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UnitingJustice AUSTRALIA

SUBMISSION TO THE FEDERAL ATTORNEY-GENERAL'S DEPARTMENT ON THE UNITED NATIONS HUMAN RIGHTS COMMITTEE'S CONCLUDING OBSERVATIONS IN RELATION TO

AUSTRALIA'S COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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Introduction

UnitingJustice Australia, the justice and advocacy unit of the National Assembly of the Uniting Church in Australia, welcomes this opportunity to comment on the United Nations Human Rights Committee's Concluding Observations on Australia's compliance with the International Covenant on Civil and Political Rights.

The Uniting Church in Australia has, since its inception, been a church of social justice, committed to the achievement of human dignity for all and to involvement in public policy which prioritises the needs of the most vulnerable and disadvantaged in our society. This commitment was enunciated in the Church's *Statement to the Nation*[1] at its Inaugural Assembly in 1977, which reads

> We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in its statement on human rights, *Dignity in Humanity: Recognising Christ in Every Person*[2], adopted by the National Assembly of the Church in 2006. As well as laying out the theological basis of our commitment to human rights, this statement expresses the Church's support for 'the human rights standards recognised by the United Nations', which express the birthright of all people to 'all that is necessary for a decent life and to the hope for a peaceful future.'

In *Dignity in Humanity*, the Uniting Church also urged

> the Australian Government to fulfil its responsibilities under the human rights covenants, conventions and treaties that Australia has ratified or signed

and pledged

> to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable.

In recent years, the Uniting Church has on many occasions had cause to bring to the attention of church members, the general public, governments and the media, violations of Australia's obligations under the International Covenant on Civil and Political Rights. These have included the Northern Territory Emergency Response legislation, anti-terrorism legislation and the indefinite, mandatory detention of asylum seekers. While we appreciate the willingness of the current Federal Government to re-engage with the United Nations human rights system, we do not believe the persistence of human rights violations in a country as prosperous as Australia, which has such a strong commitment to equality and democracy, should be tolerated.

It is our commitment to work for justice and stand against the denial of basic human rights and freedoms which continue to drive the Church's involvement in the development of just and responsible government policy and practice in Australia. In this spirit, UnitingJustice Australia makes this submission on the United Nations Human Rights Committee's Concluding Observations on Australia's compliance with the International Covenant on Civil and Political Rights.

We do not offer comment on all of the findings and recommendations of the Human Rights Committee, but rather on several which fall under our key areas of concern.

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1 Uniting Church in Australia, *Statement to the Nation*, Inaugural Assembly, 1977, available: http://www.unitingjustice.org.au/images/pdfs/resources/churchstatementsandresolutions/1_statement1977.pdf

2 Uniting Church in Australia, *Dignity in Humanity: Recognising Christ in Every Person*, Eleventh Assembly, 2006, available: http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/assembly-resolutions/dignityinhumanity_booklet.pdf

Recommendation: the State party should enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation and establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant.

The Uniting Church in Australia believes that the Australian Government, in its law-making, policy and practice, must protect and promote all of the human rights contained in the UN human rights instruments which Australia is party to, including the International Covenant on Civil and Political Rights.

We believe that a federal legislation, which comprehensively protects the rights Australia has committed to uphold at the international level, is needed. We believe that a federal legislative Australian Human Rights Act or Charter, implementing the Australian Government's international human rights obligations and accompanied by comprehensive and well-funded education and training for the community and government bureaucracy, is the best way to protect and promote human rights in Australia.[3] We note that the recent report of the National Human Rights Consultation recommended, after hearing from thousands of Australians, that the Australian Government enact a Human Rights Act to protect the rights contained in the ICCPR and others. We urge the Australian Government to act on this recommendation.

At the federal level human rights protections are severely lacking. There is a collection of legislation which protects some important elements of the human rights agreed to by nations at the international level, however this does not comprehensively or adequately provide the protection of rights and freedoms to which all members of the Australian community are entitled. These pieces of legislation include the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth*).

In the Australian Constitution, there are a few civil and political rights protected, including the right to vote, the right to trial by jury and an implied right to freedom of political communication (which has been interpreted by the High Court from the notions of representative and responsible government).

