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Respect, Protect, Fulfil:

**Submission to the Attorney-General's Department on the
Concluding Observations of the Human Rights Committee**

November 2009

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1. Introduction

1. The Public Interest Law Clearing House (Vic) Inc (**PILCH**) welcomes the opportunity to participate in the public consultation on the UN Human Rights Committee's (**HRC**) Concluding Observations on Australia. The HRC's Concluding Observations reinforce and clarify Australia's obligations under the *International Covenant on Civil and Political Rights (ICCPR)*.¹ They also serve as an authoritative barometer of Australia's compliance with the ICCPR and provide important guidance on the steps required to address any shortcomings or gaps in its implementation of the human rights and fundamental freedoms enshrined in that instrument.
2. PILCH commends the Attorney-General on the initiative to undertake this public consultation and welcomes the opportunity to provide feedback on some of the steps required to implement the recommendations of the HRC and ensure full compliance with the ICCPR.
3. This submission examines the Concluding Observations of the HRC with respect to Australia² (**Concluding Observations**) and makes concrete suggestions on the steps that the Australian Government should take to implement the HRC's recommendations. The submission does not address all of the HRC's Concluding Observations, but rather those that relate to areas in which PILCH has particular expertise and experience.
4. The submission begins in section 3 by analysing how the Australian Government might implement the HRC's recommendations on improving the situation of Indigenous Australians. Section 4 considers some of the steps that the Government might take to implement the HRC's recommendations in relation to the rights to non-discrimination and equality. Section 5 of the submission addresses the issue of homelessness and makes recommendations on how the Government can improve the situation of persons at risk of, or experiencing, homelessness. Sections 6 and 7 suggest measures that the Government might adopt to implement the HRC's recommendations on police powers and terrorism, respectively. In section 8, the submission responds to the HRC's recommendations on immigration. Section 9 makes concrete recommendations on how the Government might comply with the HRC's recommendations relating to the death penalty. Last, section 10 examines how the Government might implement the recommendations on the National Human Rights Consultation and the need for comprehensive human rights education.

2. About PILCH

5. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the

¹ *International Covenant on Civil and Political Rights*, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171.

² HRC, *Concluding Observations: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009).

delivery of pro bono legal services through four pro bono referral schemes (Public Interest Law Scheme, Victorian Bar Legal Assistance Scheme, Law Institute of Victoria Legal Assistance Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).

6. PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and,
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

7. In 2008-2009, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest.³ Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

8. PILCH has a particular interest in protecting civil and political rights of marginalised and disadvantaged people, and, for this reason, is keen to assist and encourage the Australian Government to implement its obligations under the ICCPR. To this end, it has facilitated numerous pro bono referrals and made countless policy and law reform submissions that aim to ensure that the Australian Government respects, protects and fulfils the human rights and fundamental freedoms enshrined in the ICCPR. For example, in 2008-2009, PILCH made law reform submissions on topics such as discrimination,⁴ the rights of Indigenous people,⁵ homelessness,⁶ the death penalty,⁷ and immigration.⁸

³ See Public Interest Law Clearing House, 'Law Reform', available at: http://www.pilch.org.au/Law_Reform/.

⁴ See, eg, Simone Cusack, *Ensuring Respect, Recognising Diversity*, Submission to the Senate Committee on Legal and Constitutional Affairs on its Inquiry into the *Marriage Amendment Bill 2009* (Cth) (PILCH, 2009), available at: http://www.pilch.org.au/2009_submissions/.

⁵ See, eg, Kristen Hilton, *Stolen Generations Compensation Bill 2008*, Submission to the Legal and Constitutional Affairs Committee Inquiry into the *Stolen Generations Compensation Bill 2008* (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

⁶ See, eg, Chris Povey, 'On Camera, 24/7: Homelessness and Surveillance' (PILCH, 2009), available at: http://www.pilch.org.au/Assets/Files/VLRC_Surveillance_Inquiry-6Aug09.pdf.

3. Indigenous Australians

3.1 Declaration on the Rights of Indigenous Peoples

9. PILCH congratulates the Australian Government on its formal support of the UN Declaration on the Rights of Indigenous Peoples.⁹ This is a significant and positive step toward a respectful and sustainable relationship between Indigenous Australians and the Australian Government.
10. PILCH encourages the Australian Government to ensure that its policies and programs that impact Indigenous people are compatible with the Declaration on the Rights of Indigenous Peoples. PILCH further encourages the Government to respect, protect and fulfil the human rights of Australia's Indigenous people.

3.2 National Indigenous Representative Body

11. In its Concluding Observations, the HRC expressed its concern about insufficient consultation with Indigenous Australians on issues affecting their rights. It recommended that Australia increase its efforts in this regard and establish an adequately resourced national Indigenous representative body.¹⁰ Similarly, the UN Committee on Economic, Social and Cultural Rights (**CESCR**), in its Concluding Observations on Australia, recommended that the Australian Government establish a national Indigenous representative body with adequate resources.¹¹
12. PILCH endorses the Concluding Observations of the HRC and CESCR regarding the establishment of an adequately resourced national Indigenous representative body. The absence of such a body significantly undermines the ability of Indigenous Australians to participate meaningfully in Indigenous policy formulation and public debate, which in turn raises concerns in relation to Australia's fulfilment of article 1 of the ICCPR (self-determination). It also restricts the ability of Indigenous Australians to pursue freely the development of their civil, political, economic, social and cultural rights. The absence of a representative Indigenous body is compounded by the fact that there is currently not one Indigenous person holding a seat in the Federal Parliament.¹²
13. The establishment of a representative and effective (including adequately resourced) Indigenous body is essential for ensuring that Indigenous Australians can exercise and

⁷ See, eg, Lucy McKernan and Simone Cusack, *Review of Australian Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

⁸ See, eg, Michelle Panayi and Mat Tinkler, *Review of the Migration Amendment (Immigration Detention Reform) Bill 2009*, Submission to the Senate Standing Committee on Legal and Constitutional Affairs (PILCH, 2009), available at: http://www.pilch.org.au/2009_submissions/.

⁹ *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007).

¹⁰ HRC, *Concluding Observations: Australia* (2009), at para 13.

¹¹ CESCR, *Concluding Observations: Australia* (2009), at para 15.

¹² Currently, there are only eight Indigenous state and territory Parliamentarians out of a total of 594 seats (1.5 per cent): Brian Lloyd, *Dedicated Indigenous Representation in the Australian Parliament* (2009), available at: <http://www.aph.gov.au/library/pubs/rp/2008-09/09rp23.pdf>.

enjoy their right to self-determination in article 1 of the ICCPR. PILCH supports the process initiated by the Government to establish a new national Indigenous representative body, and the extensive consultation process being undertaken under the leadership of Mr Tom Calma (Chair of the Steering Committee for the creation of a new national Indigenous representative body and Aboriginal and Torres Strait Islander Social Justice Commissioner).

14. PILCH urges the Government to:

- support the Steering Committee and implement its recommendations; and,
- ensure that the resulting national Indigenous representative body is adequately resourced and supported to enable it to fully participate in policy formulation and public debate and to consult with Indigenous Australians on matters that affect their rights.

