a), 34F(4)(a), 34G(1)(b).

<sup>25</sup> ASIO Act s 34F(4)(b).

<sup>26</sup> ASIO Act s 34F(4)(d).

<sup>27</sup> ASIO Act ss 34D(4)(b), 34E(1). These amendments were implemented by the Counter-Terrorism (Foreign Fighters) Act 2014, which enacted the Government's response to a recommendation of the Independent National Security Legislation Monitor (second annual report, December 2012, recommendation IV/1) that this should be the threshold for questioning warrants (rather than the "last resort" requirement applying to questioning and detention warrants, noted above). The second annual report of the INSLM is available at: [www.dpmc.gov.au/inslm](http://www.dpmc.gov.au/inslm).

- Questioning is conducted before an independent Prescribed Authority<sup>28</sup> who also has the power to issue directions concerning the execution of the warrant.<sup>29</sup>
- A person subject to either type of warrant has the right to contact a lawyer,<sup>30</sup> to make complaints and to seek judicial remedies in respect of the warrant.<sup>31</sup>
- Both types of warrants are subject to maximum time limits on questioning periods<sup>32</sup> and, in the case of questioning and detention warrants, a maximum period of continuous detention.<sup>33</sup>

55. Two further amendments to the legal safeguards applying to the enforcement of these warrants were made by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), to implement relevant recommendations of the then Independent National Security Legislation Monitoring the Second Annual Report of December. These are as follows:

**(a) Use of reasonable force in the execution of warrants**

56. A police officer who is authorised to detain a person under a questioning and detention warrant, or bring a person who is subject to a warrant before a prescribed authority, is permitted to use such force as is necessary and reasonable.<sup>34</sup> A police officer may only use force that is likely to cause the death or grievous bodily harm of a person where the officer believes on reasonable grounds that it is necessary to protect life or prevent serious injury to another person (including the officer).<sup>35</sup> The amendments made in 2014 repealed a previous, further ground upon which a police officer could use lethal force or force causing grievous bodily harm.<sup>36</sup> The Government accepted a recommendation of the Independent National Security Legislation Monitor (recommendation IV/3) that this ground was not necessary. As such, this amendment has served to promote the right to life, and the right to liberty and security of the person.

**(b) Offences for the contravention of a person's legal obligations under a warrant**

57. The Independent National Security Legislation Monitor was of the view that there were unintended gaps in the coverage of certain offences in section 34L of the ASIO Act, which apply to persons who fail to comply with their legal obligations under a warrant issued under Division 3 of Part III. In particular, the Monitor recommended (recommendation IV/6) the enactment of an offence that applies to persons who engage in conduct that prevents a record or thing ordered to be produced under a warrant from being produced, or produced in legible or useable form. The Monitor considered that the existing offences in subsection 34L(6) of the ASIO Act only applied to persons who failed to produce things requested under a warrant, and did not cover persons who tamper with such things, meaning that they cannot be produced in legible or useable form. The Government accepted the relevant recommendation and implemented it in 2014 via the new subsection 34L(10) of the ASIO Act.

<sup>28</sup> Generally a retired superior court judge appointed by the Attorney-General.

<sup>29</sup> ASIO Act ss 34B, 34K.

<sup>30</sup> ASIO Act ss 34E(3) (questioning warrants), 34G(5) (questioning and detention warrants).

<sup>31</sup> ASIO Act ss 34J, 34K.

<sup>32</sup> ASIO Act s 34R.

<sup>33</sup> ASIO Act s 34S.

<sup>34</sup> ASIO Act s 34V(1).

<sup>35</sup> ASIO Act s 34V(3).

<sup>36</sup> This was where a person was called upon to surrender, and the police officer believed that there was no other way of bringing the person into custody under the warrant.

## **The Independent National Security Legislation Monitor's annual reports**

### **First annual report**

58. As noted in communication CCPR/C/AUS/CO/5/Add.3, the Monitor did not make conclusive recommendations or findings in his first annual report,<sup>37</sup> but rather, identified issues for consideration in future reporting periods. As such, the Australian Government did not issue a formal response to the inaugural report and will give careful consideration to recommendations made by the Monitor in subsequent reports.

### **Second, third and fourth annual reports**

59. The Monitor's second annual report was tabled in Parliament on 14 May 2013<sup>38</sup> and published on the Department of Prime Minister and Cabinet's website. The Monitor made 21 recommendations which focused on Part 5.3 of the Criminal Code and the ASIO Act.

60. The Monitor's third annual report was tabled in Parliament on 12 December 2013<sup>39</sup> and published on the Department of Prime Minister and Cabinet's website. The Monitor made 30 recommendations which focused on Australia's international obligations, counter-terrorism financing legislation and the treatment of national security information in court proceedings.

61. The Monitor's fourth annual report was tabled in Parliament on 18 June 2014<sup>40</sup> and published on the Department of Prime Minister and Cabinet's website. The Monitor made 31 recommendations which focused on Australians involved in armed conflicts abroad, the use of foreign evidence for terrorism-related proceedings and passport cancellation and citizenship issues.

62. The Government implemented several of the Monitor's recommendations through the enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and will continue to consider any remaining recommendations in this report, together with the outcomes of the independent legislative review commissioned by the Council of Australian Governments.

## **The Council of Australian Governments Review of Counter-Terrorism Laws**

63. Further to Australia's update in CCPR/C/AUS/CO/5/Add.3, the Prime Minister announced the commencement of the Council of Australian Governments (COAG)<sup>41</sup> review into counter-terrorism laws on 9 August 2012. The Review was undertaken by an independent committee chaired by a retired judicial officer. The six member Review Committee comprised expertise in law enforcement, public accountability and judicial decision-making. In the second half of 2012, the Review Committee conducted a national program of public hearings and invited written submissions from interested members of the public.

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<sup>37</sup> The First Annual Report is available at <http://www.dpmc.gov.au/inslm/index.cfm>.

<sup>38</sup> Independent National Security Legislation Monitor Act 2010 (Cth) s 29(5).

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> The Council of Australian Governments comprises all the Commonwealth, State and Territory Governments.

64. The COAG Review was finalised on 1 March 2013 and tabled in Parliament on 14 May 2013 by the Attorney-General. The Review made 47 recommendations relating to a broad range of issues including the definition of a terrorist act, proscription of terrorist organisations, control orders, preventative detention orders and terrorism financing. On 10 October 2014 the COAG published its response to the COAG Review.

65. A number of the COAG Review recommendations have been implemented through the enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and a number of the remaining recommendations will be considered for future legislation in consultation with relevant stakeholders including Australian states and territories.

### **Safeguards preventing use of evidence obtained under torture, etc.**

66. Australian evidence law provides safeguards against the use of evidence obtained under torture or other cruel, inhuman or degrading treatment. The *Evidence Act 1995* (Cth), for example, provides that the court must exclude evidence of an admission unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or influenced by a threat of conduct of that kind.<sup>42</sup> This provision is additional to a common law bar on the admissibility of evidence obtained under duress. The *Evidence Act 1995* (Cth) further provides a general discretion for the court to exclude improperly or illegally obtained evidence. Matters heard in state and territory courts use commensurate provisions under state and territory law.

67. Amendments to the *Foreign Evidence Act 1994* (Cth) relating to terrorism-related proceedings, which commenced on 1 December 2014, provide safeguards against the use of foreign evidence in domestic terrorism-related proceedings, where that evidence has been obtained under torture or duress. Courts must exclude foreign evidence if it is satisfied that the evidence, or the information contained in the material, was obtained directly as a result of torture or duress. The *Foreign Evidence Act 1994* (Cth) defines duress as circumstances where a person performs actions because of threats of death or serious injury to themselves, or to family members, or a third party, being threats of such a nature that a reasonable person would have yielded to them.

68. In addition, the Court has a general discretion to not adduce material if doing so would have a substantial adverse effect on the right of the defendant to a fair hearing.

69. Of equal importance to evidentiary safeguards is Australia's commitment to high standards of conduct in counter-terrorism law enforcement and intelligence operations. This ensures that operations are conducted in a manner consistent with Australia's international obligations. Further, the Australian Federal Police's internal governance framework sets out procedures for preventing and reporting suspected torture or cruel, inhuman or degrading treatment during interviews conducted offshore by foreign authorities.

70. Australia has a robust framework for the prevention of, investigation of allegations relating to, and enforcement of the prohibition on torture and cruel, inhuman or degrading treatment. These include stringent legislative requirements, extensive statutory safeguards and independent oversight and accountability mechanisms:

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<sup>42</sup> s 84, Evidence Act 1995 (Cth).

- A specific criminal offence of torture under Division 274 of the Criminal Code.<sup>43</sup>
- The statutory functions of all Australian security and intelligence agencies do not, in any way, extend to constituting torture or cruel, inhuman or degrading treatment or punishment, because such conduct is in no way necessary for, or relevant to, these agencies' functions. In addition, as a further safeguard, there are several express prohibitions on cruel, inhuman or degrading treatment in some extraordinary counter-terrorism specific powers in law enforcement and intelligence legislation (focused on the prevention of terrorist acts, or the collection of intelligence that is important in relation to a terrorism offence).<sup>44</sup>
- The development of relevant operational guidelines and policy in respect of the above obligations.
- The existence of independent oversight and scrutiny mechanisms for law enforcement and intelligence operations including the Inspector-General of Intelligence and Security and the Australian Federal Police professional standards framework.

71. Australian law provides various reparation mechanisms for victims of torture and/or other cruel, inhuman or degrading treatment. These include victims of crime compensation schemes in all states and territories, the right of aggrieved persons to seek a judicial remedy in respect of their treatment, and discretionary relief in the nature of ex gratia payments.

### **Amendments to anti-discrimination legislation**

72. In 2010, amendments to the *Sex Discrimination Act 1984* (Cth) extended protections from direct discrimination on the grounds of family responsibilities to both women and men in all areas of work. It also established breastfeeding as a separate ground of discrimination. The amendments also strengthened protection from sexual harassment in workplaces and educational institutions and harassment perpetrated through new technologies including mobile phones and social media.

73. *Sexual orientation, gender identity and intersex status*: In March 2013 amendments to the *Sex Discrimination Act 1984* (Cth) introduced new protections from discrimination on the basis of sexual orientation, gender identity and intersex status, and provides protection from discrimination for same-sex de facto couples.