We believe that this lack of legal protection for the rights contained in the ICCPR has contributed to legal and political systems in Australia which allows for the violation of fundamental human rights. This has meant that the Australian Government can, and has, passed laws which contravene Australia's international human rights obligations and abuse the rights and freedoms of people in Australia with poor justification and inadequate processes for review. In recent years, the Uniting Church has on many occasions had cause to bring to the attention of church members, the general public, governments and the media, human rights violations occurring here in Australia, including

- the indefinite, mandatory detention of asylum seekers, including children, contravening the right to freedom from torture and other cruel treatment (Articles 7 and 10 of the ICCPR), the right to freedom from arbitrary detention (Article 9 of the ICCPR) and severely affecting the mental and physical health of already traumatised people (violating the right to the highest attainable standard of physical and mental health under Article 12 of the ICESCR)
- far-reaching anti-terrorism laws, which threatened freedom of association and speech, and raise serious concerns about the powers given to law enforcement authorities to detain people without charge and obtain control orders. We do not believe the threat posed by terrorism satisfies the criteria for a 'public emergency which threatens the life of the nation' permissible derogations from human rights protection in the time of public emergency under Article 4 of the ICCPR, and have instead called for a response which is proportionate to the terrorism threat.

Those experiencing a violation of their human rights, including those contained in the ICCPR, are often among the most marginalised and disadvantaged in our community, and have few avenues for remedy when their rights are violated. These groups of people include Indigenous Australians, prisoners and asylum seekers.

In recent years the Uniting Church has expressed concern about many instances where the increasing power of the executive to rush legislation through Parliament has lead to drastically inadequate timeframes for Parliamentary debate and for Parliamentary inquiries to conduct appropriate review.[4] Although we believe a Human Rights Act should include a role for the courts in determining when actions of the Government have violated human rights, it should also be modelled in a way so as to allow for

3 The Assembly Standing Committee of the Uniting Church in Australia adopted a resolution in March 2008 supporting legislative human rights protection for Australia. This resolution is available at http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/assembly-resolutions/11_asc_humanrightslegislation2008.pdf

4 These concerns have been presented, for example, in submissions to the Senate Legal and Constitutional Affairs Committee's inquiries into the provisions of the *Anti-Terrorism (No. 2) Bill 2005* and into the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*, available: http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/anti-terrorismsub_uca1105.pdf, and http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/censorshiplegsub__uja0707.pdf respectively

a greater role for the Parliament and the parliamentary processes in recognising and preventing potential human rights problems in proposed and existing legislation.

The Uniting Church is supportive of a requirement that all new legislation or changes to existing legislation to be accompanied by a Human Rights Impact Statement or similar. This statement should explain any effect of the legislation on human rights in Australia, and any negative effect must be explained and supported. This requirement would be similar to that contained in the *Victorian Charter of Human Rights and Responsibilities Act 2006* which requires that

> A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.[5]

Recommendation: the State party should consider adopting a comprehensive plan of action from human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on the rights protected under the Covenant and the First Optional Protocol. Human rights education should also be incorporated at every level of general education.

The enactment of more comprehensive legal protection for human rights will not be beneficial for the Australian community, however, if more funding and resources are not devoted to the promotion of human rights – in the community and in government departments and service agencies. Whilst we acknowledge the budgetary pressures caused by the global economic crisis, this should not deter governments from implementing measures which enhance the human rights protections of all Australians, and provide important social and economic benefits to all, but especially the already vulnerable and marginalised, in our community. Indeed, the National Human Rights Consultation Committee recommended that 'education be the highest priority for improving and promoting human rights in Australia'.[6]

A 2006 report from the UK Department for Constitutional Affairs documented the problems created by myths and misunderstandings in relation to the UK Human Rights Act. These have been widely reported in the media and have influenced not only the view of the general public but also the way public servants have applied the Act where appropriate training has been absent.[7] This demonstrates the importance of accessible education and information for the general public about a human rights act, and appropriate training and guidance for public servants.

The Australian Human Rights Commission has extensive experience in the area of human rights education and monitoring, and as such we believe it appropriate for the Commission to be properly funded to undertake the task of educating the community about any Human Rights Act and monitoring compliance and assisting with complaints in relation to the Act.

However, the Commission should only be directed to perform this role if a substantive review of the existing role and demands on the Commission is undertaken. In the Commission's 2007-08 Annual Report,[8] it was stated that the Commission had suffered a withdrawal of ongoing funding that had supported fourteen staff in the Complaints Handling Section, who had been engaged to handle the increase in complaints received after unfair dismissal laws were changed under the WorkChoices legislation. The wind back of the legislation by the current Government has not been accompanied by any corresponding reduction in complaints to the Commission and so it was decided by the then HREOC President that the funding cut would be shared across all operations of the Commission. This has resulted in a 14.5 percent funding cut in every Unit of the Commission, and has curtailed the work of each of these Units. The Human Rights Commission plays a pivotal role in the promotion and protection of human rights in Australia and because the Commission is uniquely placed to carry out the education programs needed for a Human Rights Act to make a real difference in the Australian community, it must be properly funded to carry out all of its roles in an effective and meaningful way.