3.3 Northern Territory Emergency Intervention

15. The HRC noted that certain Northern Territory Intervention measures are inconsistent with Australia's obligations under the ICCPR (arts 2, 24, 26 and 27). The HRC expressed particular concern about the suspension of the *Racial Discrimination Act 1975* (Cth) (**RDA**) and the failure to consult Indigenous people.¹³ It recommended that the Intervention measures be redesigned in direct consultation with Indigenous peoples, in order to ensure compliance with the RDA and the ICCPR.

16. CESCR also addressed the Intervention, noting that it remained concerned that some of the Intervention measures are inconsistent with article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) and, in particular, the right to non-discrimination. It also noted the inadequate consultation with the Indigenous peoples concerned.¹⁴ CESCR recommended that Australia address the human rights violations identified in the *Little Children Are Sacred Report*¹⁵ and conduct formal consultations with the Indigenous peoples concerned regarding the operation and impact of the Intervention.¹⁶

17. PILCH strongly endorses the observations and recommendations of both the HRC and the CESCR in relation to the Northern Territory Intervention. PILCH notes that similar recommendations were made by the Northern Territory Emergency Response Review Board. In its report on the Intervention, the Review Board recommended that any measures adopted as part of the Intervention should conform to the RDA.¹⁷ It also called for greater consultation at the grass roots level.¹⁸ Despite the call for greater consultation (by the HRC, CESCR, the Review Board and other Indigenous advocates), there are no systematic or formal mechanisms by which the Australian Government consults or

¹³ HRC, *Concluding Observations: Australia* (2009), at para 14.

¹⁴ CESCR, *Concluding Observations: Australia* (2009), at para 15.

¹⁵ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* (2007), available at: http://www.inquirynt.gov.au/pdf/bipacsa_report_summary.pdf.

¹⁶ CESCR, *Concluding Observations: Australia* (2009), at para 15.

¹⁷ Northern Territory Emergency Response, *Report of the NTER Review Board* (2008), 10, available at: http://www.nterreview.gov.au/docs/report_nter_review/docs/Report_NTER_Review_October08.pdf.

¹⁸ *Ibid*, at 47.

engages with people who are subject to the Intervention, to formulate policy to address Indigenous disadvantage.

18. PILCH recommends that the Australian Government implement the HRC's Concluding Observations by:
- immediately reinstating the RDA and the usual judicial review mechanisms relating to social security benefits;
 - amending the Intervention measures, particularly the measures relating to compulsory income quarantining and compulsory five year leases, so that they comply with the RDA and Australia's human rights obligations;
 - immediately entering into direct, ongoing and formal consultations with affected Indigenous communities and their advocates regarding the operation and impact of the Intervention; and,
 - amending the Australian Constitution to enshrine the prohibition against racial discrimination and to provide that the 'race power' may only be used to the benefit, and not to the detriment, of persons of a particular race.

3.4 Reparations for Stolen Generations

19. In its Concluding Observations, the HRC expressed regret that the Australian Government has not granted reparations to the victims of the Stolen Generations policies. In this connection, it recommended the implementation of a comprehensive national mechanism to ensure reparations, including compensation.¹⁹
20. PILCH strongly endorses the HRC's Concluding Observations and recommendations. The unjust policies of the Australian Government that created the Stolen Generations continue to have a devastating effect on the lives of many Indigenous Australians. Of particular concern are the inter-generational effects that are impacting the children and grandchildren of members of the Stolen Generations. PILCH has worked with Stolen Generations Victoria²⁰ in assisting members of the Stolen Generations to obtain legal assistance, and has undertaken policy work recommending the implementation of a compensation scheme for Stolen Generations members. Through this work, PILCH has witnessed first-hand the ongoing harms and effects of the Stolen Generations policies and the urgent need to compensate victims.
21. PILCH strongly recommends that the Government establish a national scheme for reparations, including compensation, for members of the Stolen Generations. PILCH notes that the provision of reparations to Indigenous peoples for violations of their human rights has been endorsed in international and domestic jurisdictions. Article 8(2) of the UN *Declaration on the Rights of Indigenous Peoples* provides that States shall 'provide effective mechanisms for prevention of, and redress for' certain actions, including 'any action which has the aim or effect of depriving [Indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities', and 'any form of forced

¹⁹ HRC, *Concluding Observations: Australia* (2009), at para 15.

²⁰ Stolen Generations Victoria Ltd is an incorporated association established to provide a range of support and referral services to assist Stolen Generations peoples to re-connect with their family, community, culture and land: see <http://www.stolengenerationsvictoria.org.au/>.

assimilation or integration'. The language of article 8(2) clearly encompasses the Australian Government's Stolen Generations policies. As the *Bringing Them Home* Report recognised, 'the objective [of those policies] was to absorb the children into white society', and '[m]any children experienced contempt and denigration of their Aboriginality and that of their parents or denial of their Aboriginality'²¹.

22. Countries such as Canada, New Zealand and South Africa and the state of Tasmania, have recognised the importance of reparations, including compensation, for violations of the human rights of their Indigenous peoples. The experiences in these jurisdictions reflect a growing international recognition of the role of reparations in the reconciliation process. The schemes introduced in each of these jurisdictions acknowledge that while monetary compensation alone is not sufficient, it can nonetheless assist in redressing the harm done.
23. PILCH supports the concept of monetary compensation as part of a reparations programme for gross violations of human rights. Monetary compensation, including ex gratia or lump sum payments represents one of the five components of the reparations package recommended in the *Bringing Them Home* Report.²² PILCH broadly endorses that report's recommendation in relation to ex gratia compensation payments, being that any Indigenous person who was forcibly removed from their family be entitled to a minimum lump sum payment in respect of that removal.²³ However, PILCH considers that such ex gratia payments must form part of a considered reparations package of the kind recommended in the Public Interest Advocacy Centre's *Restoring Identity* Report.²⁴ Importantly, a reparations package should specifically address individual and cultural healing and restitution through counselling services and language and culture preservation initiatives such as those outlined in Chapter 14 of the *Bringing Them Home* Report.

4. Rights to Non-Discrimination and Equality

4.1 National *Equality Act* and *Sex Discrimination Act 1984* (Cth)

24. In its Concluding Observations, the HRC expressed its concern that 'the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law'²⁵. The HRC's concerns were echoed by CESCR in its Concluding Observations, where it noted that Australia's 'anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights ...'²⁶. The HRC's concerns are also reflected in the Concluding Observations of the

²¹ Human Rights and Equal Opportunity Commission ('HREOC'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), CH 11, at http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf.

²² Ibid, recommendation 3.

²³ Ibid, recommendation 18.

²⁴ See Amanda Cornwall, *Restoring Identity: Preliminary Report* (Public Interest Advocacy Centre, 2002), at 54-56. See generally Amanda Cornwall, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (Public Interest Advocacy Centre, 2009), available at: http://www.piac.asn.au/publications/pubs/RI_report_final.pdf.

²⁵ HRC, *Concluding Observations: Australia* (2009), at para 12.

²⁶ CESCR, *Concluding Observations: Australia* (2009), at para 14.