74. *Australian Government Guidelines on the Recognition of Sex and Gender*: The Australian Government recognises that individuals may choose to identify and be recognised within the community as a gender other than the sex or gender they were assigned at birth and that this should be recognised and reflected in their personal records. The *Australian Government Guidelines on the Recognition of Sex and Gender* commenced on 1 July 2013. The Guidelines standardise the evidence required for a person to establish or change their sex or gender in personal records held by Australian Government departments and agencies.

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<sup>43</sup> The offence of torture applies to all persons acting as public officials or in an official capacity, as well as persons acting in a private capacity at the instigation, or with the consent or acquiescence, of a public official or person acting in an official capacity. The offence of torture expressly negates any defence of acting under orders of a superior officer or public authority.

<sup>44</sup> For example: s 34T of the ASIO Act, in relation to questioning and questioning and detention warrants; s 105.33 of the Code in relation to persons taken into or held in custody under a preventative detention order; and s 23Q of the Crimes Act in relation to persons who are arrested on suspicion of a criminal offence (including terrorist offences).

## Eliminating violence against women

75. The Australian Government understands that eliminating violence against women requires a holistic approach. This involves measures to prevent violence from occurring in the first place, such as education to change societal attitudes and improving health and economic outcomes for women and their children, ensuring that women who have experienced violence receive the support and assistance they need to recover and rebuild their lives, and that perpetrators are held to account.

76. In February 2011, the Commonwealth Government, in partnership with all states and territories and civil society, launched the *National Plan to Reduce Violence against Women and their Children 2010-2022*. The National Plan is the overarching mechanism that brings together the efforts of all Australian governments and civil society to achieve a significant and sustained reduction in violence against women and their children and demonstrates Australia's commitment to upholding the human rights of all Australian women to live free from violence. The National Plan has been built from an evidence base of research and extensive consultation with experts and the community. It recognises that violence does not occur in isolation from other issues faced by individuals and communities, and that different groups of women have different experiences of violence. The National Plan links with other national reforms, including *The National Framework for Protecting Australia's Children 2009-2020*, Australia's *National Disability Strategy 2010-2020* and works to address Indigenous disadvantage.

77. The National Plan<sup>45</sup> sets out a framework for action until 2022 and is delivered through a series of four three-year Action Plans. The First Action Plan: *Building a Strong Foundation 2010-2013*, established key national infrastructure and laid a strong foundation for long-term change. The Second Action Plan runs from 2013-2016 with a strong focus on engaging more sectors, groups and communities in order to drive a whole of community response to reducing violence against women and their children. The Second Action Plan sets out 26 practical actions that all Australian governments agree are critical to moving ahead in reducing violence, which fall under five National Priorities:

- Driving whole of community action to prevent violence
- Understanding diverse experiences of violence
- Supporting innovative services and integrated systems
- Improving perpetrator interventions and
- Continuing to build the evidence base

78. COAG established an Advisory Panel on Reducing Violence Against Women to advise COAG on practical ways to address violence. The Advisory Panel was chaired by the former Victorian Police Chief Commissioner, Mr. Ken Lay APM. Deputy Chairs of the Advisory Council are Ms. Rosie Batty, 2015 Australian of the Year and family violence campaigner, and Ms. Heather Nancarrow from Australia's National Research Organisation for Women's Safety. The final report was submitted on 1 April 2016.

79. On 24 September 2015, the Australian Government also announced a package of measures to provide a safety net for women and children at risk of experiencing violence. The package will improve frontline support and services, leverage innovative technologies to keep women safe, and provide education resources to help change community attitudes

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<sup>45</sup> Key initiatives under the National Action Plan are listed in Appendix C.

to violence and abuse. The package includes \$21 million for specific measures to assist Indigenous women and communities.

### **Indigenous Women**

80. The Australian Government is committed to reducing the underlying disadvantage that leads to high rates of violence against Indigenous women, and Indigenous women's overrepresentation in the criminal justice system, by focussing on improving education and employment outcomes and ensuring that the law of the land operates in Indigenous communities as it does in any other community.

81. Through the Indigenous Advancement Strategy's Safety and Wellbeing Programme, the Australian Government funds a range of activities that aim to prevent violence against women, support victims of violence and reduce offending by Indigenous women. These include family violence prevention legal services, Indigenous family safety activities, social and emotional wellbeing activities, prisoner through care, prevention and diversion activities and Indigenous women's legal services. The Australian Government is also providing \$6 million over two years for the Northern Territory Domestic and Family Violence Reduction Strategy to establish integrated service delivery responses to family violence issues.

82. Under *Stronger Futures in the Northern Territory*, the Australian Government provides funding for women's safe houses, remote policing, community night patrols and supplementary legal assistance services, which prevent violence against women and reduce offending by Indigenous women in the Northern Territory.

83. The Australian Government addresses the disadvantage and discrimination faced by Indigenous women who come into contact with the criminal justice system, either as victims or offenders, via a number of strategic policy frameworks and programmes. These include:

- Strategies that seek to foster the leadership of Indigenous women in their communities, and to improve access to services for women and children exposed to family violence under the National Plan
- Actions aimed at expanding models of integrated support to enable women and children experiencing domestic and family violence to remain at home safely under the *National Framework for Protecting Australia's Children 2009-2020* and
- Specific strategies aimed at reducing Indigenous women's contact with the criminal justice system and ensuring that women feel safe and are safe within their communities under the *National Indigenous Law and Justice Framework*

### **Women with Disabilities**

84. The National Plan recognises that different groups of women have diverse experiences of violence and can be particularly vulnerable to violence. Women with disability are more likely to experience domestic and family violence, and sexual assault, which can be worse and last for longer. Women with disability can face unique challenges in accessing pathways to appropriate support and justice. Key initiatives under the National Plan to help women with disability include:

- *Stop the Violence* project: the Australian government funds this project, led by Women with Disabilities Australia and supported by experts and key disability organisations. The project investigates and promotes good practice and ways to improve access and responses by services for women and girls with disability experiencing or at risk of violence. Under the Second Action Plan governments will implement key outcomes from the *Stop the Violence* project including bringing

together and disseminating good practice information on preventing violence against women with disability; training for frontline workers to recognize and prevent violence against women and their children with disability; and providing accessible information and support in National Plan communications.

- Linking the National Plan with the *National Disability Strategy 2010-2020*: under the Disability Strategy, which was agreed by COAG in 2011, a key action area designed to reduce violence, abuse and neglect of people with disability is to ensure that the National Plan focuses on improving the safety and wellbeing of women and children with disability.
- Foundation to Prevent Violence against Women and their Children: the Australian Government is working with the Foundation to strengthen the focus on women and girls with disability.
- Australia's National Research Organisation for Women's Safety: the Australian Government is providing funding to continue building the evidence base on "what works" for women and girls with disability experiencing violence and/or sexual assault.

### **Women in rural and remote areas**

85. The National Plan recognises that women from rural and remote communities may face social isolation and have less opportunity to access information and support services. It also recognises that factors such as financial insecurity, dependency, stress, a perceived lack of confidentiality and stigma attached to the public disclosure of violence can contribute to keeping rural women trapped in violent relationships. A number of initiatives link with, or come under, the National Plan to support rural and remote communities:

- The National Rural Women's Coalition: for rural women to connect with individuals and state-based networks to ensure better social and economic outcomes.
- Stopping Violence Before it Happens toolkit:<sup>46</sup> the Australian Government funds this toolkit, which is focused on women in Australian rural communities and explains the concept of primary prevention of violence against women.
- The Domestic Violence Response Training: a free accredited training program conducted in all Australian states and territories. The training is available at no cost to all health, allied health and frontline workers who are most likely to come in contact with people experiencing or at risk of domestic and family violence. Training is prioritised in rural and remote areas and has culturally appropriate courses for Indigenous workers.
- Funding White Ribbon Australia to increase their engagement with Indigenous and culturally and linguistically diverse communities, including new and emerging communities.

86. Our Watch and Victorian Health will work with Australia's National Research Organisation for Women's Safety to develop the national primary prevention framework and to enhance the evidence base, to build gender equality between men and women in families, communities, organisations and society. The work being done to prevent violence against women and their children across the country – including by community and sporting groups, business groups, local governments, schools and other key institutions – will continue to be supported by governments. This work responds to local needs, including

<sup>46</sup> <http://www.nrwc.com.au/Projects/StoppingViolenceAgainstWomenBeforeItHappens.aspx>.

initiatives for rural and regional communities, capacity building in primary prevention for service organisations, and community education to prevent harmful cultural practices like female genital mutilation.

### **Legal Framework and Services**

87. There has been a substantial amount of work undertaken in the family law system over the last five years. This includes significant legislative amendments made to the *Commonwealth Family Law Act 1975* (Cth) in 2011, which commenced on 7 June 2012, to strengthen the way the Family Law Act deals with family violence and child abuse.

88. The Family Law Act amendments were evaluated by the Australian Institute of Family Studies, which examined changes in professional practice, views and experiences of parents accessing family law system services and court judgements and administrative data. The report, which was released on 12 October 2015, found that the 2012 amendments “are a step in the right direction in a reform agenda intended to improve the system’s response to family violence and child abuse concerns in post-separation parenting arrangements”.<sup>47</sup>

### **Protections in relation to sterilisation**

89. Australian law contains a number of protections in relation to sterilisation. All states and the ACT have established guardianship tribunals to decide a range of matters for people who have an impaired capacity to make independent decisions.<sup>48</sup> These matters include decisions about a person’s lifestyle and other personal matters, such as where they live, what services they receive, and what medical and dental treatment they receive. These tribunals also have jurisdiction to authorise sterilisation of an adult and some tribunals also have jurisdiction to authorise sterilisation of a child.

90. The *Family Law Act 1975* (Cth) empowers the Family Court to make orders relating to the welfare of children.<sup>49</sup> This section is known as the “welfare power” and while it does not specifically refer to sterilisation, the Family Court’s power to deal with these cases has developed under the common law through judicial interpretation of the section.<sup>50</sup> When making orders under this section a court must regard the best interests of the child as the paramount consideration. Some State and Territory Supreme Courts have inherent *parens patriae* jurisdiction to hear these matters.

