
Australia's National Human Rights Action Plan 2012

Attorney-General's Department

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Acknowledgement

The Law Council wishes to acknowledge the assistance of its Equalising Opportunities in the Law (EOL) Committee and the following constituent bodies in the preparation of this submission:

- Law Institute of Victoria;
- Law Society of South Australia;
- Law Society of Western Australia;
- Queensland Law Society;
- Law Society of New South Wales; and
- Law Society Northern Territory.

Executive Summary

1. The Law Council welcomes the Action Plan as a positive step forward in the realisation of yet another component of the Government's Human Rights Framework.
2. The Law Council believes that the development of the Action Plan plays an important role in demonstrating the Australian Government's commitment to improving respect for and protection of human rights in Australia in line with Australia's domestic and international human rights obligations.
3. The Law Council believes that this Action Plan represents an opportunity for the Australian Government to outline in detail, all the initiatives that it is committed to in order to protect the human rights of not only its citizens, but everyone who is within Australia's borders.
4. The Law Council welcomes a number of the initiatives identified in the Action Plan. However, there are also a number of issues that the Law Council believes the Action Plan either completely overlooks, or fails to address with the level of detail that reflects the serious nature of either domestic or international human rights concerns in these areas.
5. The Law Council hopes that by outlining the Government's commitment to particular action in different areas where respect for human rights is currently lacking, the Action Plan will be utilised to further strengthen human rights in Australia.
6. The Law Council's submission identifies some general issues that should be addressed in order to strengthen the Action Plan. These include:
 - Ensuring that the Action Plan refers to a significant number of new Government policies and programs, as opposed to focussing on existing Government policy and program initiatives; and
 - Ensuring that Action Items contain specific timelines and performance indicators wherever possible.
7. The Law Council believes that if the issues outlined in this submission are taken into account, the Action Plan will be a very useful tool for the Government and other interested organisations to rely on in order to ensure Australia meets its domestic and international human rights obligations.

Introduction

8. The Law Council welcomes the release of the Exposure Draft of Australia's National Human Rights Action Plan (the Action Plan) by the Attorney-General's Department (the Department) , and is pleased to provide the Department with this submission. Several of the Law Council's Constituent Bodies have provided specific comments on the Action Plan and parts of this submission refer to those comments. Further details of the Law Council's Constituent Bodies are provided at Attachment A.
9. This submission follows earlier submissions made by the Law Council in relation to previous stages of the consultation process in:
 - September 2011 on the Baseline Study for the National Human Rights Action Plan¹;
 - February 2011 on the National Human Rights Action Plan Background Paper;² and
 - May 2009 on the National Consultation on Human Rights.³
10. The Law Council has advocated extensively in support of better recognition and protection of human rights at both the domestic and international level.
11. The Law Council welcomes a number of the initiatives identified in the Action Plan including:
 - Reviewing Australia's reservations under a number of international human rights instruments;⁴
 - Working with States and Territories towards ratifying the Optional Protocol to the Convention Against Torture;⁵ and
 - The Australian Government's commitment to increasing aid to 0.5% of Gross National Income.⁶
12. Notwithstanding these welcome components, the Law Council also wishes to express a number of concerns about the Action Plan. These concerns primarily relate to what the Law Council considers to be inadequate coverage of very significant and important human rights issues in Australia including:
 - Asylum seekers and the Australian Government's immigration detention policy;

¹ Law Council of Australia, Submission to the Attorney-General's Department on the *Baseline Study for a National Human Rights Action Plan*, 2 September 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=5FE5EF51-9FE5-C39E-53B7-9F8B24A7CDDF&siteName=lca.

² Law Council of Australia, Submission to the Attorney-General's Department on the *National Human Rights Action Plan Background Paper*, 9 February 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=931A392C-DF82-8211-600A-F5D70667761F&siteName=lca.

³ Law Council of Australia, Submission on the *National Consultation on Human Rights*, 6 May 2009. Available from [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/B741AF03F814D2C3CA25760700160A0E/\\$file/law_council_of_australia_AGWW-7RS3YB.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/B741AF03F814D2C3CA25760700160A0E/$file/law_council_of_australia_AGWW-7RS3YB.pdf).

⁴ Attorney-General's Department, *Exposure Draft - Australia's National Human Rights Action Plan 2012*, Item 3, p.4. Available from <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/NationalHumanRightsActionPlan.aspx>

⁵ *Ibid.*, Item 2, p.4.

⁶ *Ibid.*, Item 8, p.5.

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- Access to justice;
 - Counter-terrorism legislation;
 - Anti-association legislation;
 - Implementation of the Declaration on the Rights of Indigenous Peoples;
 - Mandatory sentencing and indeterminate sentences;
 - Information sharing by law enforcement and other regulatory agencies;
 - Gaps in the protection of homeless children, Indigenous children and children in immigration detention; and
 - Violence against people based on their sexual orientation and gender identity.
13. In addition to this, the Law Council is concerned about the emphasis that the Action Plan places on existing Government programs, policies and commitments instead of focusing on new initiatives. Indeed, one of the Law Council's Constituent Bodies, the Law Institute of Victoria (LIV) has raised concerns about the absence of a methodical approach to the identification of new initiatives and programs in the Action Plan and its failure to address the gaps identified in the Baseline Study that preceded the Action Plan's development.
 14. In its submission on the National Human Rights Action Plan Background Paper⁷ (the Background Paper), the Law Council stressed the importance of ensuring that the Action Plan was directed towards delivering meaningful change. The Law Council submits that it is arguable whether the mere reiteration of existing policy commitments – without ensuring that these initiatives are framed in terms of their impact on human rights - constitutes meaningful change.
 15. The Law Council acknowledges the utility and relevance of including pre-existing commitments and policies in the Action Plan where these initiatives are part of the Australia Government's response to improving Australia's compliance with international human rights obligations. However, in many instances further work needs to be undertaken to ensure that these commitments and policies fully incorporate human rights objectives and outcomes and to ensure that their impact on human rights can be measured.
 16. For example, the Law Council welcomes the inclusion of the Government's proposed consolidation of Commonwealth anti-discrimination laws in item 18 of the Action Plan, but submits that this action item should specifically include a reference to the need for this consolidation process to enhance the existing protections against discrimination under Commonwealth law and to improve Australia's compliance with international human rights standards in this area. If this pre-existing initiative is to be included in the Action Plan, its scope and/or terms of reference should explicitly reflect the human rights priorities the Action Plan is intending to pursue.
 14. Another issue of concern to the Law Council is the lack of specific performance indicators and timelines used in the Action Plan. For a number of the initiatives in the Action Plan, the term 'ongoing' is all that is used to describe the timeline and how the progress of different initiatives and programs will be measured. A number of the initiatives fail to outline any real commitment to action beyond simply 'monitoring' developments. This failure makes measuring progress of particular initiatives and programs very difficult.

⁷Op.cit., Law Council submission on *National Human Rights Action Plan Background Paper*

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15. The Action Plan makes several references to increased or continued funding in relation to a number of initiatives. Whilst the Law Council welcomes the Government's commitment to increased or continued funding in such cases, it is concerned about the lack of specificity in the Action Plan as to how this funding will be utilised, and how improvements to human rights will be ascertained.⁸ Indeed, the LIV notes that any mention of initiatives and programs in the Action Plan without a commitment to the requisite funding are unlikely to achieve long-term improvements to the level of human rights protections, and are more likely to undermine the likelihood of those programs and initiatives actually being achieved.
 16. Finally, the Law Council notes that a number of the initiatives in the Action Plan focus on initiatives that will be undertaken at the State and Territory level. The Law Council supports this approach given that protecting human rights is not limited to the Commonwealth and is the responsibility of all jurisdictions. However, it is worth noting that the Action Plan largely focusses on initiatives in Victoria and the Northern Territory. The Action Plan notes that all State and Territory Governments have been consulted on initiatives in their jurisdictions but only some have provided input to date.
 17. Whilst the LIV is pleased to see that a number of Victorian initiatives and programs are focussed on in the Action Plan, the LIV suggests that it may be appropriate for other State and Territory initiatives to be covered in the Action Plan more comprehensively. In an effort to remedy this, the LIV suggests that a sub-heading of 'Actions in States and Territories' for each topic could be inserted in the Action Plan. The Law Council submits that a further Exposure Draft should be released for consultation when the input from other States and Territories has been incorporated.