- CEDAW Committee, which note the ‘absence of an entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men’²⁷. The HRC recommended that Australia should ‘adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination’²⁸. This recommendation is supported by CESCR, which urged Australia to ‘enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds’²⁹.
25. PILCH fully endorses the HRC’s recommendation to enact federal legislation that provides comprehensive protection against all forms of discrimination in the public and private spheres. Australia is obligated, under articles 2 and 26 of the ICCPR and other international human rights treaties, to respect, protect and fulfil the rights to non-discrimination and equality.³⁰
26. The Federal Government has enacted a number of laws that prohibit discrimination on specified grounds such as age, disability, race and sex.³¹ However, the current legislative framework does not prohibit all forms of discrimination or cover all areas of discrimination. The framework is also limited in its ability to address systemic and compounded forms of discrimination,³² and prevent future acts of discrimination.³³ Moreover, there are significant gaps in the legislative framework, including in relation to discrimination on the ground of homelessness, social status, sexual orientation and gender identity. The failure to enact a comprehensive national *Equality Act* has meant that many marginalised and disadvantaged individuals and groups have no or limited legal recourse under federal law when they experience discrimination.
27. PILCH submits that, if Australia is to comply fully with its obligations under the ICCPR and other human rights instruments, it is imperative that it take the necessary steps to introduce an *Equality Act*. The enactment of such an Act would be an important step forward in the struggle to eliminate all forms of discrimination.
28. PILCH recommends that a national *Equality Act* should, at a minimum:
- require the elimination of all forms of discrimination and the realisation of substantive equality;

²⁷ CEDAW Committee, *Concluding Observations: Australia* (2006), at para 12.

²⁸ HRC, *Concluding Observations: Australia* (2009), at para 12.

²⁹ CESCR, *Concluding Observations: Australia* (2009), at para 14.

³⁰ See also Human Rights Committee (HRC), *General Comment No. 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, art 2(2); *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 UNTS 13; *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965 (entered into force Jan. 4, 1969), 660 UNTS 195; *Convention on the Rights of Persons with Disabilities*, Dec. 13, 2006 (entered into force May 3, 2008), GA Res 61/106, UN Doc A/61/611 (2006).

³¹ See *Age Discrimination Act 2004* (Cth) (‘ADA’); *Disability Discrimination Act 1992* (Cth) (‘DDA’); *Racial Discrimination Act 1975* (Cth) (‘RDA’); and, *Sex Discrimination Act 1984* (Cth) (‘SDA’). See also *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (‘HREOC Act’).

³² See, eg, Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, (2008), [3.61], [4.50], [4.5.1], [4.5.2] [‘SDA Report’].

³³ See, eg, Simone Cusack, ‘Discrimination against Women: Combating its Compounded and Systemic Forms’, (2009) 34(2) *Alternative Law Journal* 86, at 88.

- impose positive and negative obligations on public authorities to achieve these objectives;
 - recognise all prohibited grounds of discrimination under international human rights law, including, sexual orientation, gender identity and social status, which are not currently recognised under Australian law;
 - state explicitly that temporary special measures do not constitute discrimination, but rather are essential to eliminating all forms of discrimination and achieving substantive equality;
 - enable individuals who have experienced compounded (ie, multiple) discrimination to seek redress for violations of their rights, for instance, by allowing a woman with a disability who has been discriminated against to bring a claim of discrimination based on sex *and* disability;
 - provide mechanisms to effectively address individual and systemic discrimination and inequality; and,
 - provide effective remedies to redress all forms of discrimination, including compensation.
29. In the interim, the Federal Government should implement the recommendations of the Senate Committee on Legal and Constitutional Affairs in its report entitled *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*.³⁴

5. Homelessness

5.1 Homelessness in Australia

30. In its Concluding Observations, the HRC expressed its concern at the situation of people, particularly Indigenous Australians, who are experiencing homelessness in Australia and who, as a result, are not able to fully exercise and enjoy their ICCPR rights.³⁵ A similar concern was expressed by CESCR, which highlighted increases in homelessness in its Concluding Observations.³⁶
31. The HRC called on Australia to increase its efforts to ensure that people experiencing homelessness are not deprived of the full exercise and enjoyment of their ICCPR rights.³⁷ CESCR strengthened this call, urging Australia to take effective measures to address homelessness by protecting the right to adequate housing.³⁸ CESCR recommended that Australia should implement the recommendations in the 2007 report of the Special Rapporteur on the Right to Adequate Housing, which urged the Government to take steps

³⁴ Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

³⁵ HRC, *Concluding Observations: Australia* (2009), at para 18.

³⁶ CESCR, *Concluding Observations: Australia* (2009), at para 14.

³⁷ HRC, *Concluding Observations: Australia* (2009), at para 18.

³⁸ CESCR, *Concluding Observations: Australia* (2009), at para 14.

to address the homelessness crisis, including by introducing legislative prohibitions against discrimination on the grounds of homelessness and other forms of social status.³⁹

32. PILCH endorses the HRC's observations and recommendations in relation to homelessness.

5.2 National Homelessness Act

33. Australia is obligated, under article 6 of the ICCPR, to respect, protect and fulfil the right to life.⁴⁰ Further, article 6 imposes a proactive duty on Australia to take measures to enable a person to live with dignity. As adequate housing is one of the basic determinants of the right to life, PILCH submits that it is incumbent on the Government to take steps to enable people experiencing homelessness to live a life of dignity. Other relevant human rights include the right to privacy in article 17 of the ICCPR, which requires, *inter alia*, that an individual's privacy or home not be subject to arbitrary or unlawful interference and that a person not be summarily evicted into a state of homelessness or inadequate housing.⁴¹
34. The Federal Government currently assists in providing housing to those experiencing homelessness through the *Supported Accommodation Assistance Act 1994* (Cth). However, the funding mechanisms in place in that Act fail to acknowledge that homelessness services should recognise and respect the human rights of service users.
35. One way to ensure that the rights of people experiencing homelessness are adequately guaranteed is through the enactment of a national *Homelessness Act*.⁴² A *Homelessness Act* would ensure that services for people experiencing homelessness are provided in a way that is consistent with the Government's obligations under the ICCPR and other human rights treaties.
36. In order to ensure full compliance with Australia's obligations under international human rights law, a *Homelessness Act* should, at a minimum:
- enshrine Australia's obligations under the ICCPR and ICESCR, as they relate to the rights of people experiencing homelessness;
 - stipulate the obligations of the Australian Government to progressively realise the right to adequate housing (including both short and long term accommodation and housing options);
 - define the right to adequate housing (as it appears in international law) as requiring:
 - legal security of tenure;
 - availability of services, materials, facilities and infrastructure;
 - affordability of housing;
 - habitability of housing;
 - accessibility of housing (eg, physical and geographic accessibility);

³⁹ Ibid, referring to Special Rapporteur on the Right to Adequate Housing, *Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, 4th sess, Prov Agenda Item 2, UN Doc A/HRC/4/18/Add.2 (2007), Recommendation 130.

⁴⁰ ICCPR, art 6.

⁴¹ *Connors v United Kingdom* [2005] 40 EHRR 189.

⁴² See PILCH Homeless Persons' Legal Clinic, *Submission to the Homelessness Act Inquiry* (PILCH, 2009), available at: http://www.pilch.org.au/Assets/Files/Homelessness_Act_Inquiry_Aug2009.pdf.