91. A Senate Inquiry into the matter has recently released two reports on sterilisation.<sup>51</sup> The first report, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* was released on 17 July 2013 and made 28 recommendations. The second report, the *Involuntary or Coerced Sterilisation of Intersex People in Australia* was released on 25 October 2013 and made 15 recommendations.

92. In the first report, the Senate Committee did not recommend an outright ban on sterilisation of people with disabilities, concluding that a ban of non-therapeutic sterilisation procedures would potentially deny the rights of persons with disability to access all available medical support on an equal basis with persons without disability. The

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<sup>47</sup> Additional information at Appendix D.

<sup>48</sup> These go by various names. The NSW mechanism is the Guardianship Division of NSW Civil and Administrative Tribunal.

<sup>49</sup> Section 69ZC of the Family Law Act 1975 (Cth).

<sup>50</sup> For example *Secretary, Department of Health and Community Services v. JWB and SMB* (Marion’s Case) (1992) 15 Fam LR 392.

<sup>51</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation).

Committee made many recommendations to increase consistency in the way decisions about sterilisation are made by courts and tribunals across jurisdictions, including the consideration of capacity and the test to be applied when determining whether or not sterilisation should occur. Other recommendations covered education (for people with disability, medical practitioners and legal practitioners/judicial officers) and legal representation and assistance to ensure children and people with disability have adequate independent representation. The Committee also recommended that data about adult and child sterilisation be standardised across jurisdictions and the scope and operation of relevant courts and tribunals be an area of ongoing review for the Law, Crime and Community Safety Council.

93. As the majority of the recommendations related to matters at the state and territory level, the Australian Government will work with states and territories on these matters as appropriate.

### **Right to life and prohibition from torture**

94. Australia's extradition process is governed by the *Extradition Act 1988* (Cth). This legislation applies to any country declared to be an extradition country in the regulations under the legislation. The extradition process includes extensive safeguards to ensure that individuals are not extradited where there are substantial grounds for believing that they are at a real risk of being arbitrarily deprived of life, being tortured or subjected to other cruel, inhuman or degrading treatment or punishment in the requesting country, or any other country to which they may subsequently be removed following the completion of criminal justice processes in the requesting country.

95. Consideration of international obligations assumed by Australia, including obligations assumed under Articles 6 and 7 of the ICCPR, occurs at various stages of the extradition process. When determining whether to issue a notice receiving an extradition request, the Attorney-General may consider any issues relevant to the appropriateness of progressing the request, including issues regarding compliance with Australia's international obligations. In determining whether an eligible person is to be surrendered to a foreign country, the *Extradition Act 1988* (Cth) provides that the Attorney-General must be satisfied that the person will not be subjected to institutionalised conduct engaged in by government authorities for the purposes of punishment, intimidation or coercion. In addition, the Attorney-General has a broad, general discretion in determining whether to surrender a person to a foreign country. In accordance with the principle of procedural fairness, a person who is the subject of an extradition request may make submissions on any matter they wish to be taken into consideration during a surrender determination including compatibility of the person's surrender with Australia's obligations under the ICCPR.

96. A person may seek judicial review or appeal decisions made at each stage of the extradition process. Where the Australian Government is aware of an issue or situation existing in a foreign country which may invoke Australia's international obligations, this is drawn to the Attorney-General's attention when making the determination of whether to surrender a person to that foreign country. For example, Australia has a longstanding opposition to the death penalty and will not surrender a person to a country in circumstances where the death penalty would be imposed. Where a person's extradition is requested for an offence punishable by death, the Attorney-General may only make a determination to surrender that person if satisfied that the requesting country has, by virtue of a diplomatic undertaking, assured Australia that the death penalty will not be imposed on the person or, if imposed, will not be carried out. In cases where a person elects to waive extradition, before the Attorney-General can determine that the person should be

surrendered, he or she must be satisfied that on return to the requesting country there is no real risk that the death penalty will be carried out upon the person in relation to the offence.

97. In relation to Australia's migration framework, the Australian Government has in place arrangements to ensure consideration of Australia's *non-refoulement* obligations under the ICCPR and its Second Optional Protocol. Protection is provided, in response to an application for protection, where the Minister<sup>52</sup> has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm. Significant harm is defined to mean arbitrary deprivation of life, the carrying out of the death penalty, or subjection to torture and other cruel, inhuman or degrading treatment or punishment. Where a non-citizen is being removed from Australia and has not previously sought protection in Australia, a process is in place to consider any issues prior to removal.

98. In accordance with the ICCPR, the steps taken by the Australian Government to monitor the safety of individuals on occasions where they are removed using diplomatic assurances depends on the circumstances of each individual case. The Government has established monitoring mechanisms in relation to all Australian nationals or permanent residents who are extradited to a foreign country, including on the basis of a diplomatic assurance. The Government is able to conduct this monitoring because of the consular rights provided under international law and the resources provided to support Australia's consular network. Additionally, when a foreign national is extradited from Australia to a third country, the Government has agreed to formally advise that person's country of citizenship of his or her detention and extradition, subject to that person's consent.<sup>53</sup>

#### **Transferring of asylum seekers to third countries for the processing of their claims**

99. The Australian Parliament has passed legislation to allow countries to be designated as regional processing countries and enable the transfer of asylum seekers to such countries for refugee status determination. Nauru and Papua New Guinea (PNG) have been designated as regional processing countries. The Australian Government subsequently entered into Memoranda of Understanding with the Governments of both Nauru and PNG for the transfer of illegal maritime arrivals who arrived in Australia on or after 13 August 2012 for the processing of their protection claims. The Memoranda provide that refugee status determinations will take place under the domestic laws of Nauru and PNG.

100. In 2013 Australia expanded its arrangements with Nauru and PNG to allow for persons transferred there and found to be owed international protection obligations under Nauruan law or to be refugees under PNG law to settle there. The arrangements with Nauru allow for temporary settlement in Nauru for up to ten years and those with PNG allow for permanent settlement in PNG or another regional state. Australia continues to assist Nauru to identify durable settlement solutions for persons found to be owed international protection obligations, and in September 2014 a Memorandum of Understanding between Australia and Cambodia was ratified for the voluntary and permanent settlement of refugees from Nauru in Cambodia.

101. New Memoranda have been entered into with both Nauru and PNG to reflect these new arrangements. Under these Memoranda, both countries agree to ensure that transferees will be treated with dignity and respect and that relevant human rights standards are met. Further, the Governments of Nauru and PNG have provided assurances to Australia that they will:

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<sup>52</sup> Minister for Immigration and Border Protection.

<sup>53</sup> Noting that there are constraints on the disclosure of personal information under Australian law and this can only occur with that person's consent.

- Not expel or return a transferee to another country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion
- Make an assessment, or permit an assessment to be made, of whether or not a transferee is covered by the definition of refugee in Article 1A of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol Relating to the Status of Refugees* and
- Not send a transferee to another country where there is a real risk that the transferee will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty

102. Having been granted the above-mentioned assurances by Nauru and PNG, and having assessed the totality of the circumstances, Australia's position is that transferring people to the sovereign states of Nauru and PNG for the processing of their asylum claims and settlement there does not breach Australia's international obligations.

103. On 5 October 2015, the Government of Nauru announced the Nauru Regional Processing Centre (RPC) would become a fully open centre and transferees would be permitted to enter and exit 24 hours a day, seven days a week. The introduction of a fully open centre allows transferees to depart the centre at their will and there are no curfews impacting their return. For the safety of all residents at the RPC, transferees are checked in and out of the centre and visitors are not permitted. Additionally, certain contraband items are not permitted into the RPC, including alcohol. Transferees have engaged well with new open centre arrangements, with most departing the centre regularly. Transferees continue to receive full services at the RPC, including health services, meals and programmes and activities and have access to the canteen where they can purchase items with their points allocation and are permitted to take water and snacks to open centre. There are restrictions on taking certain food items into the open centre due to health standards compliance.

104. The Government of Nauru has made significant progress on its refugee status determination caseload; merits review and judicial review processes active and ongoing. Australia continues to support Nauru build its protection assessment capacity through mentoring and training and funding of claims assistance.

### **Regulating the use of force**

105. There are numerous internal and external Commonwealth mechanisms to investigate the use of force, including lethal and non-lethal force, by Australian Federal Police (AFP) officers.

106. Under the *Crimes Act 1914* (Cth), AFP officers may only use such force as is necessary and reasonable in the circumstances. An AFP officer must not, in the process of arresting a person, do anything that is likely to cause death or grievous bodily harm to him or her unless the officer believes, on reasonable grounds, that such actions are necessary to protect life or prevent serious injury to another person (including the officer).

107. There are also professional standards, determined by the Commissioner of the AFP through Commissioner's Orders. *Commissioner's Order 3 - Operational Safety*, underpins the AFP's conflict management strategies, training, use of force model, and describes the circumstances where an AFP officer may use force. These professional standards are underpinned by the AFP Core Values and AFP Code of Conduct, and AFP appointees must comply with these standards.

108. Further, the Board of the Australia New Zealand Policing Advisory Agency approved the *Australia New Zealand Use of Force Principles* (2012). This document provides strategic guidance on the use of force through a set of high level principles, giving

police organisations scope to implement individual operational policies. These principles are not intended to replace specific operating procedures or policies in use within jurisdictions but rather to support and influence them. Work is currently being undertaken across jurisdictions to consider options to improve consistency in policy for the deployment of less than lethal use of force.

#### **Mechanisms available to carry out independent investigations of complaints**

109. *Federal Government*: The Commonwealth Ombudsman has a wide array of investigative and reporting powers in relation to the AFP under the *Ombudsman Act 1976* (Cth) and the *Australian Federal Police Act 1979* (Cth). The Ombudsman may investigate complaints about the actions of AFP appointees and its policies, practices and procedures. The Ombudsman is independent and has responsibility for reporting on the comprehensiveness and adequacy of the AFP's complaint handling to the Minister for Justice and Parliament. The Ombudsman may conduct investigations of its own initiative or in response to complaints from members of the public. It is empowered to compel agencies, including the AFP to produce certain information for the purposes of its investigation in appropriate circumstances.

110. The Minister has, under the *Australian Federal Police Act 1979* (Cth), a discretionary power to arrange for a person (including an independent person) to conduct a special inquiry into the conduct of an AFP appointee, the AFP's practices or procedures or any other matter relating to the AFP.