In two submissions to the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Human Rights Committee (both prepared in 2008 by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and the Kingsford Legal Centre, and endorsed by a number of Australian NGOs), it was reported that Australia is yet to formulate any National Action Plan for human rights education, and that no formalised human rights education exists in any state or territory. Human rights education in schools tends to be implicit rather than explicit. Human rights education is contained within civics and citizenship

5 Part 3, Division 1 Section 28 (1)

6 National Human Rights Consultation Report, Recommendation 1, p.xxix

7 UK Department for Constitutional Affairs (2006), *Review of the Implementation of the Human Rights Act*, available: http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf

8 Human Rights and Equal Opportunity Commission (2008), *Annual Report 2007-2008,* available: http://www.humanrights.gov.au/about/publications/annual_reports/2007_2008/index.html

education nationally and various states and territories have subject material that teachers can use to provide human rights education. Further, the Curriculum Corporation, a partnership of all Australian Education Ministers, has produced high quality resources for human rights education in schools including recent material developed in collaboration with Amnesty International.

Within the Australian education system, however, human rights education is not itself a key learning area and there are few explicit key learning outcomes that have a link to human rights education. Thus, it is our view that human rights education in Australia falls short of Australia's obligations contained within Article 13(1) of the International Covenant on Economic, Social and Cultural Rights and Article 29(1) of the UN Convention on the Rights of the Child. Australian governments should include human rights education as a key learning area and ensure that human rights education is more explicitly integrated into school curriculum, while being sensitive to the problems of the already crowded curriculum.

Recommendation: the State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant.

Since 11 September 2001, more than 40 pieces of anti-terrorism legislation have been implemented by the Australian Government. These laws have created new criminal offences, new powers for law enforcement agencies and new powers for the federal Attorney-General to proscribe terrorist organisations. In the absence of a federal Human Rights Act, these laws have not been adequately scrutinised in light of Australia's human rights obligations.

While the Church has expressed support for the implementation of legitimate and fair policies to suppress terrorist activity and protect human life, it has spoken out against situations where it considers that counter-terrorism legislation has made undue incursion into basic civil and political freedoms without appropriate justification. We do not believe that it is either appropriate or necessary for Australia to defend itself from terrorism by violating fundamental human rights such as the right to a fair trial and the presumption of innocence.

While we acknowledge the need for lawful and justified policy to protect human rights, we believe that counter-terrorism laws must be shown to be absolutely necessary and proportionate to the threat posed by terrorism. Existing laws must be shown to be insufficient and it must be demonstrated that new legislation will adequately address current legal gaps and problems.

Legislation which prevents a person in detention from contacting anyone at any time while in custody is of serious concern in relation to the prohibition of torture and mistreatment under the ICCPR. In addition, the use of preventative detention (which allows for an individual to be held for up to 14 days with no ability to appeal their detention) and control orders violate Article 9 of the ICCPR, the right to freedom from arbitrary detention.

We recognise that a Bill intended to improve many aspects of Australia's counter-terrorism laws was recently the subject of an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. We believe that the *Anti-Terrorism Laws Reform Bill 2009* removes or improves many of the worst aspects of Australia's counter-terrorism laws, and is an ideal first step in improving the compliance of these laws with the ICCPR. Furthermore, we recognise that the Attorney-General's department has recently taken submissions for a public consultation on proposed reform to Australia's counter-terrorism and national security legislation, and welcome this initiative.

We note however that the joint submission from Amnesty International and the Human Rights Law Resource Centre to the Attorney-General's department on the National Security Discussion Paper states that 'Amnesty and the HRLRC submit that many of Australia's counter-terror laws considered in the NSL Discussion Paper violate fundamental human rights, and the NSL review does not adequately alleviate the rights violations.'[9] This submission also notes that 'the NSL review does not address some of the most controversial elements of Australia's counter-terrorism laws'[10], which are listed as:

- 'control order and preventative detention order schemes;
- excessively broad powers of ASIO to detain and question people, including non-suspects;
- the process for listing of terrorist organisations and reviewing such listing; and
- the offence of association with a terrorist organisation.'[11]

In our view, it is vital for the Government to use the two consultation processes mentioned above to reformulate Australia's counter-terrorism laws so that they comply with Australia's human rights obligations, as listed in the ICCPR.