- proximity of housing to employment options, healthcare services, schools, childcare centres and other social facilities; and,
 - culturally appropriate housing;⁴³
- prohibit the eviction of any person from government funded housing into homelessness;
 - provide for the participation of people experiencing homelessness in decision and policy making that affects them;
 - introduce minimum service standards for all government funded housing, namely, 'availability, accessibility, acceptability and quality';
 - establish an Office of the Commissioner for Adequate Housing for the purpose of safeguarding individuals' rights; and,
 - establish a Housing Ombudsman.⁴⁴

5.3 Review of Current Legislation and Policies

37. The Federal Government should review its laws, policies and procedures to determine whether or not they impact disproportionately or discriminatorily on people experiencing homelessness. PILCH submits that the *Human Rights and Equal Opportunity Act 1986* (Cth) and the *Electoral Act 1918* (Cth) should be included in this review. In addition, PILCH urges the Government to conduct a general review of all Australian laws in relation to residential tenancies,⁴⁵ fines and infringements⁴⁶ and public spaces⁴⁷ (including surveillance,⁴⁸ begging⁴⁹ and public drinking⁵⁰), to ensure that they do not disproportionately impact on people experiencing homelessness or violate their human rights.
38. Following such a review, PILCH recommends that the Federal Government work with its state and territory counterparts to reform any laws, policies and procedures that are found to impact disproportionately or discriminatorily on people experiencing homelessness.

⁴³ CESCR, *General Comment 4: The Right to Adequate Housing*, UN Doc HRI/GEN/1/Rev.5 (2001) 22, at para 8.

⁴⁴ See further Caroline Adler and Amy Barry-Macaulay, *Righting the Wrongs of Homelessness PILCH Homeless Persons' Legal Clinic submission to the Federal Government's Green Paper: 'Which Way Home?'* (PILCH Homeless Persons' Legal Clinic, 2008), available at: <http://www.pilch.org.au/Assets/Files/Submission-Green%20Paper-27June2008.pdf>; PILCH Homeless Persons' Legal Clinic *Submission to the Homelessness Act Inquiry* (2009), available at: http://www.pilch.org.au/Assets/Files/Homelessness_Act_Inquiry_Aug2009.pdf.

⁴⁵ See, eg, Kristen Hilton, *Less Room to Move, Better Room to Move in* (PILCH Homeless Persons' Legal Clinic, 2007) available at: http://www.pilch.org.au/Assets/Files/Less_Room_to_Move_Better_Room_to_Move_In_Submission_to_Consumer_Affairs_Vic%20_2007.pdf.

⁴⁶ See generally, Philip Lynch, *Disadvantage and Fines – Submission to the Victorian Government Regarding the Enforcement of Unpaid Fines against Financially and Socially Disadvantaged People* (PILCH Homeless Persons' Legal Clinic, 2003), available at: http://www.communitylaw.org.au/public_resource_details.php?resource_id=1139.

⁴⁷ See generally QPILCH Homeless Persons' Legal Clinic, *Submission in response to the Australian Government's Green Paper on Homelessness* (2008), available at: http://www.qpilch.org.au/dbase_upl/Green%20Paper%20Submission%20-%20Final.pdf.

⁴⁸ See Chris Povey, *Submission to VLRC's Consultation Paper on Surveillance in Public Places* (PILCH Homeless Persons' Legal Clinic, 2009), available at: http://www.pilch.org.au/Assets/Files/VLRC_Surveillance_Inquiry-6Aug09.pdf.

⁴⁹ See Philip Lynch, *Public Policy Responses to Begging in Melbourne* (PILCH Homeless, Persons' Legal Clinic, 2005), available at: http://www.pilch.org.au/Assets/Files/Submission_on_Begging_We_Want_Change%20_2005.pdf.

⁵⁰ See generally, Philip Lynch, *Decriminalising Disadvantage – Submission to Inquiry into the Vagrancy Act 1966 (Vic)* (PILCH Homeless Persons' Legal Clinic, 2002), available at: http://www.pilch.org.au/Assets/Files/Vagrancy_Act_Submission_2002.pdf.

(a) Human Rights and Equal Opportunity Act 1986

39. PILCH submits that the *Human Rights and Equal Opportunity Act 1986* should be reformed to:

- include social status as a prohibited ground of discrimination;⁵¹
- define the term 'social status' to include discrimination on the basis of homelessness, unemployment or receipt of social security benefits; and,
- include irrelevant criminal record as a prohibited ground of discrimination.

(b) Electoral Act 1918

PILCH submits that the recent amendments to the *Electoral Act 1918*, which increased proof of identity and proof of residence requirements, should be repealed.⁵² PILCH further submits that the itinerant or no fixed address provisions in the Act should be amended to expressly include homelessness. In addition, PILCH recommends that the Act should be amended to:

- include a definition of homelessness in section 96(1) in order to clearly include people experiencing homelessness as itinerant electors;
- enable people who have lived in a 'real place of living' for up to 6 months, rather than 1 month, to be eligible to vote as an itinerant elector;⁵³ and,
- require the Australian Electoral Commission to engage with homelessness services to increase voter awareness and facilitate the ability of people experiencing homelessness to exercise and enjoy their right to vote.⁵⁴

* * *

5.4 Consultation

40. PILCH submits that, in order to implement these suggested reforms in a meaningful and effective way, the Federal Government should involve people experiencing homelessness in the decision making process. Because people experiencing homelessness are often unable to realise their right to participate in social, cultural or economic life, it is important that the Federal Government makes it a priority to include them.⁵⁵ One way to ensure effective participation is to establish a Consumer Advisory Group comprised of people who have experienced, or are currently experiencing, homelessness. This Group should be

⁵¹ See also discussion at section 4.1 in relation to including social status as a prohibited ground of discrimination in a national *Equality Act*.

⁵² *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

⁵³ *Electoral Act 1918* (Cth), s 96(8).

⁵⁴ See generally Caroline Adler, Amy Barry-Macauley and James Farrell, *Homelessness and Voting - Submission to the Joint Standing Committee on Electoral Matters - Inquiry into the 2007 Federal Election* (PILCH Homeless Persons' Legal Clinic, 2008), available at: http://www.pilch.org.au/Assets/Files/2007_Cth_JSCEM_Electoral_Inquiry.pdf.

⁵⁵ See Caroline Adler and Amy Barry-Macauley, *Righting the Wrongs of Homelessness*, Submission to the Federal Government's Green Paper on the results of Homelessness Consumer Forum hosted by the Homeless Persons' Legal Clinic (PILCH Homeless Persons' Legal Clinic, 2008), available at: <http://www.pilch.org.au/Assets/Files/Submission-Green%20Paper-27June2008.pdf>.

charged with the responsibility of advising the Government on issues relating to homelessness.