Protection and promotion of human rights in Australia

General Comments

18. The introductory paragraph in the 'Protection and promotion of human rights in Australia' section of the Action Plan cites initiatives such as reviewing Australia's reservations to the seven core international human rights treaties to which Australia is a party;⁹ ratifying the Optional Protocol to the Convention against Torture;¹⁰ and reviewing its position on the International Convention for the Protection of All Persons from Enforced Disappearances¹¹ as examples of some of the ways in which the Australian Government intends to strengthen protections for human rights in Australia.
19. The Law Council believes that these initiatives represent an important step towards Australia better realising its international human rights obligations and is therefore pleased to see that they have been included in the Action Plan.
20. However, notwithstanding the importance of these initiatives and the roles they play in improving the protection and promotion of human rights in Australia, the Law

⁸ See for example Items 8 and 21 in the Action Plan which commit the Government to increasing aid to 0.5% of Gross National Income, and providing funding for human rights education, respectively.

⁹ Op.cit., *Exposure Draft - Australia's National Human Rights Action Plan 2012*, Item 3, p.4.

¹⁰ Ibid., Item 2, p.4.

¹¹ Ibid., Item 4, p.5.

Council also has a number of concerns about the initiatives that this section of the Action Plan appears to overlook.

21. Firstly, the Law Council is disappointed to see that the Action Plan fails to acknowledge the lack of comprehensive constitutional or legislative protection for human rights at the federal level. It is also disappointed to see that the Action Plan fails to include initiatives that would indicate that the Australian Government intends to review its decision not to enact a federal Human Rights Act despite recommendations to do so by a number of United Nations (UN) treaty bodies, including the UN Human Rights Council¹² and by the National Human Rights Consultation Committee.
22. In its submission on the Background Paper,¹³ the Law Council suggested that the Action Plan would be strengthened through the inclusion of initiatives that addressed the gaps in Australia's human rights regime that were outlined in the National Human Rights Consultation Report.¹⁴ These included recommendations that could be implemented without necessarily passing a Human Rights Act such as:
 - Amending the *Acts Interpretation Act 1901* (Cth) to require legislation to be interpreted consistently with human rights; and
 - Amending the *Administrative Decisions Judicial Review Act 1977* (Cth) to make certain human rights a relevant consideration in decision-making.
23. These amendments would compel consideration of human rights in the interpretation of legislation and administrative decision-making. Unfortunately however, these recommendations appear to have also been overlooked in the Action Plan.
24. Another issue of concern to the Law Council is the number of initiatives in this section of the Action Plan that appear to simply reiterate existing Government policy commitments as opposed to new Government initiatives. For example, items 10 and 11 in the Action Plan merely reiterate the Australian Government's ongoing commitments to promoting human rights through official aid programs and the provision of funding to the Office of the High Commissioner for Human Rights (OHCHR).
25. A similar observation can be made in relation to the following items in the Action Plan which also simply reiterate what the Government will continue to do, rather than outlining new targets or actions that the Government will implement in an effort to address shortfalls in the protection and recognition of human rights in Australia:
 - The Australian Government will continue to adhere to the provisions in the *Extradition Act 1988* regarding surrender where the offence for which extradition is sought is punishable by the death penalty (Item 7);

¹²See for example recommendation 86.22, United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/17/102011, Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

¹³Op.cit., Law Council Submission on the *National Human Rights Action Plan Background Paper*, p.5.

¹⁴Attorney-General's Department, *National Human Rights Consultation Report*, September 2009, p. xxxii. Available at

[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/%28CA02151F94FFB778ADAE C2E6EA8653D%29-NHRC+Report+%28Recommendations%29.pdf/\\$file/NHRC+Report+%28Recommendations%29.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/%28CA02151F94FFB778ADAE C2E6EA8653D%29-NHRC+Report+%28Recommendations%29.pdf/$file/NHRC+Report+%28Recommendations%29.pdf)

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- The Australian Government will continue to work to build the capacity of the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights (Item 12);
 - The Australian Government will continue to implement the first disability strategy for the aid program (launched in 2008) called *Disability for All* (Item 13); and
 - The Australian Government will continue to resource the International Pro Bono Advisory Group to support pro bono work internationally (Item 14).
26. Whilst it may be the case that some initiatives are ongoing, the Law Council is concerned that the Action Plan as currently drafted places too great a reliance on these types of initiatives, and that this comes at the cost of real reform.
27. Finally, a number of initiatives in this chapter of the Action Plan are drafted quite broadly and without adequate reference to specific performance indicators and timelines. Drafting the initiatives in this way makes it very difficult to determine if and when these initiatives have been implemented. This aspect of the Action Plan is particularly concerning given that the Law Council and other Non-Government Organisations (NGOs) have previously stressed that in order for the Action Plan to be effective, it must set “achievable targets and propose realistic activities rather than making vague promises”.¹⁵

Improving data collection and analysis

Item 1

28. Item 1 in the Action Plan states that the Australian Government will establish an advisory group to provide advice on matters related to the collection and interpretation of data and other information, with the aim of improving measurement of progress on human rights in Australia.
29. Whilst the Law Council supports the establishment of such an advisory group the Law Council submits that this action item should include more detail.
30. In its present form, this initiative does not outline who the advisory group will be comprised of; what matters related to the collection and interpretation of data and other information the advisory group will be providing advice on; what constitutes ‘data’ and ‘other information’; or how the advisory group intends to measure progress in relation to human rights in Australia. In addition to this, the Action Plan does not outline specific timeframes that different aspects of this initiative will need to be completed by. Instead, it simply states that initial scoping will be completed by June 2012.

¹⁵ Human Rights Law Resource Centre, *Making Rights Real: A National Human Rights Action plan for Australia*, February 2011, p.8. Available from [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/%28CA02151F94FFB778ADAE C2E6EA8653D%29-NHRC+Report+%28Recommendations%29.pdf/\\$file/NHRC+Report+%28Recommendations%29.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/%28CA02151F94FFB778ADAE C2E6EA8653D%29-NHRC+Report+%28Recommendations%29.pdf/$file/NHRC+Report+%28Recommendations%29.pdf)

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31. As stated by the Office of the UN High Commissioner for Human Rights, in order to facilitate positive change, it is critical that the Action Plan initiatives are drafted in such a way so as to be “action-oriented”.¹⁶ In this regard, they must:
- “Indicate clearly what the current situation is;
 - Identify what problems need to be overcome;
 - Specify what action will be taken (in terms that provide benchmarks for the evaluation of progress);
 - Specify who is to take the action;
 - Establish a firm time frame in which action will be taken; and
 - Provide for effective monitoring and evaluation of what has been done.”¹⁷
32. In its submission on the Background Paper, the Law Council suggested that the initiatives in the Action Plan should be drafted with this methodology in mind. Drafting action items in this way ensures that Government policy makers have clear guidance as to what it is that needs to be carried out in relation to particular initiatives.
33. Accordingly, the Law Council submits that the Government should revisit Action Plan initiatives such as Item 1 to ensure that they are drafted with sufficient detail so as to ensure implementation progress can be better evaluated and identified.