#### **Immigration detention**

111. The Australian Government considers immigration detention to be an essential component of strong border control. People who seek to enter Australia without appropriate authority do not provide the Government with an opportunity to assess any risks they might pose to the Australian community. The Government therefore continues to see the need to retain mandatory immigration detention to ensure the integrity of our migration and citizenship programmes. All illegal arrivals are initially detained so that any potential health, identity and security checks can be undertaken. Other unlawful non-citizens who pose a risk to the Australian community or to the integrity of our migration and citizenship programmes may also be held in immigration detention. The Government is committed to ensuring that all people in immigration detention are treated fairly and reasonably within the law, and are provided with a safe and secure environment.

112. Australia's immigration detention network has a range of facilities available to accommodate detainees, including community detention. Placement decisions take into account the individual circumstances of the detainee, as well as broader operational requirements.<sup>54</sup>

##### **(a) Applicable time limits for detention of migrants**

113. Time in immigration detention is dependent upon an assessment of the ongoing need for detention based on a number of factors, including identity determination and the complexity of processing due to individual circumstances relating to health, character or security matters and developments regarding information on the situation in other countries. The assessment is completed expeditiously in order to minimise the time an individual may have to spend in immigration detention.

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<sup>54</sup> See Appendix E.

114. Immigration detention is for administrative purposes. As a safeguard against indefinite or arbitrary detention, the length and conditions of a person's detention is subject to regular review to ensure the detention continues to be lawful and appropriate in all the circumstances. A person in immigration detention may also seek judicial review of the lawfulness of their detention in Australian Courts. The immigration detention system is also subject to regular scrutiny from external agencies such as the Commonwealth Immigration Ombudsman, the AHRC, the United Nations High Commissioner for Refugees and the International Committee of the Red Cross.

**(b) The Migration Act 1958 and the detention of stateless persons**

115. The Government is committed to minimising the incidence of statelessness and ensuring that stateless persons are treated no less favourably than people with an identified nationality. A person being stateless is not an indicator for detention. Where a person has claimed to be stateless and is not found to engage Australia's *non-refoulement* obligations, the Department of Immigration and Border Protection will explore resolution options including removal. Should removal be unavailable, cases will be assessed by the Department against the Guidelines for Ministerial intervention on a case by case-by-basis. If appropriate, cases will be referred to the Minister for consideration of a visa grant.

116. Where persons are found to be refugees and assessed by the Australian Security Intelligence Organisation to be a direct or indirect risk to security, they will be subject to an adverse security assessment. Individuals with an adverse security assessment remain in immigration detention until they can be removed from Australia, either to their country of origin or to a third country, where it is safe to do so. Any removal action taken is consistent with Australia's *non-refoulement* obligations. Where immigration detention occurs, including for those people who claim to be stateless, the length and conditions of detention are subject to regular review by the Department. The reviews consider the lawfulness and appropriateness of the person's detention, their detention arrangements and other matters relevant to their ongoing detention and case resolution. Furthermore, the least restrictive form of immigration detention appropriate to the circumstances is used for those people who cannot be released into the community. The continuing detention of a detainee is dependent upon factors such as the management of health, identity and security risks, the ongoing assessments of risks to the community and/or the integrity of Australia's migration programs.

117. The Independent Reviewer of Adverse Security Assessments, appointed on 3 December 2012, provides an independent review process for those in immigration detention who are owed protection obligations under international law, but who, by reason of their being the subject of an adverse security assessment, cannot be granted a permanent protection visa or have had their permanent protection visa cancelled. The Independent Reviewer also conducts periodic reviews, every twelve months, of adverse security assessments issued to people in immigration detention.

**(c) Children in detention**

118. In Australia, a period of detention is required for all illegal maritime arrivals, including children, so that health, security and character checks can be undertaken. Wherever possible and appropriate, children are detained in the least restrictive form of immigration detention, such as low security alternative places of detention or in community detention. Unaccompanied minors and vulnerable families with children are initially accommodated in low-security sites such as immigration residential housing, immigration transit accommodation and alternative places of detention for health, security and identity checks.

119. The Minister for Immigration and Border Protection is the legal guardian for children under 18 years of age, who are not Australian citizens, who did not enter Australia in the charge of, or for the purposes of living in Australia under the care of, a parent or relative or an intending adoptive parent and at the time of their arrival intend to become a permanent resident. The Minister ensures that guardianship obligations are delivered through arrangements with service providers who provide appropriate accommodation, care, welfare, education and recreational activities. The Minister's role as guardian is delegated to various departmental officers.

120. Unaccompanied minors are currently accommodated in the community where possible. Most unaccompanied minors in community detention live with a carer in a group house arrangement with other unaccompanied minors. Unaccompanied minors who have relatives in the community can be placed with these relatives. While they are in the community their rent, food and other household items are funded by the Government. They also receive a small weekly personal allowance for such things as mobile phone credit, transport or personal items.

121. In line with community standards, unaccompanied minors attend schools, have access to health care and are also supported to become involved in after school activities such as soccer clubs, art or music classes and other recreational or creative activities. If they are required to be accommodated in an alternative place of detention, the Government ensures that appropriate support services are available including departmental case managers, mental health support teams, medical staff, interpreting services and education staff. In making decisions concerning the welfare and care of unaccompanied minors in alternative places of detention, the Government draws upon the advice of these experts. Unaccompanied minors in alternative places of detention also receive pastoral care and support from a contracted service provider, in addition to care services provided by the facility services provider including a range of structured and unstructured programmes and activities which are run daily, on-site and off-site, such as school classes run by qualified providers.

122. To ensure that minors are not held in restrictive forms of immigration detention and where the claimed age of a person is in dispute, the department employs an age determination process which includes a focused interview. These interviews are conducted in the presence of an independent observer. A person is treated as a minor until such a time an assessment is made. During the interview process, two departmental officers interview the detainee and reach a finding independently. The interview includes questions relating to schooling, employment, claimed birth date, age of parents, any siblings and the timing of significant events. If the assessing officers' opinions differ, the detainee is given the benefit of the doubt and treated as a minor.

123. Following the passage of legislation in December 2014, the Australian Government has made very significant headway in reducing the numbers of children in held detention and all children have been moved from Christmas Island to the mainland. As at 30 December 2015, 91 children remained in held detention in Australia, down from a peak of almost 2,000 in mid-2013.

## **Migration processing framework**

### **(a) Excised offshore places and the Christmas Island detention centre**

124. Detention facilities on Christmas Island continue to be used to hold detainees and for initial processing of illegal maritime arrivals such as entry procedures and health checks before any person are transferred to the mainland or a regional processing centre. Australia is not taking steps, and has no plans, to repeal the provisions of the Migration Act 1958

relating to “excised offshore places.” Closure of the Christmas Island immigration detention centre is not being considered.

**(b) Equal access to fair and judicially reviewable determinations of protection applications**

125. *Onshore*: Protection visas meet Australia’s *non-refoulement* obligations under the 1951 *Convention Relating to the Status of Refugees* and its 1967 Protocol, the International Covenant on Civil and Political Rights and its *Second Optional Protocol aiming at the abolition of the death penalty* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. They provide protection to refugees as well as to persons who are at risk of suffering significant harm and cannot return to their home country.

126. *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (the RALC Act), which was passed by the Parliament on 5 December 2014, creates a new fast track assessment process for illegal maritime arrivals who arrived in Australia on or after 13 August 2012 and before 1 January 2014, and the Minister for Immigration and Border Protection allows the illegal maritime arrival to make a valid application for a temporary protection visa or a Safe Haven Enterprise visa.

127. Under the fast track assessment process, all illegal maritime arrivals will receive a full and comprehensive assessment of their claims for protection. Each protection assessment is assessed on its individual merits, on a case-by-case basis, with reference to up-to-date information on conditions in the applicant’s home country. Principles of procedural fairness and natural justice apply at all stages of decision making in the fast track assessment process.

128. Illegal maritime arrivals will have access to merits review conducted by the Immigration Assessment Authority, an independent statutory review body within the Refugee Review Tribunal. However, IMAs who have been refused a Protection visa and who have been found to put forward claims that indicate they have been previously refused protection, already have protection available elsewhere or have unmeritorious claims will not have access to merits review.

129. Decisions to refuse or cancel a temporary protection visa or Safe Haven Enterprise visa on character grounds are subject to independent merits review by the Administrative Appeals Tribunal.

130. *Nauru*: Questions regarding the Government of Nauru should be addressed to the Government of Nauru. *Papua New Guinea*: Questions regarding the Government of Papua New Guinea should be addressed to the Government of Papua New Guinea.

## **Human trafficking and slavery**

**(a) Training officers to proactively identify and respond to trafficking**

131. On 2 December 2014, the Australian Government launched Australia’s *National Action Plan to Combat Human Trafficking and Slavery 2015-2019* (National Action Plan). The National Action Plan provides the strategic framework for Australia’s response to human trafficking and slavery and sets clear goals and action items underpinned by key performance indicators for monitoring purposes. Continued training on human trafficking and slavery for Australian domestic frontline officers and Australian officials overseas are listed as action items under the National Action Plan.

132. Primary training for federal and state and territory police is conducted through the annual Human Trafficking Investigation Program, which provides officers with the

knowledge and skills to successfully conduct complex, sensitive, and protracted investigations of offences involving human trafficking,<sup>55</sup> including in a multi-jurisdictional or international environment. The AFP has also held a series of awareness-raising forums in each jurisdiction, in collaboration with state and territory police. In October 2014, the AFP and Victoria Police released an information and awareness package on human trafficking for frontline police officers. The package will be rolled out nationally to all state and territory law enforcement agencies. Since 2011, the AFP has also convened regular collaborative discussion exercises to increase awareness of trafficking issues amongst front line officers from both Government and non-government organisations.

133. The Department of Immigration and Border Protection provides specific ongoing training in identifying possible trafficking cases to compliance field officers and to officers taking up overseas postings. This training incorporates clear instructions around referral protocols to the AFP that are regularly monitored and reviewed. The Department has also provided guidance material to support key service and call centre staff that may either encounter suspected victims or receive allegations of human trafficking.