5.5 Homelessness and Indigenous Australians

41. Indigenous Australians experience considerable disadvantage in relation to housing rights. The housing conditions of Indigenous Australians remain well below those of the general population and are a major factor that contributes to their poor health. As well as experiencing overcrowded and inadequate housing, Indigenous Australians may also be denied the right to enjoy their culture as a result of housing conditions.⁵⁶ Housing provided in Indigenous communities often does not accommodate the cultural importance of communal living or the significance of using public space for cultural activities.⁵⁷ Indigenous women are disproportionately affected by homelessness, often as a result of family violence which causes them to leave their home.⁵⁸ For Indigenous women living in remote and rural communities, this may in turn, force them to leave their family and community.
42. PILCH recommends that the Australian Government establish an Indigenous Housing Group to advise it on the specific housing needs of Indigenous Australians, and how to overcome many of the obstacles (eg, poverty, discrimination, culturally inappropriate housing⁵⁹) that impede the provision of adequate housing for Indigenous Australians. It may be that this could be a function, or a sub-Committee, of the National Indigenous Representative Body. PILCH also recommends increased funding and access to legal and other support services for Indigenous people experiencing homelessness.

6. Police Powers

43. In its Concluding Observations, the HRC expressed its concern regarding reports of excessive use of force by law enforcement officials, particularly against marginalised and disadvantaged groups. It also expressed concern regarding allegations of excessive use of 'TASERS' by law enforcement officials and the absence of independent review of allegations of police misconduct.⁶⁰ The HRC called on Australia to take all appropriate measures to eliminate excessive use of force by law enforcement officials, including, for example, the adoption of measures to restrict the use of TASERS. In addition, it urged Australia to: establish an independent police complaints mechanism; ensure the effective

⁵⁶ ICCPR, art 27.

⁵⁷ See Australian Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008), section 5.1, available at: http://www.hreoc.gov.au/Human_Rights/housing/homelessness_2008.html#5_1.

⁵⁸ See *NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights*, 2009, para 254; Homelessness Australia, *Homelessness and Aboriginal and Torres Strait Islanders*, available at: [http://www.homelessnessaustralia.org.au/UserFiles/File/Homelessness%20&%20Indigenous%20Australians%20for%20web\(2\).pdf](http://www.homelessnessaustralia.org.au/UserFiles/File/Homelessness%20&%20Indigenous%20Australians%20for%20web(2).pdf).

⁵⁹ See *Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, UN Doc A/HRC/4/18/Add.2 (2007), at para 80.

⁶⁰ HRC, *Concluding Observations: Australia* (2009), at para 21.

prosecution and punishment of persons that use excessive force; and, provide compensation for victims subject to excessive force by law enforcement officials.⁶¹

44. PILCH shares these concerns and fully endorses the HRC's recommendations. PILCH urges the Australian Government to work collaboratively with the state and territory governments to implement the HRC's recommendations.

6.1 Excessive Use of Force

45. Use of force in policing must be avoided where possible, or minimised if unavoidable.
46. In PILCH's view, appropriate training and operational leadership, especially in human rights, is essential to eliminating use of excessive force by law enforcement officials.⁶² At a minimum, a human rights approach to the use of force requires training on how to:
- avoid and limit use of force;
 - adopt a planned approach to incidents rather than seek quick 'resolutions';
 - de-escalate rather than inflame situations through effective communication;
 - respond effectively to individuals affected by alcohol, with a mental health problem, or with cultural or language differences; and,
 - respect, protect and fulfil human rights in conflict situations.
47. An effective response to use of force by law enforcement officials also requires appropriate measures to monitor use of force. PILCH recommends that law enforcement agencies adopt measures to remedy systemic under-reporting of use of force (estimated to be up to 70%⁶³). In this connection, PILCH recommends implementation of recommendation 61 of the *Stephen Lawrence Inquiry*⁶⁴ that all stop and searches by police be recorded and receipted. In PILCH's view, law enforcement agencies should analyse collected data to ensure greater accountability.⁶⁵

6.2 Internal Investigation of Complaints against Police

48. There is an urgent need in Australia to improve the independence and transparency of police complaints mechanisms. For example, the overwhelming majority of complaints against Victorian police are investigated by the police themselves, often at the local level where the complaint was made. In contrast, only 3% of complaints are investigated by the independent Office of Police Integrity (OPI). This is particularly concerning when viewed in light of the fact that only 4% of complaints are substantiated in Victoria.⁶⁶ PILCH urges the Federal Government to work together with state and territory governments to ensure that

⁶¹ Ibid.

⁶² See, eg, Victoria Police Manual, *VPM Instruction, 101-1 Operational Safety Principles* (updated 2006).

⁶³ See generally Office of Police Integrity, *Annual Report 2007*; Office of Police Integrity, *Annual Report 2008*.

⁶⁴ *The Stephen Lawrence Inquiry* (1999), at 8-9, available at: <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>.

⁶⁵ Office of Police Integrity, *Review of the Use of Force by and against Victoria Police* (2009), at 11-12, 54-55.

⁶⁶ Tamar Hopkins, *Effective Investigation of Complaints Against Police*, 2009, available at: http://www.communitylaw.org.au/flemingtonkensington/cb_pages/policecomplaints.php.

police complaints are investigated (rather than just overseen) by an independent, transparent body.⁶⁷

49. PILCH submits that a human rights approach to police complaints requires that they be investigated by a body that is:

- independent of the police hierarchically, institutionally and practically;
- capable of conducting an effective investigation, by which is meant determining whether or not the actions of the police breach legal or disciplinary standards and human rights standards;
- capable of responding to complaints in a timely fashion;
- open to public scrutiny; and,
- victim centred and enables the victim to fully participate in the investigation.⁶⁸

50. The Government might consider modelling such a body on the Police Ombudsman of Northern Ireland, which is considered by experts to be an example of good practice.⁶⁹

6.3 Police Discipline and Victim Compensation

51. Allegations of breaches of police powers must be investigated. Where allegations have been substantiated, the perpetrator must be prosecuted and punished and, if found guilty, compensation should be provided to the victim.⁷⁰

52. In 2007, the OPI conducted a review of the Victoria Police discipline system, finding it to be 'archaic, punitive, bureaucratic and slow'.⁷¹ The review made a series of recommendations to fundamentally reform the system, including that: it be simplified; be remedial rather than punitive; streamline the dismissal process; and, involve active management within all levels of command. PILCH endorses these recommendations.

53. PILCH submits that the Australian Government must take steps to ensure that police are held legally accountable for breaches of their powers. For instance, the Government should reverse common law and statutory immunities that currently protect the state and individual police from prosecution.⁷² PILCH recommends that state, territory and federal governments amend legislation so that the State is vicariously liable for all legal wrongs committed by police officers in the execution or purported execution of their duties.⁷³

⁶⁷ See, eg, *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007), at para 337; *Bati v Turkey* [2004] ECHR (3.6.2004), at para 135; Royal Commission into Aboriginal Deaths in Custody, *Final Report*, (11 vols), AGPS, Canberra, 1991, vol. 1, at 130.

⁶⁸ See, eg, ICCPR, arts 2(3), 6(1), 7, 9; *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 9-10, 22.

⁶⁹ See Tamar Hopkins, *Effective Investigation of Complaints Against Police*, 2009, available at: http://www.communitylaw.org.au/flemingtonkensington/cb_pages/policecomplaints.php.

⁷⁰ See ICCPR, art 2(3).

⁷¹ Office of Police Integrity, *Review of the Police Discipline System* (2007), at 12. See also Office of Police Integrity, 'Review of the Police Discipline System', available at: <http://www.opi.vic.gov.au/index.php?i=84>.

⁷² See *Enever v the King* 1906 HCA 3. See also, eg, *Police Regulation Act 1958* (Vic), s 123.