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9 Human Rights Law Resource Centre and Amnesty International, '*Human Rights and Human Security:* Joint Submission to the Commonwealth Attorney-General's Department regarding National Security Legislation', 1 October 2009, p.2

10 ibid., p.3

11 ibid.

Recommendation: the State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the Racial Discrimination Act 1995 and the Covenant.

At its Twelfth Assembly meeting in July 2009, the Uniting Church in Australia adopted a resolution to

> convey to the Commonwealth Government our view that it is in contravention of the United Nations Declaration on the Rights of Indigenous Peoples while any parts of the Commonwealth Racial Discrimination Act (RDA) are suspended for Northern Territory Indigenous citizens, or if it re-instates this Act with different qualification for Indigenous people[12]

By excluding the operation of the RDA under the NT Intervention legislation, Indigenous people are unable to rely on its protections or seek review by the courts. The RDA's protection against racial discrimination, which is otherwise granted to all other Australians, does not apply to the most vulnerable members of our community.

We welcome the Government's announcements on its intention to recast the NT Intervention policies in a manner compliant with the Racial Discrimination Act. We are concerned, however, that the policies will simply be stated as 'special measures' under the RDA and that compulsory income quarantining will continue. Special measures, under international law, must be necessary, proportional to the problem, of a temporary nature, and implemented with the consent of the affected peoples. These criteria have not been met in relation to compulsory income quarantining.

At the Church's Twelfth Assembly meeting, we also resolved to

> call on all Australian governments (Commonwealth, State and Territory) to use negotiated partnership approaches in regard to Indigenous Australian citizens, which includes the right to negotiate and communicate in their language of choice, and through their specified mechanisms[13]

This resolution was made partly in response to the absolute lack of adequate and appropriate consultation with Indigenous people prior to the introduction of the NT Intervention measures. The NT Intervention legislation, which continues to have far-reaching consequences for the rights of Aboriginal and Torres Strait Islander peoples, was rushed through Parliament by the executive without needing to adhere to any processes for review and was enacted with scant regard for engagement with the people and communities affected.

The Uniting Church expressed its concerns about the swift passage of this tremendously important legislation in 2007:

> This is some of the most significant legislation in the history of our nation, over riding aspects of the Race Discrimination and Native Title acts. It is with disbelief that we note that it merited only a one-day Senate hearing, which did not consult with some of the key stakeholders in the plan.[14]

It was pointed out during the debate by Mr Daryl Melham MP, member for Banks in the then-ALP Opposition:

> We are currently debating five bills. They come to 537 pages in total. There are also 196 pages of explanatory memoranda. With regard to the opposition's ability to scrutinize these bills, the public should appreciate that the shadow spokesperson was only given copies midmorning yesterday and they filtered through all the way into the evening. The ultraspeedy passage of these bills is clearly designed to avoid public scrutiny, not least from Aboriginal communities but also from other community bodies with legitimate concerns about the government's proposals.[15]

International human rights law requires that solutions be found to the problems of violence, abuse and poverty in Indigenous communities that protect all human rights. This is particularly pertinent given the Australian Government's commitments to the UN Declaration on the Rights of Indigenous Peoples. Effective and just policy should always stand up to human rights scrutiny. Policy cannot be sustainable in the long term if it does not safeguard the human rights of the population it is designed to protect and benefit.

12 Uniting Church in Australia, 'Matters affecting Indigenous peoples', resolution 09.37, Twelfth Assembly, July 2009, available: http://nat.uca.org.au/images/assemblies/minutes12thassembly09.pdf

13 ibid.

14 'Uniting Church condemns parliament processes on NT Indigenous Intervention', media release, 15 August 2007, available: http://www.unitingjustice.org.au/images/pdfs/issues/indigenous-justice/media/ntlegislationsenatereport_150807.pdf

15 House of Representatives Official Hansard, 7 August 2007, available: http://aph.gov.au/hansard/reps/dailys/dr070807.pdf, p.89

Recommendation: the State party should take urgent and adequate measures, including legislative measures, to ensure that nobody 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.

The principle of non-refoulement, contained in several international human rights conventions[16], prohibits Australia from returning a refugee to a country where his or her life would be threatened. To date, while Australia has committed to this principle internationally, there is no adequate domestic implementation of this obligation.