Australia’s international human rights commitments

Item 2

34. Item 2 in the Action Plan reiterates the Government’s commitment to working with the States and Territories to take the necessary steps towards ratifying the Optional Protocol to the Convention Against Torture (OPCAT).
35. The Law Council is pleased to see that the Action Plan outlines the Government’s commitment to working with the States and Territories to ratify this Optional Protocol.¹⁸ The Law Council encourages the Government to undertake this ratification process expeditiously.
36. OPCAT establishes an international body known as the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), which is responsible for inspecting and monitoring places of detention such as prisons, psychiatric facilities, juvenile detention centres and immigration detention centres. Insofar as OPCAT also requires countries that ratify this instrument to “set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment,”¹⁹ ratification of OPCAT would enhance accountability and transparency in Australian places of detention.

¹⁶ Office of the United Nations High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, Professional Training Series No.10, 29 August 2002, p.18. Available from <http://www.ohchr.org/Documents/Publications/training10en.pdf>

¹⁷ *Ibid.*, p.18.

¹⁸ *Op.cit.*, *Exposure Draft - Australia’s National Human Rights Action Plan 2012*, Item 2.

¹⁹ See Article 3, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199. Available from <http://www2.ohchr.org/english/law/cat-one.htm>

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37. Australia signed the OPCAT on 19 May 2009. Little action appeared to have taken place in relation to Australia's ratification of OPCAT from 2009 until 28 February 2012. This lack of action led to criticism of Australia, including at Australia's Universal Periodic Review in January 2011. A number of UN Human Rights Council Member States noted that Australia had not yet ratified the OPCAT and subsequently recommended that Australia expedite the ratification of this important human rights instrument.²⁰
38. The Government's commitment in the Action Plan to work with the States and Territories to ratify OPCAT; table a National Interest Analysis in Parliament; develop model legislation for consideration by jurisdictions; seek endorsement of Australia ratifying OPCAT from the Parliamentary Joint Standing Committee on Treaties; and lodge the instrument of ratification with the United Nations are therefore very pleasing. However, the Law Council notes that the Action Plan currently does not outline a deadline by which the Government aims to complete these processes. The Law Council submits that it would be useful to include more specific deadlines in the Action Plan for these processes, although it notes that OPCAT has now been referred to the Joint Standing Committee on Treaties.²¹
39. The Law Council is pleased to see Action Item 2 includes many of the necessary procedural steps required for Australia to ratify the OPCAT. However, the Law Council is of the view that the Action plan should also reflect the Australian Government's a commitment to undertake the measures necessary to give practical effect to the objects of the OPCAT. This includes:
- Building upon the work of the Australian Human Rights Commission and others to develop and establish a National Preventive Mechanism or Mechanisms;
 - Identifying the main places of detention that will be covered in Australia; and
 - Outlining how compliance with the OPCAT will be monitored and how appropriate standards will be developed and implemented.
40. The inclusion of time frames for undertaking these activities would also be welcomed, and a relevant performance indicator could be the establishment of the National Preventative Mechanism/s.²²

Other Human Rights Instruments

41. The Law Council is also concerned that the Government has not committed in the Action Plan to signing or ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)²³ or the

²⁰ See Recommendations 86.1- 86.6, United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/17/10. Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

²¹ See joint media release by the Hon. Nicola Roxon MP and the Hon. Craig Emerson MP, 'Gillard Government moves to ratify OPCAT,' 28 February 2012. Available from <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/28-February-2012---Gillard-Government-Moves-To-Ratify-Opcat.aspx>

²² *Implementing the Optional Protocol to the Convention against Torture : Options for Australia* (2008) A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia)

²³ *International Convention on the Protection of the Rights of All Migrant Workers and their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990. Available from <http://www2.ohchr.org/english/law/cmw.htm>

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.²⁴

42. The ICRMW applies universal human rights standards to migrant workers and their families and as such, promotes access to humane working and living conditions. It provides guidance on national migration policies to ensure that minimum standards of human dignity are protected. It also contains strategies for international co-operation based on respect for human rights and the rule of law.
43. In the recent UN Universal Periodic Review of Australia, a number of countries and the Australian Human Rights Commission urged Australia to consider ratification of the ICRMW.²⁵ In its response to these recommendations, the Australian Government expressed its intention not to become a party to this Convention, citing “existing protections for migrant workers as adequate”.²⁶ The Law Council does not agree that existing protections for migrant workers are adequate.
44. The Law Council has recently addressed the need for a range of measures to address labour exploitation, including among migrant workers, in a submission on the introduction of forced labour offences into the *Criminal Code Act 1995 (Cth)*.²⁷ While the new offences go some way to addressing gaps in protection for migrant workers, the Law Council considers that further measures are necessary and could be supported by ratification of ICRMW.
45. Another issue of concern to the Law Council is the Government’s failure to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the Optional Protocol).
46. The Optional Protocol establishes a complaints mechanism whereby the Committee on Economic, Social and Cultural Rights is empowered to consider complaints from individuals or groups who believe that their rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been breached. The Optional Protocol also establishes an inquiry mechanism that enables the Committee to investigate and make recommendations to State Parties if it is found that there have been violations of ICESCR.²⁸
47. Given the Action Plan states that the Government will review its position in relation to other Conventions such as the International Convention for the Protection of All Persons from Enforced Disappearances and the International Labour Organization

²⁴ See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution A/RES/63/117 on 10 December 2008. Available from http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf

²⁵ See for example recommendations 86.9 and 86.10, United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/17/10/2011, Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement> Countries that recommended Australia sign and ratify this Convention included Argentina, Algeria, Bolivia, Turkey, Philippines, and Bosnia and Herzegovina.

²⁶ See United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia Addendum*, 31 May 2011, A/HRC/17/10/Add.1. Available from http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf

²⁷ See Law Council Submission on *Crimes Legislation Amendment (Slavery, Slavery-like conditions and People Trafficking) Bill 2012*, 20 January 2012. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F824861E-F961-E5B9-B626-510645D3D66A&siteName=lca

²⁸ See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution A/RES/63/117 on 10 December 2008. Available from http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf

Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, the absence of similar commitments by the Government with respect to the ICRMW and the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights are notable omissions.

48. Accordingly, the Law Council submits that the Action Plan should also include commitments by the Government to review its position in relation to the ICRMW and the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights.

Item 3

49. The Law Council welcomes the Government's commitment to reviewing its reservations and declarations under the following international instruments²⁹:

- International Covenant on Civil and Political Rights (ICCPR);
- Convention on the Elimination of Discrimination Against Women (CEDAW);
- Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Rights of the Child (CROC);
- Optional Protocol to the Convention on the Rights of the Child: Children in Armed Conflict; and
- Convention on the Rights of Persons with Disabilities (CRPD).

50. The Law Council has previously made submissions that a number of these reservations should be removed as outlined below.

International Covenant on Civil and Political Rights

51. The Law Council welcomes the commitment in the Action Plan to review reservations to the ICCPR because it has previously expressed concerns in relation to the Australian Government's reservations to this Convention,³⁰ particularly in relation to the reservations to Article 10(2)(b) and 10(3) which essentially allow juvenile offenders to be held with adult offenders when incarcerated.³¹
52. These reservations limit the protections granted to children who are deprived of their liberty and expose these children to older offenders who may have a negative influence on them.
53. The Law Council therefore submits that the Australian Government should go further than committing to a review and actually commit to removing its reservations to Articles 10(2)(b) and 10(3), as a matter of urgency.