⁷³ See Tamar Hopkins and Hugh De Kretser, *Reform to the Vicarious Liability of Victoria Police for Wrongs Committed by Police Officers*, Submission to Victorian Minister for Police and Emergency Services (Federation of Community Legal Centres, 2008).

54. PILCH recommends amending the state and territory anti-discriminatory laws to ensure that police interactions with suspects are explicitly defined as a 'service', so that those interactions are appropriately subject to the obligation to respect, protect and fulfil the right to non-discrimination on prohibited grounds. In addition, PILCH recommends that victims be granted access to complaint investigation reports to assist in their civil litigation cases, reversing the position where these are often only available to criminal prosecution and police civil defence teams.

6.4 TASERS

55. Excessive and inappropriate use of electro-muscular disruption devices, including TASERS, raises serious human rights concerns.⁷⁴ For example, excessive and inappropriate use of TASERS in law enforcement has been linked to hundreds of fatalities.⁷⁵

56. PILCH recommends that a cautious approach be adopted before TASERS are made available to more law enforcement agencies in Australia. Where TASERS are made available to such agencies, they should be reserved for specialist units properly trained in their use. Policies on TASER deployment must clearly articulate where they fit on the use of force continuum, and such policies should exclude their use in a coercive or punitive manner, or in the absence of an appreciable overt threat of injury (where greater or lethal force may otherwise have been justified). Use of force avoidance techniques should always be applied before TASERS are deployed; "usage creep" must be avoided; and, de-escalation tactical skills maintained.⁷⁶ Further, TASERS should not be used against groups that have been found to be at particular risk of injury or death as a result of being TASERed (eg, youth or persons with mental health issues). Appropriate medical treatment should be provided to victims of TASERS.⁷⁷

57. PILCH also recommends that law enforcement agencies be required to keep detailed records of TASER use (whether or not they are fired). Records should include information on the circumstances of the deployment of TASERS, their effectiveness, and abuse or injury in their use.⁷⁸ Those records should be made publicly available and inform appropriate evaluations or investigations.

⁷⁴ See, eg, ICCPR, arts 6(1), 7.

⁷⁵ See, eg, Amnesty International, *Safety of Tasers Questioned as US Death Toll Hits 334* (2008), available at: <http://www.amnesty.org.au/news/comments/20003/>.

⁷⁶ See Queensland Police Service, *Review of the Police Service Taser Trail* (2009), at 42.

⁷⁷ See, eg, International Association of Chiefs of Police, *Model Policy Electronic Control Weapons* (2005).

⁷⁸ See, eg, Police Executive Research Forum Centre on Force Accountability, *PERF Conducted Energy Device Policy and Training Guidelines for Consideration* (2005), at paras 32-45.

7. Terrorism

7.1 Counter Terrorism and National Security Legislation

58. In its Concluding Observations, the HRC raised concerns that counter-terrorism measures adopted by Australia appear to be incompatible with the ICCPR, including its non-derogable provisions. The HRC expressed particular concern regarding the:

- vague definition of the term 'terrorist act';
- reversal of the burden of proof (contrary to the right to be presumed innocent);
- failure to define the term 'exceptional circumstances'; and,
- expanded powers of the Australian Security Intelligence Organisation (**ASIO**), including those to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.⁷⁹

59. PILCH shares these concerns and endorses the HRC's recommendation that Australia 'ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant'⁸⁰. In this connection, PILCH submits that the Australian Government should amend its counter-terrorism and national security legislation to, *inter alia*:

- ensure that the definition of 'terrorist act' is sufficiently clear and restricted so that it does not unreasonably criminalise freedom of belief and expression;
- guarantee the right to be presumed innocent, including by abrogating:
 - the provision that permits the detention of a person suspected of terrorism offences without charge for seven days (renewable); and,
 - control order and preventative detention order schemes;
- comply with the ICCPR prohibition against arbitrary detention, including by:
 - disallowing detention without access to a lawyer and in conditions of secrecy for more than 48 hours; and,
 - limiting the excessively broad powers of ASIO to detain and question people, including non-suspects;
- ensure that the notion of 'exceptional circumstances' in the *Anti-Terrorism Act (No. 2) 2005* (Cth) does not create an automatic obstacle to release on bail; and,
- ensure that the right to privacy and the freedoms of association and expression are respected.⁸¹

60. PILCH considers that, in order to comply with its human rights obligations, the Australian Government should ensure all counter-terrorism and national security legislation includes adequate and independent review procedures, including a national monitor with an independent remit to review and comment on such legislation.

⁷⁹ HRC, *Concluding Observations: Australia* (2009), at para 11.

⁸⁰ *Ibid.*

⁸¹ The Government could ensure that the right to privacy is respected by, for example, repealing the broad powers to enter a private home without a warrant if they suspect on reasonable grounds that a 'thing' relevant to a terrorist act (even one that has not occurred) is on the premises. The Government could ensure that the freedoms of association and expression are respected by, for example: removing praise of a terrorist group as a ground for proscribing a terrorist organisation; requiring more than mere recklessness, and requiring connection with a specific terrorist act, in establishing the offence for training with a terrorist organisation; properly defining 'support' of a proscribed organisation, so as not to criminalise publication of views merely favourable of an organisations aims and views; repeal the offence of associating with a terrorist association; and, allowing merits review at the Administrative Review Tribunal for the listing or re-listing of a terrorist organisation.

61. PILCH further submits that the Government should implement the recommendations enumerated in previous PILCH and HRLRC submissions on the counter-terrorism and national security legislative framework.⁸²

8. Immigration

8.1 Non-Refoulement

62. In its Concluding Observations, the HRC expressed its concerns about 'reports of cases in which the State party has not fully ensured respect for the principle of non-refoulement'.⁸³ The HRC recommended that Australia should 'take urgent and adequate measures, including legislative measures, to ensure that no person is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment'.⁸⁴
63. PILCH endorses the HRC's recommendation to enact federal legislation that provides comprehensive protection against non-refoulement and prevention from extradition to a State where a person may face the death penalty. Australia is obligated, under the ICCPR⁸⁵ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*,⁸⁶ to not expose persons to torture. Article 3 of CAT establishes a free-standing right to prevention from *non-refoulement*. It provides that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.
64. Currently, the *Migration (Complementary Protection) Bill 2009* is before Federal Parliament. This Bill seeks to amend the *Migration Act 1958* to ensure that it is compatible with Australia's obligation, under international human rights laws, to prevent *non-refoulement*. Whilst PILCH welcomes the Bill, it submits that the Bill falls short of full compliance with Australia's obligations under the ICCPR and CAT. The Bill does not apply an absolute prohibition on *non-refoulement*, nor does it prevent non-citizens seeking asylum from being sent to other states where they may be placed at risk of torture.
65. PILCH recommends that the Federal Government should amend the *Migration (Complementary Protection) Bill 2009* to enshrine the right to non-refoulement in accordance with Australia's obligations under the ICCPR and CAT, and to prevent refoulement of non-citizens.