134. Regulatory authorities also assist in the identification of trafficking victims and closely liaise with the AFP. The Fair Work Ombudsman provides officers with operational guidance on trafficking issues. For example, the Fair Work Ombudsman Operations Manual provides Fair Work Inspectors with guidance about appropriate matters for referral to the Department of Immigration and Border Protection or the AFP, where concerns arise regarding a worker being exploited through slavery, forced labour or servitude. Contained within the Manual is a “Human Trafficking Indicators Guide”, developed by the AFP for Fair Work Inspectors to consider in determining potential trafficking offences for referral. The Fair Work Ombudsman has also published information for an adviser on handling enquires related to human trafficking on the Fair Work Infoline.

135. The Australian Government has also funded the development of an e-learning program for use by front line officers. This program was launched in March 2014. The Government also funds non-government organisations, unions and industry groups to provide outreach for trafficking victims and to conduct education and awareness initiatives.

136. Australia also plays a leading role in international efforts to prevent and disrupt human trafficking and in improving the capacity of other countries in the region to tackle this issue effectively. Australian agencies work through UN forums; regionally through the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime* (Bali Process) and bilaterally to advocate strong responses to trafficking, strengthen legal and justice systems, promote law enforcement cooperation, support information campaigns and provide technical training and assistance on victim protection. In 2014, Australia and Thailand co-chaired a Bali Process drafting committee which developed a *Policy Guide on Criminalizing Trafficking in Persons*, a practical tool to assist policymakers and practitioners strengthen legislative frameworks. In 2015, Australia has been a core member of a Bali Process drafting committee which is preparing policy guides on identifying and protecting victims of human trafficking.

137. Australia will also co-chair with Indonesia a Bali Process Working Group on Trafficking in Persons, which will bring together a network of experts to share information, lead projects, and promote regional cooperation to combat trafficking in persons. The first meeting of the working group, was held in March 2015. This was held together with a Bali

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<sup>55</sup> For ease of reference, this document uses “human trafficking” as a general term that encompasses slavery and slavery-like practices including servitude, forced labour, deceptive recruiting for labour or services, debt bondage and forced marriage.

Process regional symposium on trafficking for the purposes of labour exploitation, co-chaired by Australia and Thailand.

**(b) Assistance and protection for victims of trafficking**

138. In 2013, legislative amendments to the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth) came into force, strengthening the existing range of offences against human trafficking. The amendments provide protections to ensure that victims of trafficking are afforded appropriate support and protection when engaging with the criminal justice system. Victims can now give evidence by closed-circuit television, video link or video recording. This assists in protecting them from the defendant or members of the public. They can also have a support person with them while they give evidence.

139. Australia provides a comprehensive range of support services for trafficked people through the Support for Trafficked People Support Program (Support Program). The Support Program is available to all victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour, who meet the eligibility criteria. The Support Program is demand-driven and wholly funded by the Australian Government, with tailored case management services provided by the Australian Red Cross. It provides a 24 hours a day, seven days a week, 365 days a year national response. The Support Program helps people access a range of support services to improve their mental and physical health and well-being following the trauma of their trafficking experience, and provides opportunities to learn new skills and develop options for life after the Support Program. These services may include:

- Case management support
- Safe and secure accommodation
- Medical treatment (through Medicare and the Pharmaceutical Benefits Scheme, or as approved)
- Counselling
- Referral to legal and migration advice
- Appropriate skills development training, including English language and vocational guidance where appropriate and
- Social support

140. The Support Program provides an initial 45 days of intensive support for all people on the Support Program, irrespective of whether they are willing and/or able to assist with the criminal justice process. This time provides a period of reflection to enable people on the Support Program to recover from the trafficking experience and to consider options for the future, including whether they are willing to assist in the criminal justice process. Access to a further 45 days' support is available for trafficked people who are willing, but not able, to assist with the investigation or prosecution of a human trafficking or slavery-related offence, for reasons including age, ill health, trauma or practical impediment.

141. Minors can automatically access the 45 day extension of support if it is in their best interests. After the initial period of intensive support, access to the Support Program is linked to participation in the criminal justice process. Clients are provided with ongoing support until the investigation and prosecution of a human trafficking or slavery-related matter is finalised. Support may include:

- Assistance with securing longer-term accommodation
- Assistance to purchase essential furniture and household items; access to Medicare and the Pharmaceutical Benefits Scheme and

- Access to legal services and interpreters and assistance to obtain employment and training (including English-language training) if desired

142. People who are leaving the Support Program are generally provided a 20 day transition period during which they may be referred to longer-term support services and prepare for life after the Support Program. Trafficked people who do not wish to participate in the Support Program may be eligible to participate in other governmental and non-governmental programs.

**(c) Reparations to, and treatment of, victims**

143. The 2013 legislative amendments to the Commonwealth *Crimes Act 1914* ensure that reparation can be made to the victim of any federal offence for loss suffered by reason of the criminal conduct, even if the loss was not a direct result of that conduct. Previously, reparation was only available where the person had suffered loss as a direct result of the offence. The amendment ensures that reparation orders are more widely available.

144. In Australia, victims of trafficking are not inappropriately incarcerated, fined, or penalised for any breach of migration regulations associated with being trafficked. Australia's Human Trafficking Visa Framework enables foreign nationals who do not already have a valid visa and are suspected victims of trafficking to remain lawfully in Australia on a temporary basis rather than be subject to mandatory detention and possible removal. If trafficked people do not wish to assist law enforcement agencies, they may still seek assistance from the Department of Immigration and Border Protection or from a registered migration agent to identify other migration options. Where trafficked people have contributed to a prosecution or investigation and would be in danger should they return home, they may be eligible for grant of a permanent visa under the Human Trafficking Visa Framework.

## **Treatment of persons deprived of their liberty**

**(a) Incarceration of Indigenous men, women and juveniles**

145. Indigenous Australians remain highly over-represented in Australia's criminal and juvenile justice systems. The Australian Government is focussed on addressing the underlying disadvantage that leads to the high rate of incarceration and recidivism experienced by Indigenous Australians, including young Indigenous Australians and Indigenous women. Funding is provided through the Indigenous Advancement Strategy for offender interventions, youth diversion, prisoner through care and legal assistance services which are activities specifically designed to reduce the adverse contact of Indigenous Australians with the criminal justice system.

146. Commonwealth, State and Territory governments work together under the National Indigenous Law and Justice Framework<sup>56</sup> which contains principles, goals and actions to guide work in this area. All states and territories have agreed to reduce the overrepresentation of Indigenous people in Australia's criminal justice systems through effective crime prevention, diversion and recidivism reduction programmes under the National Indigenous Law and Justice Framework.

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<sup>56</sup> For more information, please refer to the following links: <http://www.ag.gov.au/LegalSystem/IndigenousLaw/Indigenousjusticepolicy/Documents/National%20Indigenous%20Law%20and%20Justice%20Framework%20-%20Good%20Practice%20Appendix.pdf> and [.http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/national%20indigenous%20law%20and%20justice%20framework.pdf](http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/national%20indigenous%20law%20and%20justice%20framework.pdf).

147. The Australian Government currently administers grant programs that benefit community safety and research into Indigenous law and justice issues, and provides funding to facilitate Indigenous access to legal support. The Australian Government also provides funding for programs designed to reduce the adverse contact of Indigenous Australians with the criminal justice system. These include offender programs, youth diversion and prisoner through care programs. State and territory governments also provide funding for a range of programs to address the over-representation of Indigenous Australians in the criminal justice system.<sup>57</sup>

**(b) Prison conditions**

148. The Federal Government does not operate any prisons. State and territory governments work to improve the conditions of the prisons that they operate. Examples of initiatives to improve prison conditions are provided in Appendix G.

**(c) Access to appropriate mental health care**

149. All states and territories have mental health care programs available to prisoners. Examples of available healthcare programs are provided in Appendix H.

**(d) Independent external mechanisms**

150. Each state and territory has in place arrangements for monitoring and inspecting prisons and places of detention. Examples of mechanisms that are in place are provided in Appendix I.

**(e) Deaths in custody**

151. Each state and territory has in place arrangements to ensure that all deaths in custody are reviewed and investigated by independent bodies. For example, each has a state coroner's office which is independent and can investigate deaths in custody. Further examples are provided at Appendix J.

**(f) Non-custodial measures and diversion programmes**

152. The states and territories have adopted several non-custodial measures and diversion programmes. Examples of measures and programmes that are in place are provided in Appendix K.

### **Preventative detention of convicted persons**

153. Under Australia's federal system of government, criminal law enforcement is primarily a matter for the Australian states and territories, with each managing their own criminal justice system, including the development of policy and legislation in relation to sentencing offenders and the administration of police, courts and prisons. Under the Constitution, the Commonwealth is limited to dealing with criminal matters that fall within its federal jurisdiction and within the scope of Commonwealth powers, such as the importation of drugs, social security fraud, people smuggling and theft or destruction of Commonwealth property. The *Crimes Act 1914* (Cth) provides for the sentencing, imprisonment and release of federal offenders. There is no provision that allows convicted federal offenders regarded as dangerous to be detained in prison beyond the expiry of the sentence imposed by the court.

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<sup>57</sup> See Appendix F.

154. *New South Wales (NSW)*: In NSW, a continuing detention or extended supervision order may be made by the Supreme Court under the *Crimes (High Risk Offenders) Act 2006*. These orders allow Corrective Services to continue to detain or supervise a person after the expiry of their sentence, up to a maximum of 5 years. This can only occur where the court is satisfied to a high degree of probability that the person poses an unacceptable risk of committing serious sex or violent offences if released without supervision. This risk is assessed taking into account a number of factors including the reports of two qualified psychiatrists or psychologists who have conducted individual assessments of the offender. Orders are subject to regular review and may be revoked at any time. Offenders may appeal against the imposition of an order on any question of law or fact. Orders under this legislation serve the legitimate purpose of protection and, as such, the government considers that they are not arbitrary or punitive in nature. Offenders do not automatically qualify for an order by virtue of having committed a particular offence. Eligibility is individually assessed. The Supreme Court must be satisfied that an order is necessary and the order must be in the least restrictive terms possible. An order for detention cannot be made if community supervision would adequately address the risk posed by the offender. The orders are supported by the availability of rehabilitation programs in prisons and offenders are given opportunities to participate in those programs before the expiry of their sentence.<sup>58</sup> In early 2015 there were 53 offenders subject to an extended supervision order. Two offenders are subject to a continuing detention order. All offenders subject to extended supervision orders have access to rehabilitation programs, commonly provided through community based psychologists. There were also no emergency detention orders in place.