The *Migration Amendment (Complementary Protection) Bill 2009*, introduced by the Government and recently the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee, will ensure that people who are at risk of being arbitrarily deprived of their life or tortured, but whose situation does not grant them refugee status under the Refugee Convention, are not retuned to a country where they face this risk. We welcome the Government's efforts through this Bill to respond to Australia's non-refoulement obligations through a system of complementary protection.

Recommendation: the State party should 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, as well as whereby it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state.

The cooperation of Australian law enforcement officials with overseas agencies which exposes Australians to the risk of the death penalty is at odds with Australia's obligations under the Second Optional Protocol to the ICCPR.

The unwillingness of the Australian Government to intervene in the sentencing of three of the 'Bali 9' to the death penalty represents a weakening of our opposition to the death penalty. The role of the Australian Federal Police in the arrest and conviction of the Bali 9 is equally concerning.

We support the introduction of explicit comprehensive prohibition of the provision of international assistance for crimes that may lead to the imposition of the death penalty.

Recommendation: the State party should consider abolishing the remaining elements of its mandatory detention policy, and consider closing down the Christmas Island detention centre.

Australia's immigration detention policy and practice should comply with Australia's international human rights obligations, including ensuring that:

- no one is subjected to arbitrary arrest or detention (Article 9(1) of the ICCPR)
- anyone deprived of their liberty has the right to challenge its lawfulness before a court
- anyone detained has access to independent legal advice and assistance
- detention of a child is be used only as a measure of last resort and for the shortest appropriate period of time
- everyone is entitled to respect for their human rights without discrimination

Mandatory detention

We do not believe that mandatory detention is just and responsible public policy. There is no evidence to show that the current mandatory detention system minimises the risk to the community, avoids high rates of non-compliance or deters other immigration offences.

All unauthorised asylum seeker entrants continue to be detained in an IDC until health, security and identity checks are completed. While the length of detention may be shorter than in previous years, detaining everyone means detention is not a matter of last resort, as is espoused in the Government's New Directions in Detention, but rather still be a matter of first resort. International human rights law requires the justification of detention for each individual case.

Christmas Island

The size and remoteness of Christmas Island and its status as an excised territory make it fundamentally unacceptable for use as an immigration detention location.

Offshore entry persons' claims for refugee status are assessed under an administrative process which applies only to asylum seekers who arrive in excised offshore places. This process is not governed by

16 Australia's non-refoulement obligations are contained in the ICCPR, but also in the Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty, the Convention on the Rights of the Child, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention Relating to the Status of Refugees

the Migration Act (unlike the separate process for assessing asylum claims onshore), but rather by draft guidelines developed by DIAC, which are neither legally binding nor publicly available. Decisions to detain and to continue to detain are not subject to any regulatory or judicial oversight, and the Migration Act bars offshore entry persons from taking legal action in regards to the lawfulness of their detention.

The considerable constraints placed on the management of immigration detention on Christmas Island, which stem from the decision to detain people in such a small and remote community, create problems including:

- limited access to appropriate services including health and mental health care, legal advice and recreation services;
- a great need for religious services and pastoral care;
- unmet demand for access to interpreters trained and accredited in the languages required by detainees;
- detention facilities which are inappropriate for detaining asylum seekers, particular those with a history of trauma or torture; and
- a lack of appropriate accommodation for community detention once health, security and identity checks have been completed.

The use of Christmas Island is particularly concerning in relation to the treatment of children. The Australian Human Rights Commission recently highlighted the following concerns in relation to the detention of families with children and unaccompanied minors on Christmas Island:

- families with children and unaccompanied minors are mandatorily detained, despite the Migration Act not requiring detention in excised offshore places
- the detaining of families with children and unaccompanied minors in the construction camp facility, rather than in community detention, which is not an appropriate environment for their detention
- there is a lack of clarity surrounding the responsibilities relating to child welfare on Christmas Island
- there is a conflict of interest in the Minister or a DIAC officer acting as the legal guardian of an unaccompanied minor, while also being the authority responsible for the minor's detention and the decision to grant a visa[17]

We share these concerns, and believe that they show the fundamental inappropriateness of Christmas Island as a detention facility. As such, we recommend the Government move to end its use of Christmas Island for immigration detention purposes.

17 Australian Human Rights Commission, *Immigration detention and offshore processing on Christmas Island*, pp.23-24, October 2009, available: http://humanrights.gov.au/human_rights/immigration/idc2009_xmas_island.pdf