⁸² See, eg, Phil Lynch, Gregor Husper and Lucy McKernan, *Joint Submission to the Senate Standing Committee on Finance and Public Administration in relation to the National Security Legislation Monitor Bill 2009* (PILCH, 2009), available at <http://www.hrlrc.org.au/files/Nat-Security-Legislation-Monitor-HRLRC-PILCH-Submission.pdf>; Human Rights Law Resource Centre, 'Counter-Terrorism', available at: <http://www.hrlrc.org.au/category/content/topics/counter-terrorism/>.

⁸³ HRC, *Concluding Observations: Australia* (2009), at para 19.

⁸⁴ *Ibid.*, at para 20.

⁸⁵ ICCPR, art 7.

⁸⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, [annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc A/39/51 (1984)], entered into force June 26, 1987.

8.2 Mandatory Detention

66. The HRC welcomed the Australian Government's commitment to use immigration detention centres only in limited circumstances and for the shortest practicable period. Yet, it also raised a number of concerns about current policy and practice, including the retention of mandatory detention and the excise zone, and the ineffective processes to review detention decisions.⁸⁷ The HRC urged the Government, *inter alia*, to: abolish the remaining elements of Australia's mandatory immigration detention policy; implement the recommendations in the *Immigration Detention Report*; and, close the Christmas Island detention centre.⁸⁸ CESCR expressed similar concerns and echoed the HRC's recommendation to implement the *Immigration Detention Report*.⁸⁹
67. PILCH strongly supports these recommendations. PILCH submits that, despite the introduction of the *Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) and alternatives to detention pilot programs, further reforms are required to ensure that Australia's immigration detention policy is compliant with international human rights law.
68. PILCH urges the Australian Government to abolish its mandatory immigration detention policy as a matter of urgency, and expand community-based alternatives to detention, in particular the Community Care Pilot Project.
69. PILCH urges the Australian Government to amend the *Migration Act 1958* to:
- incorporate the three immigration detention values outlined in points 4, 6, and 7 of Minister Evans' 'New Directions in Detention' speech;⁹⁰
 - prescribe the value that 'children including juvenile foreign fishers, and where possible, their families, will not be placed in *detention*' (emphasis added), rather than stating that they 'will not be placed in a *detention centre*' (emphasis added), as is currently proposed reform the *Migration Amendment Bill*;⁹¹
 - incorporate a discretion to detain asylum seekers with clear and explicit Guidelines;
 - enumerate clear and certain time limits for detention of asylum seekers;
 - stipulate that the Department of Immigration bears the burden of establishing that detention is both necessary and proportionate, having regard to the Guidelines;
 - stipulate that only *senior* departmental officials can decide to detain asylum seekers;
 - obligate the Department to provide written reasons for detention to all detainees and to inform them of their right to have that decision reviewed;
 - provide for automatic judicial review of a decision to detain to the Federal Court;
 - require periodic review of detention by the Federal Court or an independent tribunal;

⁸⁷ HRC, *Concluding Observations: Australia* (2009), at para 23.

⁸⁸ *Ibid.*

⁸⁹ CESCR, *Concluding Observations: Australia* (2009), at para 25.

⁹⁰ Chris Evans, 'New Directions in Detention- Restoring Integrity to Australia's Immigration System', speech delivered at The Australian National University, Canberra, 29 July 2008. See also Michelle Panayi and Mat Tinkler, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) (PILCH, 2009), at 8-9, available at: http://www.pilch.org.au/2009_submissions.

⁹¹ See PILCH Submission on the *Immigration Detention Reform Bill*, *ibid.*, at 18-20.

- abolish bonds for release from immigration detention; and,
 - return all excised territories to the migration zone.
47. PILCH further submits that the Australian Government should adopt all recommendations in the *Immigration Detention Report*,⁹² especially those that relate to:
- the human rights of all detainees;⁹³
 - the closure of the Christmas Island detention centre;
 - the redevelopment and renovation of all detention centres;⁹⁴ and,
 - increasing the provision of onsite interpreters at all detention centres and, in addition, the need to cater for gender specific interpreters where necessary.
48. In addition, PILCH submits that the Australian Government should:
- remove private contractors from managing detention centres,⁹⁵ and,
 - ensure that all detainees have access to government funded legal assistance from the time that a decision to detain is made and until detention ceases.

9. Death Penalty

70. PILCH welcomes the Government's recent publication of an Exposure Draft of the *Extradition and Mutual Assistance in Criminal Matters Legislation Bill 2009 (Extradition and Mutual Assistance Bill)*, which seeks to amend the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth). The proposed amendments are intended to make those Acts more compatible with Australia's human rights obligations, including, in particular, its obligations under the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*⁹⁶ (**Second Optional Protocol**).

9.1 Extradition

71. The *Extradition Act 1988* currently contains a presumption against extradition where the offence is punishable by the death penalty.⁹⁷ However, the Attorney-General retains an overriding discretion to extradite a person where it is considered that the person should be surrendered in relation to the offence.⁹⁸

⁹² See Australian Human Rights Commission, *2008 Immigration Detention Report: Summary of Observations Following Visit to Australia's Immigration Detention Facilities* (2008), available at: http://www.hreoc.gov.au/Human_Rights/immigration/idc2008.pdf.

⁹³ See PILCH Submission on the *Immigration Detention Reform Bill*, above note 90, at 23-28.

⁹⁴ *Ibid*, at 20-21.

⁹⁵ *Ibid*, at 27-28.

⁹⁶ *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 85 (entered into force 11 July 1991).

⁹⁷ *Extradition Act 1988* (Cth), s 22(3)(c).

⁹⁸ *Ibid*, s 22(3)(f).

72. The HRC noted with concern the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty. It recommended that Australia take the necessary legislative and other steps to ensure that no person is extradited to a state where he or she may face the death penalty, and revoke the residual power of the Attorney-General in this regard.⁹⁹

73. PILCH recommends that section 22 of the *Extradition Act* should be amended to provide that an extradition request is to be refused if the death penalty may be imposed on the person.

9.2 International Police-to-Police Cooperation

74. In its Concluding Observations, the HRC noted with concern the lack of a comprehensive prohibition on providing international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the Second Optional Protocol.¹⁰⁰ It recommended that the Australian Government take the necessary legislative and other steps to ensure that it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State and revoke the residual power of the Attorney-General in this regard.¹⁰¹

75. PILCH recommends that the Government:

- proceed with the proposed amendment in section 8 of Schedule 3 of the *Extradition and Mutual Assistance Bill*, which seeks to expand the circumstances in which the Attorney-General must refuse to provide assistance to a foreign country that may result in the imposition of the death penalty to include the investigation of an offence in a pre-charge situation;
- ensure that section 8 of Schedule 3 of the Exposure Draft restricts the Attorney-General's discretion to provide mutual assistance to cases where:
 - he or she has obtained a guarantee from the country seeking mutual assistance that no person will be subject to the death penalty; or,
 - such assistance is exculpatory.
- ensure that section 8 states explicitly that:
 - the only exception to the restriction on the Attorney-General's discretion are cases involving an imminent threat to human life; and,
 - cooperation in such cases should proceed only with a report to Parliament.
- should clarify whether or not the Bill is intended to cover the provision of assistance to foreign law enforcement agencies by the Australian Federal Police in death penalty cases or whether the AFP's *Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*¹⁰² will continue to govern decisions about the provision of mutual assistance in such circumstances.