²⁹ Op.cit., *Exposure Draft - Australia's National Human Rights Action Plan 2012*, Item 3.

³⁰ See for example, Law Council Submission to Senate Legal and Constitutional Affairs Committee on the *Commonwealth Commissioner for Children and Young People Bill 2011*, 6 January 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6CF4F4CD-9C94-C6B9-B951-410BA849B76C&siteName=lcahttp://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6CF4F4CD-9C94-C6B9-B951-410BA849B76C&siteName=lca

³¹ See for example *Brough v Australia* (2006) UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) where the UN Human Rights Committee found that Australia was in violation of: article 10(1) of the ICCPR, which requires that prisoners be treated humanely; article 10(3), which provides that juveniles be separated from adults in prison; and article 24(1) which requires that children be protected by society and the State without discrimination.

Convention on the Elimination of Discrimination Against Women

54. The two reservations accompanying Australia's ratification in 1983 of CEDAW provided:
- *"The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'.*³²
 - *The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents. The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia."*³³
55. While the reservation in relation to Australia's defence force policy was amended in August 2000 to limit the reservation to the exclusion of women from combat duties, the reservation in relation to Article 11(2) has not been amended.
56. The Law Council has previously raised concerns about the Government's reservations in relation to paid maternity leave and the exclusion of women from combat duties. In its 2008 submission to the Senate Standing Committee on Legal and Constitutional Affairs on its Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act,³⁴ the Law Council suggested that steps should be taken to remove these reservations.
57. Since 2008, a number of initiatives have been implemented by the Government to assist families after the birth of a child.³⁵ The Australian Government's paid parental leave scheme commenced on 1 January 2011 and operates throughout Australia. The *Paid Parental Leave Act 2010* (Cth) entitles employees who take on the role as the primary carer of a newborn or adopted child to social security benefits. The Law Council's Equalising Opportunities in the Law (EOL) Committee notes that, this entitlement provides greater financial security to employees who take maternity leave and may otherwise not be entitled to paid maternity leave under their relevant industrial instrument.

³² Australia's Reservation to Art 11(1), *Convention on the Elimination of All Forms of Discrimination Against Women*. Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#3

³³ Ibid.

³⁴ Law Council Submission to Senate Standing Committee on Legal and Constitutional Affairs on the *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, 15 August 2008. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=AE88237E-1E4F-17FA-D247-A7DB436B110F&siteName=lca

³⁵ The Paid Parental Leave Scheme that came into force on 1 January 2011. Further information on this Scheme can be found at <http://www.familyassist.gov.au/payments/family-assistance-payments/paid-parental-leave-scheme/>

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58. In addition to this, the EOL Committee notes that the *Fair Work Act 2009* (Cth) has strengthened a number of protections for those on parental leave through the recognition of the right to unpaid parental leave as a National Employment Standard, and the introduction of further protections under the general protections scheme.
59. In light of these initiatives the Law Council submits that the Government should commit to not just reviewing but removing its reservation to Article 11(2) of CEDAW in the Action Plan.
60. The Law Council also submits that the Government should commit to not just reviewing but removing its reservation to Article 11 (1) in the Action Plan. The recent inquiries into the treatment of women in the Defence Force³⁶ reinforce the Law Council's previous submission in this regard.

Convention on the Elimination of All Forms of Racial Discrimination

61. Australia has the following reservations in relation to the CERD:

*"The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)."*³⁷

62. Article 4(a) of CERD outlines a State's obligation to:

*"(a) ...declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;"*³⁸

63. The Law Council is pleased to see that the Australian Government has committed to reviewing its reservations to CERD in the Action Plan, but submits that the Government should commit to not just reviewing but removing its reservation to Article 4(a).
64. As noted by the Australian Human Rights Committee in its Shadow Report to the CERD Committee on 8 July 2010, Australia still has a long way to go in ensuring

³⁶For example, see Australian Human Rights Commission, *Report on the Review into the Treatment of Women in the Australian Defence Force – Phase 1*, 21 October 2011. Available from http://www.hreoc.gov.au/defencereview/ADFA_report/ADFA_2011.pdf

³⁷ Australia's Reservation to Art 4(a), *Convention on the Elimination of All Forms of Racial Discrimination*. Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec

³⁸ Article 4(a), *Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Available from <http://www2.ohchr.org/english/law/cerd.htm>

that the rights of its Indigenous population; migrant and ethnic minorities; and asylum seekers are not violated on the basis of race.³⁹

65. Withdrawing its reservation to this important Convention would be a positive step towards the Australian Government better meeting its international human rights obligations with respect to combating racial discrimination. Indeed, a number of human rights organisations have recommended that the Australian Government withdraw its reservation to CERD. For example, the Committee on the Elimination of Racial Discrimination has made this recommendation on a number of occasions in the past.⁴⁰ More recently, as part of Australia's Universal Periodic Review in January 2011, the Republic of Korea, South Africa and Denmark also recommended Australia withdraw its reservations to CERD.⁴¹ Despite the concerns of the International community, however, to date, the Australian Government has refused to act on these recommendations.

Convention on the Rights of the Child

66. Australia has the following reservation in relation to CROC:

*"Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37(c)."*⁴²

67. The Law Council has previously raised concerns in relation to the Australian Government's reservation to this Convention.⁴³ These concerns are similar to those expressed by the Law Council in relation to Australia's reservations to Articles 10(2)(b) and 10(3) of the ICCPR, insofar as the reservation to Article 37(c) of CROC also permits juveniles to be exposed to adult offenders in prison. The Law Council is particularly concerned about the situation in Queensland, which has been highlighted by the Queensland Law Society for many years, where 17 year olds are treated as adults in the criminal justice system there.
68. The Law Council is not alone in expressing such concerns. Indeed, similar concerns have also been echoed by a number of international bodies, with the final report of the Working Group who undertook Australia's Universal Periodic Review in 2011 recommending that the Australian Government withdraw its reservation to Article 37(c).⁴⁴

³⁹ See Australian Human Rights Commission Submission to the CERD Committee, *Information Concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination*, 8 July 2010. Available from http://www2.ohchr.org/english/bodies/cerd/docs/ngos/AHRC_Australia77.pdf

⁴⁰ See for example CERD Committee, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, 13 September 2010, CERD/C/AUS/CO/15-17; CERD Committee, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, CERD/C/AUS/CO/14, 14 April 2005; CERD Committee, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, CERD/C/304/Add.101, April 2000.

⁴¹ Op.cit., Recommendations 86.14 - 86.16, *Report of the Working Group on the Universal Periodic Review – Australia*.

⁴² Australia's Reservation to Article 37(c), *Convention on the Rights Of the Child*. Available from http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec

⁴³ Op.cit., Law Council Submission on the *Commonwealth Commissioner for Children and Young People Bill 2011*.

⁴⁴ Op.cit., *Report of the Working Group on the Universal Periodic Review – Australia*.

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69. The Law Council submits that the Government should commit in the Action Plan not just to reviewing the reservation to CROC but to removing the reservation.

Item 4

70. Item 4 of the Action Plan outlines the Government's intention to review its position on the International Convention for the Protection of All Persons from Enforced Disappearances (CPED). This Convention entered into force on 23 December 2010. However, Australia has not yet signed or ratified it.
71. The CPED aims to establish the truth about enforced disappearances, punish perpetrators and provide reparations to victims and their families. States that ratify this Convention have an obligation to hold anyone that is involved in the enforced disappearance of another person, criminally responsible. The Convention also provides the families of those people who are 'forcibly disappeared' with the right to obtain reparations, and acknowledges that the families of people who have disappeared have the right to know what happened to them. This includes an obligation on States to locate and return the remains of disappeared persons who are subsequently found to have died.
72. Australia's reluctance to sign or ratify this Convention has been criticised by a number of human rights organisations as well as members of the international community. Indeed, Thailand, France and Argentina recommended Australia sign and ratify the CPED following Australia's Universal Periodic Review in January 2011.⁴⁵
73. The Law Council supports Australia's engagement with the UN system and therefore supports the Government's commitment in the Action Plan to review its position in relation to this Convention.