155. The *Crimes (High Risk Offenders) Amendment Act 2014 (NSW)* commenced on 7 January 2015. The Act amended the *Crimes (High Risk Offenders) Act 2006* in relation to aspects of the supervision and detention of high risk sex and violent offenders, including introducing a number of important safeguards:

- Emergency detention orders can only be sought on application of the NSW Attorney-General
- Applications must be accompanied by a sworn affidavit of the Commissioner of Corrective Services, or an Assistant Commissioner – evidence must be given to the court as to why there are no other practicable and available means of ensuring community safety other than detention of the offender
- An emergency detention order can only last for at most 120 hours; it cannot be renewed or sought again based on the same set of circumstances
- There is a right of appeal to the Supreme Court against granting of an emergency detention order

156. These safeguards ensure that the offender's loss of liberty will be for the shortest period possible before that person either returns to the community or is given an opportunity to appear before the Court to be heard.

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<sup>58</sup> The vast majority of orders made under the *Crimes (High Risk Offenders) Act 2006* are for supervision in the community. Only one of the 22 orders made under the Act since 2010 has been for continuing detention. That order related to an offender, Mr. Tillman, who had been subject to an extended supervision order and had breached it. This matter was considered by the UN Human Rights Committee, which found that the State party did not demonstrate that Mr. Tillman's rehabilitation could not have been achieved by less restrictive means than continued detention (CCPR/C/98/D/1635/2007). That finding is rejected by Australia and, as indicated in Australia's response to the Committee's views, the NSW Government does not consider that further action is necessary in relation to the scheme under which Mr. Tillman was detained.

157. *Victoria: The Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (SSODSA) has been in operation in Victoria since 1 January 2010. The SSODSA is a civil scheme that provides for post-sentence supervision and detention of serious sex offenders convicted of certain sexual offences (such as rape) who are serving a custodial sentence including parole. The main purpose of legislation is to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who present an unacceptable risk of harm to the community to be subject to ongoing detention or supervision. The secondary purpose of the Act is to facilitate the treatment and rehabilitation of such offenders.

158. The relevant court may make a supervision order or a detention order if the court is satisfied that the offender poses an unacceptable risk of committing a relevant offence (namely a sexual offence, such as rape) if a supervision order or detention order is not made and the offender is in the community. Offenders are not automatically subject to the scheme and it is not solely based on an offender's conviction for a sexual offence for which they served a custodial sentence. Each offender is individually assessed through a report by a medical expert.

159. The orders are subject to regular review and may be revoked. During reviews, the court considers a progress report on the offender including their risk of re-offending if the order was revoked and the offender's participation in any rehabilitation or treatment programs. The orders may be renewed, extended or revoked. The orders are also subject to appeal.

160. The conditions imposed on an offender subject to supervision aim to constitute the minimum interference with the offender's liberty, privacy or freedom of movement that is necessary in the circumstances to ensure the purposes of the conditions and are reasonably related to the gravity of the risk of the offender re-offending.

161. The regime is compatible with Victorian *Charter of Human Rights and Responsibilities Act 2006*.

## **Ensuring access to justice**

### **Ensuring equality in access to justice to assist marginalized and disadvantaged people**

162. The Australian Government is committed to ensuring access to justice for marginalised and disadvantaged people and is investing \$1.6 billion over the next five years for a range of legal assistance services to help disadvantaged people with their legal problems. This includes \$1.3 billion over five years under a National Partnership Agreement on Legal Assistance Services for Community Legal Centres and Legal Aid Commissions to ensure some of the most vulnerable people in Australia, including people experiencing domestic violence, culturally and linguistically diverse people, and Indigenous Australians, have access to legal services. It also includes \$350 million over five years for Indigenous legal assistance providers, in line with the Government's Indigenous affairs priorities and ongoing commitment to improving law and justice outcomes for Indigenous Australians.

163. In addition, the Australian Government is providing \$100 million Women's Safety Package to assist women and children at high risk of experiencing violence. The Women's Safety Package includes \$15 million over three years for specialist domestic violence units and health-justice partnerships to be set up in existing legal assistance providers. These services will increase opportunities for victims of family violence to seek legal help safely.

164. The Commonwealth, states and territories have recently worked together with the legal assistance sector to reform legal assistance arrangements. These commenced from

1 July 2015. The reforms recognise the important complementary roles of different service providers in the justice system, and help clients to better navigate the system. They are intended to support a more sustainable legal assistance sector by ensuring that resources are directed where they are most needed and focus upon increased coordination, collaboration and better planning of front-line service delivery.

165. Other measures that the Government is currently undertaking to ensure equality of access include:

- Working with civil justice system stakeholders and data experts to develop a framework to guide the collection of consistent data to create an evidence base for the civil justice system, and
- Amalgamating the three key Commonwealth merits review tribunals (the Administrative Appeals Tribunal merged with the Social Security Appeals Tribunal, Migration Review Tribunal and Refugee Review Tribunal) commenced on 1 July 2015, with the aim of further enhancing the efficiency and effectiveness of the Commonwealth merits review jurisdiction through improved quality and consistency of Government decision making.

### **Improve access to culturally appropriate legal assistance services**

166. Australia's Indigenous policy approach recognises the importance of culturally appropriate service delivery, including legal assistance services.

167. Aboriginal and Torres Strait Islander Legal Services are funded by the Australian Government to provide high-quality, culturally appropriate and accessible legal assistance services for Indigenous Australians. While law and order is primarily the responsibility of state and territory governments, the Australian Government has funded legal assistance for Indigenous Australians in metropolitan, regional and remote locations since 1971. The services ensure Indigenous Australians can fully exercise their legal rights as Australian citizens and recognise Indigenous Australians continue to be significantly overrepresented as both offenders and victims in the criminal justice system. The support demonstrates the Government's concern over the high level of disadvantage faced by Indigenous Australians across all significant social and economic indicators and the ongoing difficulty Indigenous Australians face in accessing mainstream legal services. Total funding for 2014-15 for the *Indigenous Legal Assistance Programme* is \$74.31 million.

168. Through the *Indigenous Advancement Strategy's Safety and Wellbeing Programme*, the Australian Government funds Indigenous family violence prevention legal services to provide free legal assistance, court support, casework and counselling services for victim-survivors of family violence and/or sexual assault who are Indigenous, or whose partner or children are Indigenous. The Programme funds 14 service provider organisations in six states and territories.

169. The Australian Government provides funding to support free access to interpreters for Northern Territory law and justice agencies and Government-funded legal service providers. The Government is also providing funding to improve the capacity of Indigenous interpreting services in central Australia, to support the operations of the Kimberley Interpreting Service and to build the capacity of the National Accreditation Authority for Translators and Interpreters to meet the needs of the Indigenous interpreting sector.

170. State and Territory Governments are also responsible for the health and criminal justice systems, including ensuring that interpreters are available to clients of services which they fund.

171. *Northern Territory*: The Northern Territory has adopted a Language Services Policy which recognises the importance of providing culturally and linguistically sound service to ensure all clients are able to access services in a fair and equitable manner. The policy acknowledges the importance for government agencies to make use of the Aboriginal Interpreter Service, which provides interpretation in over 100 Indigenous languages and dialects in use in the Northern Territory.

## Juvenile justice

172. Australian governments are taking active steps to improve their juvenile justice system and ensure respect for the rights of children in detention. Detailed information on these measures can be found in Australia's 2008 report to the Committee on the Rights of the Child and the written response to the List of Issues prior to Australia's appearance before the Committee in 2012.

### (a) Increasing the age of criminal responsibility from 10 years

173. The age of criminal responsibility for Commonwealth and state and territory offences is ten years of age.<sup>59</sup> The Government deems this appropriate because it accords with modern Australian community expectations of juvenile criminal responsibility of children. It also reflects Australia's particular history and culture in accordance with the commentary to the UN's *Standard Minimum Rules for the Administration of Juvenile Justice 1985*.

174. At the federal level, there is a rebuttable presumption that a child between the age of 10 and 14 years of age is incapable of committing crime.<sup>60</sup> The Australian Government considers this is appropriate because it allows for a gradual transition to full criminal responsibility and provides a safeguard for children between 10 and 14 years. Determining whether a child aged between 10 or 14 is criminally responsible for an act requires that the prosecution prove beyond reasonable doubt that the child knew that his or her conduct was wrong. The child does not need to know that the act is a crime or contrary to law. Similar rules exist in state and territory criminal law.

### (b) Child-appropriate facilities that are separated from adult detainees

175. Australia has a significant landmass of approximately 7.7 million square kilometres and a relatively small population of just over 23 million. This means that areas of the State are very sparsely populated, presenting practical challenges in maintaining separate facilities for adults and children in certain regions. However, children and young people in conflict with the law are detained in age-appropriate facilities, generally separate from adult detainees. In these facilities, they are provided with access to appropriate programs, counselling and training courses. Examples of facilities, and programs and courses, are provided in Appendix L.

### (c) Abolition of mandatory sentences for children

176. Mandatory sentences do not apply to any offences committed by children under federal law. Children convicted of offences against a federal law are liable to penalties similar to penalties against a state or territory law.<sup>61</sup> Most states and territories do not apply

<sup>59</sup> See thresholds set out in section 4M of the Crimes Act 1914 (Cth) and section 7.1 of the Criminal Code Act 1995 (Cth).

<sup>60</sup> See section 4N of the Crimes Act 1914 (Cth) and section 7.2 of the Criminal Code.

<sup>61</sup> Subsection 20C(1), Crimes Act 1914 (Cth).

mandatory sentences for children. For example, mandatory or statutory minimum sentences do not apply to any person under age of 18 for any offences committed under Victorian law.

**(d) The re-integration of juvenile offenders**

177. The Australian Government supports the states and territories undertaking initiatives to implement diversionary measures and alternative sentencing options for juvenile offenders. The *Crimes Act 1914* (Cth) provides that a child or young person charged or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the state or territory.<sup>62</sup> This enables young federal offenders to be dealt with by “specialist juvenile justice systems” established in the states and territories. National bodies, such as Australasian Juvenile Justice Administrators, assume responsibility for overseeing the administration of juvenile justice and promoting national standards for youth justice.<sup>63</sup> The Australasian Juvenile Justice Administrators publishes “Standards for Juvenile Custodial Facilities” which details service standards for juvenile custodial facilities. It seeks to align Australian standards with comparable international standards. The Commonwealth supports law enforcement and justice systems giving due consideration to the rights of the child.