⁹⁹ HRC, *Concluding Observations: Australia* (2009), at para 20.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Australian Federal Police, *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (2007) (providing that the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating offences that attract the death penalty). These

10. **Human Rights Act and Human Rights Education**

10.1 **National Human Rights Act**

76. In its Concluding Observations, the HRC welcomed the initiative to undertake a National Human Rights Consultation (**Consultation**) on the recognition, protection and promotion of human rights in Australia.¹⁰³ Yet, it expressed concern that Australia has not incorporated the ICCPR into domestic law. It urged the Government to: enact legislation giving domestic effect to the ICCPR; introduce a mechanism to ensure the compatibility of domestic law with the ICCPR; and, provide judicial remedies for violations of ICCPR rights.¹⁰⁴ Like the HRC, CESCR welcomed the Consultation. However, it expressed concern that the Consultation's terms of reference did not explicitly call for consideration of economic, social and cultural rights. CESCR reminded the Government of the principle of interdependency and indivisibility of human rights and urged it to take economic, social and cultural rights into account when considering submissions.¹⁰⁵
77. PILCH commends the Government for initiating the Consultation. It welcomes the *National Human Rights Consultation Report (2009)*¹⁰⁶ and, in line with the recommendations of the report and the HRC and CESCR, PILCH strongly urges the Government to enact a national *Human Rights Act* that gives effect to Australia's obligations under international human rights law, including the ICCPR and ICESCR.
78. The Government should work together with human rights experts to draft a *Human Rights Bill* that: takes into account the recommendations of the *National Human Rights Consultation Report*; is based on a legislative model; protects and promotes civil and political rights and economic, social and cultural rights; and, gives full effect to Australia's human rights obligations. With respect to the particulars of the Bill, PILCH refers the Attorney-General to its previous submissions.¹⁰⁷

10.2 **Human Rights Education**

79. In its Concluding Observations, the HRC noted the absence of any framework or programme in Australia to promote knowledge of the ICCPR. It called for the adoption of a

Guidelines are currently under review by the Attorney-General's Department. See generally Lucy McKernan and Simone Cusack, *Review of Australian Federal Police Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* (PILCH, 2008), available at: http://www.pilch.org.au/2008_submissions/.

¹⁰³ HRC, *Concluding Observations: Australia* (2009), at para 5.

¹⁰⁴ *Ibid*, at para 8.

¹⁰⁵ CESCR, *Concluding Observations: Australia* (2009), at para 10.

¹⁰⁶ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

¹⁰⁷ See Simone Cusack *et al.*, *Strengthening the Protection and Promotion of Human Rights: A Human Rights Act for Australia*, Submission to the National Human Rights Consultation Committee (PILCH, 2009), available at: <http://www.pilch.org.au/Assets/Files/NHRC%20PILCH%20Submission.pdf>; Amy Barry-Macaulay and Caroline Adler, *Righting the Wrongs of Homelessness 2009* (PILCH Homeless Persons' Legal Clinic, 2009), available at: [http://www.pilch.org.au/Assets/Files/FINAL%20HPLC%20submission%20-%20HR%20Consulation%20-%2015%20June%202009\[1\].pdf](http://www.pilch.org.au/Assets/Files/FINAL%20HPLC%20submission%20-%20HR%20Consulation%20-%2015%20June%202009[1].pdf); Caroline Adler and Amy Barry-Macaulay, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia* (PILCH Homeless Persons' Legal Clinic, 2009), available at: <http://www.pilch.org.au/Assets/Files/Promoting%20and%20Protecting%20the%20Human%20Rights%20of%20People%20Experiencing%20Homelessness%20in%20Australia.pdf>.

comprehensive plan of action for human rights education and the incorporation of human rights education at all levels of general education.¹⁰⁸ CESCR also stressed the need for comprehensive human rights education.¹⁰⁹ The need to improve human rights education in Australia was further reinforced in the *National Human Rights Consultation Report*.¹¹⁰

80. PILCH strongly supports the call to adopt a comprehensive plan of action for human rights education and incorporate human rights education at all levels of general education. Human rights education is an important tool for shaping how people live in and understand their community. How people treat each other is based on the assumptions made about the rights of others and our responsibilities towards them. Tackling issues such as racism and domestic violence not only requires robust laws that protect and promote human rights, but also comprehensive education aimed at transforming underlying attitudes and prejudices that undermine the realisation of human rights and fundamental freedoms. Moreover, Australia is also obligated, under international human rights law, to provide education 'directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'¹¹¹.
81. The importance of implementing comprehensive human rights education is highlighted by the UK experience where, in its initial years of operation, there was misunderstanding about the nature and scope of the *Human Rights Act 1998* (UK). The Department for Constitutional Affairs explained that deficiencies in education about this Act led to its misapplication and fuelled a number of damaging myths about human rights.¹¹² The Federal Government should learn from this experience and ensure that the enactment of a national *Human Rights Act* is accompanied by a comprehensive educational campaign.¹¹³
82. PILCH submits that the Government should adopt a comprehensive plan of action for human rights education and incorporate human rights education at every level of general education. In drafting a plan of action for human rights education, the Government should:
- host an expert group meeting or roundtable on the possible nature and content of the plan;
 - review plans of action of other states and open a dialogue with them regarding the strengths and weaknesses of those plans; and,
 - circulate a draft plan of action and consult and seek feedback from key stakeholders and attendees of the expert group meeting or roundtable discussed above.

It is imperative that the Government ensure that any plan of action is consistent with Australia's human rights obligations, including, in particular, the right to education.

83. In incorporating human rights education at all levels of general education, the Government might:

¹⁰⁸ HRC, *Concluding Observations: Australia* (2009), at para 27.

¹⁰⁹ CESCR, *Concluding Observations: Australia* (2009), at para 34.

¹¹⁰ National Human Rights Consultation Committee, above note 106, at CH 6.

¹¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 at 71 (1948), art 26(2); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 UNTS 3, art 13(1).

¹¹² Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, (2006), 29.

¹¹³ See generally Victorian Equal Opportunity and Human Rights Commission, *The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forwards* (2008).

- work with state Departments of Education to revise education curricula to require the establishment of ongoing, mandatory human rights subjects in primary and secondary schools;
- work with University Faculties of Law and regulatory bodies for the legal profession to make a human rights course/unit compulsory or quasi compulsory to obtain a Bachelors of Law or Juris Doctorate and for admission to practice as a lawyer;
- work with University Faculties of Education to ensure that future teachers are required to undergo human rights education; and,
- work with the Australian Human Rights Commission, leading Australian human rights experts and key stakeholders in the education sector to develop accessible education materials to be disseminated in a variety of different formats.

84. The Australian Government should also consider:

- providing adequate resources to the Australian Human Rights Commission, public authorities and educational institutions to provide education and training on human rights;
- establishing a number of scholarships for University students pursuing further studies in human rights. These scholarships should include a stipend to enable recipients to undertake an internship or student placement with a domestic or international human rights organisation;
- encouraging University Departments of Arts to offer human rights courses in the Departments of Political Studies, Women's Studies, Social Sciences and History;
- working with state and territory bar associations to ensure that individuals undertaking the Bar Reader's Course are educated about human rights; and,
- working with judicial colleges to ensure that judges are educated about human rights norms, principles and key jurisprudence.