Item 5

74. Item 5 of the Action Plan states that the Government will review its position on the International Labour Organization (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention).
75. The ILO Convention seeks to "recognise the aspirations of indigenous people to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."⁴⁶ In addition to this, the Convention seeks to ensure that indigenous people benefit equally from the rights and opportunities which national laws and regulations grant to other members of the population; and seeks to promote the full realisation of the social, economic and cultural rights of indigenous people with respect for their social and cultural identity, their customs and traditions and their institutions.⁴⁷
76. Whilst these goals would appear to be desirable, the ILO Convention has been criticised by indigenous people for a number of reasons in the past. These criticisms

⁴⁵ Op.cit., Recommendations 86.7 – 86.9, *Report of the Working Group on the Universal Periodic Review – Australia*.

⁴⁶ See Preamble to International Labour Organisation Indigenous and Tribal Peoples Convention 169, adopted 27 June 1989. Available from <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>

⁴⁷ Ibid., Article 2(2).

relate to a number of issues with the Convention, but can essentially be summarised as follows:

- The Convention is not seen as being a comprehensive and philosophically acceptable statement of indigenous peoples' rights.⁴⁸
- Indigenous people do not feel they were adequately consulted when the Convention was being drafted.⁴⁹
- Article 6(1) of the Convention only compels governments to "consult" with indigenous people before making laws that affect Indigenous people. Mere consultation leaves responsibility for decision-making, including over some indigenous affairs, with non-indigenous governments and it reinforces the inability of indigenous peoples to govern themselves.⁵⁰
- Indigenous people argue that, under Article 8, indigenous customs and institutions can be too easily overridden by the government in the name of other laws of the country. Article 8(2) has also been criticised as prioritising internationally recognised human rights over indigenous laws and value-systems.⁵¹

77. In Australia's Universal Periodic Review, Norway and Bolivia both recommended that Australia ratify the ILO Convention.⁵² In its response to these recommendations, the Australian Government said that whilst it could not commit to becoming a party to the ILO Convention, it would formally consider such a proposal.⁵³

78. In light of the above issues, the Law Council supports the Government reviewing its position with respect to this Convention.

Item 8

79. Item 8 of the Action Plan outlines the Government's commitment to increasing its aid contributions to 0.5% of Gross National Income by 2015-2016.

80. The Australian Government has estimated it will spend approximately \$4.8 billion on Official Development Assistance (ODA) in 2011-2012. This equates to approximately 0.35% of Australia's Gross National Income.⁵⁴

81. On 16 November 2010, the then Minister for Foreign Affairs, the Hon. Kevin Rudd MP announced a review of Australia's aid effectiveness. The aim of this review was to "thoroughly examine the aid program, determine whether the program's current systems, policies and procedures are as effective and efficient as they can be, and

⁴⁸ See Catherine Iorns, (1993) 'Australian Ratification of International Labour Organisation Convention No. 169,' *Murdoch University Electronic Journal of Law*, 1(1). Available from <http://www.murdoch.edu.au/elaw/issues/v1n1/iorns111.html>

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Op.cit., Recommendations 86.11 and 86.12, *Report of the Working Group on the Universal Periodic Review – Australia*.

⁵³ Op.cit., p.2, *Report of the Working Group on the Universal Periodic Review – Australia Addendum*.

⁵⁴ See AusAID, Summary of Australia's Overseas Aid Program 2011-2012. Available from <http://www.ausaid.gov.au/budget/budget11/pdf/budget-highlights-2011-12.pdf>

give advice on how to make the program more strategic over the next five years and beyond.”⁵⁵

82. The report from this review was handed down in April 2011 and made 39 recommendations in relation to the aid program that Australia should aspire to implement by 2015 - 2016.⁵⁶ These recommendations included:

- Decisions about country allocations should be based on poverty, national interest, capacity to make a difference, and the current scale and effectiveness of aid. Decisions about country programs should also reflect the need to consolidate the aid program.⁵⁷
- The aid program should increase its emphasis on private sector development and strengthening civil society. Policy statements in relation to each should be developed.⁵⁸
- In scaling up the aid program, country allocations and programs should be adjusted in line with the Review Panel’s specific recommendations;⁵⁹ and
- The Direct Aid Program should at least double, with the highest increases in countries with no specific country program.⁶⁰

83. On 6 July 2011, the Australian Government issued its response to this review. The Government either agreed or agreed-in-principle to 38 of the 39 recommendations,⁶¹ noting amongst other things, that one of its key development objectives as it heads towards 2015-2016 will be to “improve governance in developing countries to deliver services, improve security and enhance justice and human rights for poor people.”⁶²

84. Australia’s aid donations are critical in assisting many countries to realise the civil, political, cultural, economic and social rights of their citizens. Accordingly, the Law Council supports the inclusion of item 8 in the Action Plan.

Item 14

85. Item 14 of the Action Plan outlines the Australian Government’s commitment to continuing to resource the International Pro Bono Advisory Group (the Advisory Group) to support pro bono work internationally. Performance indicators or timelines for this initiative are not specified. Instead, the Action Plan simply describes these aspects of the initiative as being ‘ongoing’.

⁵⁵ Australian Government, *Report of the Independent Review of Aid Effectiveness*, April 2011, p.vii. Available from <http://www.aidreview.gov.au/publications/aidreview.pdf>

⁵⁶ Ibid.

⁵⁷ Ibid., Recommendation 3, p.12.

⁵⁸ Ibid., Recommendation 10, p.15.

⁵⁹ Ibid., Recommendation 4, p.12.

⁶⁰ Ibid., p.12.

⁶¹ The only recommendation that was not agreed to or agreed to in principle was recommendation 29: that the words ‘International Development’ should be added to the title of the Minister for Foreign Affairs. This recommendation was noted for further consideration by the Government. See Australian Government, *Report of the Independent Review of Aid Effectiveness*, April 2011, p.64. Available from <http://www.aidreview.gov.au/publications/aidreview.pdf>

⁶² AusAID, *An Effective Aid Program For Australia : Making a Real Difference – Delivering Real Results*, p.36. Available from <http://www.ausaid.gov.au/publications/aidreview-response/effective-aid-program-for-australia.pdf>

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86. The Pro Bono Advisory Group was established in July 2009 by the then Commonwealth Attorney-General, the Hon Robert McClelland MP. The Law Council has participated in the Advisory Group since its establishment.⁶³ The aims of the Advisory Group can be summarised as follows:
- To promote international pro bono work by the legal profession in Australia;
 - To build effective partnerships in overseas legal capacity building and access to justice work; and
 - To seek to identify linkages with the Commonwealth's international development assistance programs.⁶⁴
87. The Law Council supports international pro bono work particularly in the Asia Pacific region and is involved in the establishment of the Centre for Asia Pacific Pro Bono.⁶⁵
88. The Law Council also supports the aims of the Advisory Group and is pleased to see that the Government has committed to continuing to resource this important initiative. However, it would be useful if the Action Plan provided greater detail as to the types of resources that the Government intends to commit to this group over the period of the Action Plan. It would also be useful for measuring implementation progress if this initiative included more specific timelines and performance indicators rather than simply describing these aspects of the initiative as being 'ongoing'.