178. States and territories have responsibility for Australia’s criminal justice systems, and provide individual case management to detainees to plan for their positive reintegration into their communities. Examples of these programs, as well as examples of how the Government provides support for Indigenous children, are at Appendix M.

**(e) An independent mechanism to monitor compliance**

179. The states and territories are responsible for monitoring the conditions in juvenile detention facilities. Two examples are provided below. For further examples see Appendix N.

180. *Tasmania*: Mechanisms to enable independent oversight and investigation include the Ombudsman Tasmania, the Tasmanian Commissioner for Children, the Tasmanian Integrity Commission and the Tasmanian Prison Service Directorate Security Unit.

181. *ACT*: Independent agencies with formal powers of oversight and inspection at the Bimberi Youth Justice Centre include the Official Visitor, the Aboriginal and Torres Strait Islander Official Visitor, the Public Advocate and the ACT Human Rights Commission.

**(f) Measures taken to improve the situation of homeless children**

182. According to the Specialist Homelessness Services report from 2013-2014, children aged between 0–17 years represent 27 per cent of clients receiving support, despite representing only 23 per cent of the general population. Since the changeover from the Supported Accommodation Assistance Program data collection methods to the Specialist Homelessness Services Collection in July 2011, children who are directly receiving services from a homelessness agency are now counted as individual clients, regardless of whether they are accompanied by a parent. Children need assistance from homelessness agencies for a variety of reasons. For young people aged 15 to 24, who presented to an agency alone, “housing crisis” (16%) was the most common main reason for seeking assistance followed by “domestic and family violence” (15%) and “inadequate or inappropriate dwelling conditions” and “relationship/family breakdown” (both 13%).

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid; See also the Australasian Juvenile Justice Administrators Terms of Reference.

183. A range of services for children experiencing or at risk of homelessness are funded by the states and territories under agreements between the Commonwealth and state and territory governments. The agreements clarify the roles and responsibilities of the Commonwealth, states, territories and local government in the delivery of housing and homelessness services across relevant sectors. The 2014-2015 *National Partnership Agreement on Homelessness* provided funding of \$115 million on frontline services to prevent and reduce homelessness. Under the 2014-15 agreement, there were more than 140 initiatives supporting women and children experiencing domestic and family violence, including support to stay in their present housing where it is safe to do so. The 2015-17 NPAH commenced on 1 July 2015. This Agreement provides \$230 million in Commonwealth funding over two years (\$115 million each year) to fund frontline homelessness services. Funding is based on the amounts provided to states and territories under the 2014-15 NPAH. Under the new NPAH, the Commonwealth has given funding priority to frontline homelessness services focusing on women and children experiencing domestic and family violence, and homeless youth.

184. Complementing the measures under the Agreement, the Australian Government also funds Reconnect, a community based early intervention program for young people aged 12 to 18 years or 12 to 21 years for the 13 Newly Arrived Youth Specialist Services (NAYS). The NAYS Services provide support to young people who have arrived in Australia over the previous five years, focusing on people entering Australia on humanitarian visas and family visas, and who are homeless or at risk of homelessness. Reconnect uses early intervention strategies to help the young person stabilise their living situation, achieve family reconciliation and improve their level of engagement with work, education, training and the community. Of the 6200 clients that received support in 2013-2014, more than 90 per cent reported an overall improvement in the young person's situation at the end of support. In February 2013, the program received funding for a further three years through to 2016.

### **Combatting cases of discrimination, multiculturalism and combatting racism**

185. Since 1987, the Australian Government has had successive multicultural and settlement advisory councils which have been committed to advancing multicultural Australia. The current Australian Multicultural Council (AMC), whose term commenced on 15 December 2014, provides advice on issues of multicultural policy and programmes over its three year term. The Terms of Reference for the Council include: advice on harnessing the economic and social benefits of Australia's culturally diverse population, building stronger and more cohesive communities, and promoting stronger intercultural and interfaith understanding.

186. Diversity and Social Cohesion grants are aimed at building socially cohesive Australian communities. They do so by supporting projects that enhance the long-term capacities of higher need and at-risk communities, including the promotion of stronger community relations and the development of sustainable community partnerships. They also aim to promote respect, fairness and a sense of belonging for Australians of every race, culture and religion.

187. Australia's Multicultural Access and Equity Policy acknowledges that to properly serve our multicultural society, Australian Government departments and agencies have an obligation to ensure programmes and services are accessible to all eligible Australians, and deliver equitable outcomes for them, regardless of their cultural or linguistic backgrounds.

188. The policy aims to overcome barriers of culture or language that impede the delivery of government programmes and services so that people can get the support they need in order to participate fully in the Australian community.

189. The National Anti-Racism Strategy, launched in August 2012, is a partnership between the AHRC, the Government and non-government representatives, with the aim to “promote a clear understanding in the Australian community of what racism is, and how it can be prevented and reduced” The key objectives of the Strategy are:

- To create awareness of racism and how it affects individuals and the broader community
- To identify, promote and build on good practice initiatives to prevent and reduce racism and
- To empower communities and individuals to take action to prevent and reduce racism and to seek redress when it occurs

190. Australia recognises that newly-arrived migrants need support as they adjust to a new life in Australia. The Government ensures that migrant and humanitarian entrants can become contributing members of the Australian community as quickly as possible by providing settlement support. This support includes programmes which enable people to develop the knowledge and skills they need to participate in society and to ensure that government and community programs are responsive to their cultural, linguistic and religious diversity.

191. The *Racial Discrimination Act 1975* (Cth) prohibits discrimination and vilification on the basis of race, colour, descent or national or ethnic origin in all areas of public life. Religion is not a protected attribute under the Act. Individuals who consider they have been unlawfully discriminated against may make a complaint to the AHRC. The AHRC investigates and, where appropriate, attempts to conciliate and resolve complaints. Where a complainant is not satisfied with the outcome of conciliation, complainants may take their complaint to the Federal Circuit Court or Federal Court of Australia for judicial consideration. Discrimination on the basis of race is also unlawful under the legislation of the states and territories, with “race” being defined differently in each jurisdiction. Discrimination on the basis of religion is unlawful in Queensland, Victoria and Tasmania; and NSW and Tasmania also prohibit discrimination on the basis of “ethno-religious origin”.

192. The *Criminal Code Act 1995* (Cth) contains offences prohibiting urging violence that are designed to protect the community from violence that is politically, religiously or racially motivated.<sup>64</sup> This includes a new “advocating terrorism” offence, which came into effect on 1 December 2014, designed to prevent people from promoting and encouraging the doing of terrorist acts or terrorism offences. Those urging violence offences carry a maximum penalty of up to seven years while the advocating terrorism offence carries a maximum penalty of five years imprisonment. The offences have an extended geographical reach, so that they apply to the broadest possible range of conduct, including urging violence or advocating terrorism from an overseas location.

193. Relevant statistical information relating to complaints to the AHRC under the *Racial Discrimination Act 1975* (Cth) over the past six financial years is available on the AHRC’s website. The AHRC does not publish disaggregated data relating to the complainants’ gender or race in relation to complaints of racial discrimination.

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<sup>64</sup> Sections 80.2A and 80.2B of the Criminal Code Act 1995.

## Compulsory voting

### (a) Legislative provisions disqualifying persons from voting on the basis of disability

194. The *Commonwealth Electoral Act 1918* (Cth) provides that “...a person who by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting... is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election...”<sup>65</sup> This is a two part test. Firstly, the person must be of unsound mind. Secondly, as a result of being of unsound mind the person must be incapable of understanding the nature and significance of enrolment and voting. The Australian Electoral Commission<sup>66</sup> may not object to a person’s enrolment on the grounds of the above provision.<sup>67</sup> It is usually someone close to the person who raises an objection and seeks to have that person excused from the obligation of compulsory enrolment and compulsory voting.<sup>68</sup>

195. In practice, the provision is enlivened when a person raises a concern with the Australian Electoral Commission about another person, which initiates a formal process which may result in the removal of the second person from the electoral roll.<sup>69</sup> One of the protections that the Act affords is that a person cannot be removed from the Roll on the ground specified above unless the objection is accompanied by a certificate of a medical practitioner stating that, in the opinion of the medical practitioner, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting. Similar provisions exist in some state and territory electoral legislation.<sup>70</sup>

196. The ALRC completed its final report in its inquiry into Equality, Capacity and Disability in Commonwealth Laws. The report was tabled in Parliament on 24 November 2014. The ALRC made seven recommendations in relation to electoral matters. The Commonwealth Government is considering the recommendations.

### (b) How legislation regarding compulsory voting operates in practice

197. In relation to compulsory voting, the Electoral Act provides that it is the duty of every elector to vote at each election. An elector is guilty of an offence if the elector fails to vote at an election. The Act enables a person to request not to be penalised for not voting if they are able to demonstrate that they had a “valid and sufficient” reason to not vote.

<sup>65</sup> Section 93(8)(a) of the Commonwealth Electoral Act 1918 (Cth).

<sup>66</sup> The Australian Electoral Commission is responsible for conducting federal elections and referendums and maintaining the Commonwealth electoral roll. The Commission also provides a range of electoral information and education programs and activities.

<sup>67</sup> Section 114(3) of the Commonwealth Electoral Act 1918 (Cth).

<sup>68</sup> Subsection 93(8)(a).

<sup>69</sup> These concerns are generally raised by persons close to the elector in question, and motivated by what they see as the best interests of the person concerned, for example protecting them from having to respond to repeated penalty notices for failure to vote at successive elections. Advisory Report on the Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012, Joint Standing Committee on Electoral Matters report, August 2012. Available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=em/electreferendumbill2012/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/electreferendumbill2012/report.htm).

<sup>70</sup> For example, in Victoria, Section 18 of the Charter Act provides the right to vote and section 48(2)(d) of the Constitution Act 1975 (Vic) provides for removal from the role, including on the basis of unsound mind. In NSW, section 22 of the Parliamentary Electorates and Elections Act 1912 (NSW) provides the entitlement to vote and section 25 of that same act deals with removal from the role, including on the basis of unsound mind.