Legal Protections

Item 17

89. Item 17 of the Action Plan states that the Government will ensure that the Australian Human Rights Commission (AHRC) is empowered and funded to resolve complaints of discrimination, including ensuring it is accessible and equitable for all.
90. The Law Council believes that the AHRC has an important role to play in providing educational and complaint handling services nationally and monitoring the human rights implications of laws and proposed laws. In its recent submission on the consolidation of Commonwealth anti-discrimination laws, the Law Council supported enhancement of the important role of the AHRC.⁶⁶
91. In recent years, the AHRC has seen a significant increase in the number of complaints it has had to deal with, as well as increases in operational costs.⁶⁷ In 2010 - 2011, the AHRC handled 2152 complaints in relation to discrimination.⁶⁸

⁶³ See

<http://www.ag.gov.au/InternationalProBonoAdvisoryGroup/Pages/InternationalProBonoAdvisoryGroupmembers.aspx>

⁶⁴ See International Pro Bono Advisory Group Goals. Available from

<http://www.ag.gov.au/Documents/FINAL%20-%20Advisory%20Group%20Goals.pdf>

⁶⁵ See <http://www.southpacificlawyers.org/asia-pacific-pro-bono-funding-announced>

⁶⁶ See Law Council submission to Attorney-General's Department on *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 1 February 2012, pp. 74-78. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=3CB40B21-C7BF-4A41-2DFB-DD4B0ECB3127&siteName=lca

⁶⁷ See Australian Human Rights Commission submission to the Joint Committee of Public Accounts and Audit Inquiry on the *Effects of the Ongoing Efficiency Dividend on Smaller Public Sector Agencies*, 29 July 2008. Available from http://www.hreoc.gov.au/legal/submissions/2008/20080729_efficiency_dividend.html#3

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92. Given the high level of demand for the AHRC's services, particularly in the context of discrimination complaints handling, it is therefore crucial that the Government provides the AHRC with adequate funding so that it can continue to provide these valuable services. The Law Council submits that the Action Plan should outline a commitment by the Government to ensuring that funding levels for the AHRC are responsive to any required expansion of the AHRC's roles or functions in the future, including any proposed expansion of the AHRC's role under the Commonwealth Consolidation of Anti-Discrimination Laws.
93. In this regard, the Law Council supports the Government's commitment to funding the AHRC as outlined in Item 17.

Item 18

94. Item 18 of the Action Plan reiterates the Government's commitment to consolidating Commonwealth anti-discrimination legislation. The Law Council supports this initiative and believes that such reforms are necessary in order to promote substantive equality in Australian society.
95. The Law Council recently made a submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper.⁶⁹ In its submission, the Law Council acknowledged that the issues raised in the Discussion Paper represented a good start towards achieving consolidation of the existing laws. However, the Law Council also noted that the scope and complexity of some of the issues required further consideration by the Law Council and the Government.
96. The Law Council supports the Government's commitment in the Action Plan to the consolidation of anti-discrimination legislation, but believes that the Action Plan could be strengthened by including an additional component to this initiative that outlines the Government's commitment to ensuring that the community (including businesses) are educated about any changes to anti-discrimination laws.

Australia's Human Rights Framework

Item 21

97. Item 21 in the Action Plan outlines the ways in which the Government intends to increase awareness of human rights in a range of sectors – specifically through funding a number of education and training packages for the Commonwealth public sector, primary and secondary schools and through community education.
98. The Law Council considers that significant progress has already been made in relation to the implementation of a number of the initiatives in the Action Plan, such as promoting greater human rights awareness within the community. For example, the Law Council notes that in 2011, 15 community organisations were awarded

⁶⁸See Australian Human Rights Commission Annual Report 2010-2011, p.106. Available from http://www.hreoc.gov.au/pdf/about/publications/annual_reports/2010_2011/AHRC_AnnualReport10-11_Final.pdf

⁶⁹Op.cit., Law Council submission on the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*.

Human Rights Education Grants to implement programs designed to improve awareness of human rights in their communities.⁷⁰

99. The Law Council also welcomes the provision of additional funding to the Australian Human Rights Commission (AHRC) to enable it to expand its community education role on human rights. Educating different sectors of the community about human rights is a valuable way to increase respect for and the realisation of such rights.
100. The Law Council supports the Government's commitment to enhancing support for human rights education in primary and secondary schools. Indeed, the Law Council considers the integration of human rights into the National Curriculum as critical to achieving the 'educate' component of Australia's Human Rights Framework.
101. The Law Council understands that the Attorney-General's Department carried out a series of training seminars on human rights for Commonwealth public servants involved in public sector policy development and implementation of Government programs between August and October in 2011,⁷¹ and that further training will be carried out for all public servants at some point in the future.
102. However, the Law Council submits that it would be useful if the Action Plan provided more specific deadlines and performance indicators for the initiatives under this Action Item, rather than simply 'funding expended in 2013-14' as is currently the case.

Item 24

103. Item 24 of the Action Plan states that the Government will review legislation, policies and practices for compliance with the seven core UN human rights treaties to which Australia is a party, commencing with legislation administered by the Attorney-General's Department.
104. The Law Council supports such a review and has raised concerns about how such a review will be undertaken with the Attorney-General.⁷² The Law Council believes the Government's review of legislation for human rights compliance would be greatly enhanced if it included the opportunity for public and/or parliamentary scrutiny. One of the Law Council's Constituent Bodies, the Law Society of NSW (LSNSW), submits that it may be useful for this task to be allocated to the new Parliamentary Joint Committee on Human Rights that will be established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
105. The Law Council submits that the Action Plan should include not just the commitment to this review but also details of the processes and timelines for the review.

⁷⁰ These included the Forum on Australia's Islamic Relations who made a series of human rights education videos for YouTube focused on culturally diverse youth; and the National Association of Community Legal Centres' program to develop and deliver practical human rights resources with affected communities on issues such as dealing with family violence and accessing government services.

⁷¹ See

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.asp>

⁷² Law Council letter to the then Cth Attorney-General, the Hon. Robert McClelland MP, 21 April 2011.

The human rights concerns of the general community

106. There are a number of significant and important human rights issues in this section of the Action Plan that the Law Council submits should be addressed in greater detail, as discussed below.

Access to Justice

107. The Law Council has brought the critical underfunding of the legal assistance sector to the Government's attention on a number of occasions in the past.⁷³

108. Since the Howard Government's introduction of the 'Commonwealth/State divide' in the legal assistance sector in 1997, the Commonwealth Government has effectively reduced the amount of funding that it once contributed to this sector.

109. Prior to 1997, the Commonwealth Government's proportion of funding to the legal assistance sector was 55 per cent compared to the States' share of 45 per cent. Today, substantial structural re-adjustment is required to return the Commonwealth's contribution to even 50 per cent.⁷⁴ Indeed, in order to return Commonwealth per capita funding levels to what they were in 1997, the Government would need to provide an additional \$72.36 million to the legal assistance sector in the 2012-13 budget.⁷⁵

110. In its submission to the Attorney-General's Department on the Baseline Study in September 2011⁷⁶, the Law Council suggested that the Action Plan should address the need for increased legal assistance sector funding to ensure access to justice. Specifically, the Law Council suggested that the Action Plan should include measures that would ensure:

- Increased funding for Legal Aid Commissions, Community Legal Centres and dedicated Aboriginal and Torres Strait Islander Legal Services; and
- The provision of legal assistance for other vulnerable community members such as offshore entry persons seeking asylum in Australia who require assistance to understand and access their rights in relation to judicial review.

111. The Law Council does not believe that the Action Plan adequately addresses these measures. The LIV, Law Society of the Northern Territory (LSNT), and Law Society of Western Australia (LSWA) have also indicated that they would expect to see a

⁷³ See for example the Law Council's Budget Submissions to the Government in 2012-2013, 2011-2012, 2010-2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5F540531-1E4F-17FA-D27C-B1E150BD1107&siteName=lca; http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=275007C0-DC2F-F00D-33DE-FCCB13BAA484&siteName=lca; and http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4FC3DC8A-E531-AA92-4B01-7B7E7262F6BF&siteName=lca

⁷⁴ Law Council of Australia, *2012-13 Pre-Budget Submission to Treasury*, 27 January 2012, p.6. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4FC3DC8A-E531-AA92-4B01-7B7E7262F6BF&siteName=lca

⁷⁵ Ibid.

⁷⁶ Op.cit., Law Council Submission on the *Baseline Study for a National Human Rights Action Plan*, p. 6.

more comprehensive commitment to specific levels of funding for legal aid and community legal centres in the Action Plan.

112. The Law Council notes that items 206 and 207 in the Action Plan outline the Government's commitment to continuing to fund community legal centres (including those that provide legal information in relation to refugee and immigration matters) and the Translating and Interpreting Service (TIS National). However, these initiatives are drafted broadly and consequently provide no indication of the funding that the Government intends to provide to either service.
113. Similarly, Item 87 in the Action Plan states that the Government will continue to provide funding for legal assistance services including the Aboriginal and Torres Strait Islander Legal Service; Family Violence Prevention Legal Services; and Indigenous women's legal services. Whilst it is pleasing to see the Government's commitment to funding in this regard, the Law Council believes that more detail is required including clear and measurable funding targets and timelines.
114. Accordingly, the Law Council submits that the Action Plan should include the following initiatives:
- A commitment by the Commonwealth to return its per capita funding levels for the legal assistance sector to 50 per cent;
 - A commitment by the Commonwealth for increased funding to Community Legal Centres and dedicated Aboriginal and Torres Strait Islander Legal Services; and
 - A commitment to a separate funding allocation for assistance for offshore entry asylum seekers in relation to judicial review.
115. Another issue that one of the Law Council's Constituent Bodies, the LSNT, has raised is the negative impact on access to justice of the lack of a multi-purpose administrative review tribunal in the Northern Territory. The LSNT notes that there have been two reports by the Northern Territory Law Reform Committee (NTLRC) recommending the establishment of such a tribunal.
116. The LSNT notes that it has at times been suggested that the low number of administrative review matters in the Local Court (or the Supreme Court) reflects an absence of a need for such a tribunal in the Northern Territory. The LSNT notes that the 2004 NTLRC report rejects this argument as illusory, and instead concludes that the plethora of modes of reviewing administrative decisions amounts to "a statutory labyrinth [that] effectively deprives the ordinary citizen of the means of challenging an administrative decision by simple, direct and inexpensive means." The LSNT submits that the Action plan should provide for the establishment of a multi-purpose administrative review tribunal in the Northern Territory.

Item 26

117. Item 26 in the Action Plan outlines the Government's commitment to building a stronger evidence base for the civil justice system to assist in ensuring compliance with the objectives identified in the Strategic Framework for Access to Justice in the Federal Civil Justice System, and to inform future access to justice policy and program decisions.

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118. The Law Council has previously made submissions on the Strategic Framework for Access to Justice in the Federal Civil Justice System.⁷⁷ The Law Council is ‘broadly supportive’ of such an initiative, and believes that the current system would benefit from the establishment of an overarching set of principles to guide access to justice policy creation.⁷⁸
119. The Law Council notes that a Working Group on this issue has recently been formed by the Attorney-General’s Department. The Working Group is comprised of a number of stakeholder representatives and research experts, and is tasked with developing a civil justice data, evaluation and research framework.⁷⁹ The Law Council has nominated the Chair of its Federal Court Liaison Committee, David Gaszner, to be the Law Council’s representative on this Working Group.
120. The Law Council submits that the Action Plan should include not just the commitment to building a stronger evidence base for the civil justice system, but also details of the processes and timelines for this Action Item.

Item 27

121. Item 27 in the Action Plan states that Commonwealth, State and Territory Governments will implement the National Partnership Agreement on Legal Assistance Services.
122. The National Partnership Agreement provides Commonwealth funding to legal aid commissions and promotes nationally significant reform across the legal assistance sector.⁸⁰ The Agreement aims to provide a “national system of legal assistance that is integrated, efficient and cost-effective and focussed upon providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.”⁸¹
123. The Law Council supports the National Partnership Agreement, and has recently advocated for its review.⁸² As part of this review, the Law Council believes that the Commonwealth Government should:
- Develop a National Partnership Agreement with the States and Territories which is based on national goals, as distinct from Commonwealth or State goals.⁸³
 - Restore Commonwealth share of Legal Aid Commission funding to 50% (up from 32%). This would require an additional recurrent expenditure of \$220 million.⁸⁴

⁷⁷ See Law Council submission on *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2 December 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=66AC4613-1E4F-17FA-D2B0-81B95366B68A&siteName=lca

⁷⁸ Ibid., p.9.

⁷⁹ See http://www.clrc.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_BuildinganEvidenceBasefortheCivilJusticeSystem

⁸⁰ See Attorney-General’s Department website, ‘Review of the National Partnership Agreement on Legal Assistance Services’ at <http://www.ag.gov.au/Legalaid/Pages/ReviewoftheNationalPartnershipAgreementonLegalAssistanceServices.aspx>

⁸¹ Ibid.

⁸² The Review of the National Partnership Agreement needs to be completed by 30 June 2013.

⁸³ See <http://www.lawcouncil.asn.au/programs/national-policy/legal-aid/campaign.cfm>

124. Similarly, the Law Council would like to see the States and Territories:

- Agree to the involvement of the legal profession in the negotiation of the new National Partnership Agreements.⁸⁵
- Provide a guaranteed 'floor' under State funding levels, which is maintained regardless of fluctuations in public purpose funds.⁸⁶
- Maintain current funding levels regardless of any increase in Commonwealth funds.⁸⁷

125. On 30 January 2012, the Commonwealth Attorney-General, the Hon. Nicola Roxon MP announced a review into Australia's Commonwealth-funded legal services. The aim of this review is to ensure that these legal services "are delivering the most cost-effective legal assistance services to those most in need".⁸⁸

126. In addition to this, the review will consider the progress that has been made towards achieving the specific legal aid performance indicators set out in the National Partnership Agreement on Legal Assistance Services with the states and territories.⁸⁹

127. The Law Council is pleased to see that the Government is committed to this review and submits that the Action Plan should mention this under Item 27.

Item 32

128. Item 32 of the Action Plan states that the Victorian Government will continue providing the Court Referral and Evaluation for Drug Intervention and Treatment Program (CREDIT) and the Bail Support Program (BSP) Support Program to increase the likelihood of accused people successfully completing the bail period by providing support.

129. The LIV submits that the CREDIT/Bail Support program's purpose is incorrectly stated in Item 32 of the Action Plan. Instead, the LIV suggests that Item 32 should more closely reflect the aims of the combined CREDIT/Bail Support Program enunciated on the Victorian Magistrate's Court website as follows:

- "Successful completion of bail by the accused who would otherwise be remanded in custody.
- Reduction in the number of accused persons remanded due to lack of accommodation and/or treatment or support in the community.
- Successful placement of the accused in drug treatment and/or rehabilitation programs.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ See Media Release by Attorney-General Nicola Roxon, 'Review of Legal Assistance Services', 30 January 2012. Available from <http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/First%20Quarter/30-January-2012---Review-of-legal-assistance-services.aspx>

⁸⁹ Ibid.