198. As voting is compulsory, electors are given a number of ways to cast their vote, including postal voting, voting at Australian overseas missions and in remote localities, and voting in person at a polling place in their electorate. Furthermore, as voting is conducted by secret ballot, to fulfil their obligations under the Electoral Act electors are only required to receive and lodge a ballot paper. Therefore, Australian electors can exercise their right to vote by submitting a blank or non-compliant ballot paper, although this is not encouraged.

199. The Australian Government believes that voting is a civic duty comparable to other duties that citizens perform such as taxation and compulsory education and that this ensures a Parliament that reflects more accurately the will of the people. Australia's electoral system is based upon the democratic principle of universal adult suffrage recognised in article 25(b) of the ICCPR. Compulsory voting serves as a powerful symbol of the universalistic nature of Australian society. Consistent with Australia's obligations under article 25(b), all citizens are equally valued participants in the democratic process regardless of economic, residential or employment status and personal characteristics such as age, race or sex.

**(c) Measures taken to ensure effective consultation with Indigenous peoples**

200. The *Environment Protection and Biodiversity Conservation Act 1999* is the Australian Government's primary environment and heritage legislation. The Act includes provisions for protecting and managing the World Heritage and National Heritage values of inscribed or listed places. The World and National Heritage management principles, which are prescribed in regulations to the Act, provide a guiding framework for excellence in managing heritage properties.

201. The National Heritage management principles recognise that Indigenous people are the primary source of information on the value of their heritage and that the active participation of Indigenous people is integral to the effective management of Indigenous heritage values. The Commonwealth must use its best endeavours to ensure that a management plan is prepared and implemented in cooperation with the relevant state or territory. Management plans for National Heritage places must not be inconsistent with these management principles.

202. The *Native Title Act 1993* (Cth) sets out a process to recognise Indigenous Australian's native title rights and interests and procedures to be followed when certain other interests, such as mining, interact with native title rights and interests. The Native Title Act seeks to balance potentially competing interests in land that is or may be subject to a determination recognising native title.

203. A "right to negotiate" applies when acts such as mining and mining related exploration are to occur on land that is subject to native title. The "right to negotiate" requires all parties to engage in a process of negotiating in good faith for a minimum period of six months with a view to reaching agreement on the proposal. If agreement cannot be reached during the period, an application may be made for a determination about whether the mining or exploration may proceed which may be subject to conditions. If negotiations have not been conducted in good faith, the determination must not be made and parties must continue to negotiate in good faith.

204. The Native Title Act also provides for native title representative bodies and service providers, whose primary role is to assist Indigenous Australians in native title matters. The Government currently funds 15 bodies and providers to perform this role. The Government also funds capacity building services including training and research for native title representative bodies and service providers. The Act places an emphasis on Indigenous people being involved in proposed actions affecting their land. It does not operate as a veto,

instead it seeks to balance potentially competing interests in land that is or may be subject to native title

205. Parties may enter into an Indigenous land use agreement (ILUA) under the Native Title Act to agree, among other things, that acts affecting native title may occur. The agreements may cover a diverse range of matters such as land use protocols, cultural heritage agreements, and compensation.

206. The proliferation of native title agreement making is one example of the broadening engagement of Indigenous people in relation to land. As at 31 December 2014, there were 959 ILUAs registered with the National Native Title Tribunal covering 26.9% of the total Australian land mass. In the 2013-14 financial year, 118 ILUAs were registered with the overwhelming majority in Queensland. In addition, the various Commonwealth and state and territory statutory regimes and cultural heritage laws provide for Indigenous Australians to be granted, or to access, their traditional lands, and/or to participate in decision-making relating to traditional sites and objects. The National Congress of Australia's First Peoples is the national representative body of the Indigenous Peoples of Australia. It is an independent company, owned and controlled by its membership and directors. As of 18 February 2015, the National Congress had 8,241 individual members and 181 member organisations.<sup>71</sup> Since 2009-10, the National Congress has received \$29.3 million from the Australian Government to support its establishment and operations.

207. The Australian Government engages with a range of Indigenous leaders, organisations and communities, including the National Congress, when designing policies, programmes and implementing services that affect Aboriginal and Torres Strait Islander peoples

### **Stronger Futures in the Northern Territory**

208. The *Stronger Futures in the Northern Territory National Partnership Agreement* is a 10 year, \$3.4 billion investment that was introduced in 2012 to improve the lives of Aboriginal people in the Northern Territory. The measures under this Agreement respond directly to priorities identified as the most urgent by Indigenous people in the Northern Territory during extensive consultations undertaken in mid-2011. More than 480 meetings were held with people in around 100 communities and town camps across the Northern Territory.

209. In developing the Stronger Futures legislation, careful consideration was given to Australia's human rights obligations, including the *International Convention on the Elimination of All Forms of Racial Discrimination* and other key international instruments. The legislation was designed to be consistent with the Racial Discrimination Act, and contains explicit provisions which make it clear that Stronger Futures legislation does not affect the operation of the Racial Discrimination Act.

210. The Stronger Futures legislation was examined by the Australian Parliament's Parliamentary Joint Committee on Human Rights in 2013. The Committee acknowledged that measures under Stronger Futures had been motivated by the policy goal of seeking to reduce disadvantage and to promote equal enjoyment of human rights. The Committee initiated a twelve month review of the legislation in 2014 and is due to report on this by late 2015.

<sup>71</sup> Figures sourced directly from National Congress of Australia's First Peoples, 27 March 2015.

211. In the May 2015 Budget, the Australian Government announced funding of \$988.2 million over eight years to establish a new National Partnership Agreement (NPA) on Northern Territory Remote Aboriginal Investment, replacing the existing NPA on Stronger Futures in the Northern Territory. \$1.4 billion will continue to be administered by the Australian Government departments of the Prime Minister and Cabinet, Social Services and Health to provide services and support for Indigenous Australians.

## **Native title and Stolen Generations**

### **Native title**

212. The Government continually reviews and seeks to improve the operation of the native title system, and regularly engages with stakeholders to seek their views. Since Australia's fifth periodic report the Government has initiated a range of native title related legislative reforms and reviews, on which native title representative bodies and relevant native title groups and organisations have been consulted. The most significant of these are detailed below.

213. Amendments to the Native Title Act in 2009 and 2012 realigned functions between the Federal Court and the National Native Title Tribunal, giving the Federal Court the central role in the management of native title claims. The number of claims resolved by consent determination per year has increased more than fourfold, indicating that this structure is contributing to speedier, negotiated outcomes.

214. Provisions in the 2009 amendments gave the Federal Court more flexibility about how to manage native title claims, including through:

a) Enabling the Court to rely on an agreed statement of facts between the key parties, designed to simplify connection processes in consent determinations; and

b) Giving the Court the ability to make orders about matters beyond native title, which recognises the broad nature of agreements negotiated and entered into by some parties. Broader settlements can deliver real economic and other benefits for claimants, and resolution and certainty for all parties. Native title claims often raise issues other than native title. Parties are now able to resolve a range of native title and related issues through native title agreements, encouraging comprehensive claim resolution within the one process.

215. Provisions in the 2009 Native Title Act amendments apply the 2008 amendments to the *Commonwealth Evidence Act 1995* to native title claims that commenced prior to 1 January 2009. This includes amendments which recognise the manner in which Indigenous communities record traditional laws and customs, which can greatly assist Indigenous people to give evidence in native title matters.

216. The *Carbon Credits (Carbon Farming Initiative) Act 2011* deems exclusive possession native title holders to have carbon rights over the Crown land which is the subject of their native title, giving them the right to undertake sequestration projects under the Act without requiring the consent of the Crown. The Act also gives all determined native title holders, as "eligible interest" holders, the right to consent to sequestration projects by others on their land.

217. An independent review was commissioned by the Government into the role and functions of native title representative bodies and service providers to ensure they continue to meet the evolving needs of the system and particularly the needs of native title holders after native title claims have been determined. The review reported in March 2014 and the Government is considering its response.

218. In 2013 the ALRC was asked to inquire into Commonwealth native title laws and legal frameworks, and to specifically address two major issues:

- Connection requirements relating to the recognition and scope of native title rights and interests and
- Any barriers to access to justice posed by the authorisation and joinder provisions

219. The ALRC provided its final report to the Australian Government on 4 June 2015.

220. On 10 October 2014, COAG announced an urgent investigation into Indigenous land administration to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses to provide jobs and economic advancement for Indigenous people.

221. As part of the investigation, an Expert Indigenous Working Group is working with Commonwealth, state and territory governments to ensure that policy directions and proposals are developed with the involvement of Indigenous stakeholders. The Investigation reported to COAG in December 2015.

### **Stolen generations**

222. On 13 February 2008 the then Prime Minister delivered the National Apology to Australia's Indigenous Peoples in recognition of the profound grief and loss suffered as a result of past government policies and practices. This created an opportunity for a new relationship based on mutual respect and mutual responsibility between Indigenous and non-Indigenous Australians.

223. The Australian Government's approach focuses on practical changes to improve the lives of the Stolen Generations and to make amends for the past wrongs by providing healing and support services, funded under the *Indigenous Advancement Strategy*.

224. The Australian Government has also funded the collection and preservation of some records and oral history recording of those removed from their families. These collections are publicly available through websites and the National Library of Australia.

### **Stolen wages**

225. Indigenous "stolen wages" relates to the period from the 1890s to the 1970s when the governments of some jurisdictions within Australia controlled the wages and savings of Indigenous people under the terms of various "protection acts", with such monies being held in government accounts or trust funds. The Australian Senate Committee on Legal and Constitutional Affairs conducted an inquiry into stolen wages and published its report *Unfinished Business: Indigenous Stolen Wages* in 2006. The report recommended that all levels of government facilitate unhindered access to their archives for Indigenous peoples and their representatives for the purposes of researching the Indigenous stolen wages issue as a matter of urgency, funding an education and awareness campaign and consulting with Indigenous peoples on the issue. In its response to the report, the Australian Government indicated that it would consider any substantive claims from Indigenous Australians who came within the Commonwealth's jurisdiction, in the NT and the ACT, during the relevant period. To date, NSW, QLD and WA have instituted compensation or reparation schemes for stolen wages.