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- Long-term reduction in involvement of the accused in the criminal justice system.⁹⁰

Counter Terrorism

Item 37

130. The Law Council has long been involved in advocacy on the introduction and operation of national security and anti-terrorism measures at the federal level.⁹¹
131. Since 2001, the Federal Government has introduced more than 50 pieces of legislation in an effort to combat terrorism and/or the threat of terrorism in Australia. While the Law Council has always acknowledged the need to safeguard Australia's national security and supported measures to protect the community from possible terrorist acts, it has often been critical of national security measures that detract from established principles of the Australian criminal justice system, fail to comply with international human rights standards or abrogate rule of law principles. The Law Council is not alone in this regard.
132. Indeed, in the final report of the Working Group on the Universal Periodic Review of Australia, five different countries recommended that Australia review its counter-terrorism legislative framework to ensure that the legislation complies with Australia's human rights obligations.⁹² This follows earlier recommendations by the UN Human Rights Committee for Australia to ensure that its counter-terrorism legislation and practices fully conformed with its obligations under the International Covenant on Civil and Political Rights (ICCPR).⁹³
133. Human Rights concerns arise from legislative provisions which, amongst other things:
 - Restrict the movement of persons who have not been charged with or convicted of any offence through the imposition of control orders and preventative detention orders;⁹⁴
 - Authorise the Australian Security Intelligence Organisation (ASIO) to compel a person to answer questions, potentially without their lawyer present, and to detain a person for up to seven days for the purposes of questioning;⁹⁵

⁹⁰ See <http://www.magistratescourt.vic.gov.au/home/court+support+services/magistrates+-+credit+-+bail+support+program>

⁹¹ See for example Law Council submission to Senate Committee on Legal and Constitutional Affairs on the *Anti-Terrorism Laws Reform Bill*, August 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3397DB8D-1E4F-17FA-D297-BD5010231D6E&siteName=lca. See also Law Council submission to Senate Legal and Constitutional Affairs Committee on the *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010*, 10 May 2010. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=BC01A853-9E8F-4F89-5DCC-289C3987760F&siteName=lca

⁹² Op.cit., Recommendations 86.136- 86.140, *Report of the Working Group on the Universal Periodic Review – Australia*.

⁹³ See United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee – Australia*, CCPR/C/AUS/CO/5, April 2009. Available from <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.

⁹⁴ See Div. 104 and 105, *Criminal Code 1995* (Cth)

⁹⁵ See Part III Div 3, *Australian Security Intelligence Organisation Act 1970* (Cth)

- Reverse the presumption in favour of bail for persons suspected of terrorism offences;⁹⁶
- Provide for regulations to specify certain organisations as terrorist organisations and criminalise certain interactions with such organisations;⁹⁷ and
- Grant police powers to stop, question and search persons for the purposes of investigating and preventing terrorism.⁹⁸

134. Accordingly, in its submission on the Baseline Study, the Law Council outlined its ongoing concerns with Australia’s counter-terrorism laws and recommended that the Action Plan provide for the review and reform of these laws to ensure their compliance with Australia’s human rights obligations. To this end, the Law Council recommended that the Action Plan should address the specific concerns of key international and domestic bodies in this area.⁹⁹

135. The Law Council does not believe that counter-terrorism is adequately addressed in the Action Plan. For example, the Action Plan fails to address any of the human rights issues regarding control orders and preventative detention orders, or the extraordinary powers available to ASIO in relation to terrorism matters. Indeed, only one initiative in the Action Plan is dedicated to counter-terrorism, which states:

“The Australian Government will continue to ensure that the Independent National Security Legislation Monitor has the power to review the practical operation of Australia’s counter-terrorism and national security legislation on an ongoing basis. The Monitor’s reports will be presented to Parliament in accordance with the Independent National Security Legislation Monitor Act 2010. The IGIS and PJCIS will also provide additional oversight mechanisms which complement the work of the Monitor.”

136. The Law Council submits that the Action Plan should contain a commitment by the Government to respond to reports prepared by the Monitor within a reasonable period of time.

People Trafficking

137. The Law Council supports the detailed initiatives in relation to people trafficking in the Action Plan. However, it would support a reduction in the number of initiatives dedicated to this issue if this enabled other issues, such as counter-terrorism, to be addressed in greater detail.

138. The Law Council is particularly pleased to see that the Government has committed to reviewing criminal sanctions for people trafficking and slavery to ensure that law enforcement is better able to investigate and prosecute perpetrators. The Law Council notes that the Government has already taken the first steps in relation to this review through its release of a Discussion Paper on Australia’s Criminal Justice Response to Slavery and People Trafficking; Reparation and Vulnerable Witness

⁹⁶ See s.15AA, *Crimes Act 1914* (Cth)

⁹⁷ See Part 5.3, Div 102, *Criminal Code 1995* (Cth)

⁹⁸ See ss.3UA-3UK, *Crimes Act 1914* (Cth)

⁹⁹ Op.cit., Law Council Submission on the *Baseline Study for a National Human Rights Action Plan*, p. 9.

Protections in March 2011;¹⁰⁰ and the release of Exposure Draft legislation by way of the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* in January 2012.¹⁰¹ The Law Council made submissions on both of these documents.

139. The Action Plan currently contains two pages of initiatives dedicated to combating people trafficking. In its submission on the Baseline Study, the Law Council noted that this section of the Baseline Study was overly focussed on detailed discussions of Australia's people trafficking response to date, and that the Action Plan should instead focus on issues such as how victims access State and Territory compensation schemes or alternatively, a new broader federal compensation scheme.
140. The Law Council is disappointed to see that the Action Plan still contains a significant number of 'ongoing' initiatives and overlooks the issue of a compensation scheme for victims.
141. In its submission on the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, the Law Council reiterated the need for a Commonwealth victim's compensation scheme. The Law Council noted that while State and Territory compensation schemes do exist, these schemes are subject to significant limitations in their usefulness for victims of people trafficking.
142. In light of these limitations, the Law Council submits that consideration of a federal victims' compensation scheme is necessary and should be addressed in the Action Plan.

Issues that have been overlooked

143. In addition to the issues that the Law Council has identified above, the Law Council is concerned about the Action Plan's failure to address issues such as mandatory sentencing and indefinite sentences.
144. It is unclear why the Action Plan overlooks these issues given that these issues have been identified by national and international human rights bodies as being of ongoing concern; raise questions with respect to Australia's compliance with a number of its human rights obligations; are capable of operating in a discriminatory manner; and interfere with the independence of the judiciary.

Mandatory Sentencing

145. The Law Council opposes the use of mandatory sentencing regimes on the basis that they impose unacceptable restrictions on judicial discretion and undermine rule of law and human rights principles.¹⁰²

¹⁰⁰ See Law Council submission on the *Consultation on the Criminal Justice Response to Slavery and People Trafficking, Reparation and Vulnerable Witness Protections*, 3 March 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=930511F9-994A-380C-0D55-62C871B803F7&siteName=lca

¹⁰¹ Op.cit., Law Council submission on the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*.

¹⁰² For further details on the development of the Law Council's policy in this area see Law Council of Australia, *The Mandatory Sentencing Debate*, September 2001, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91B75434-1E4F-17FA-D2BA-B6D5A60592A7&siteName=lca

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146. The existence of mandatory sentencing provisions in the laws of the Commonwealth and some of its States and Territories¹⁰³ have been subject to strong criticism by domestic and international human rights bodies on the grounds that they are inconsistent with fundamental human rights principles.¹⁰⁴
147. Although the *International Covenant on Civil and Political Rights* (ICCPR) does not specifically address mandatory sentencing, the scope of many of its Articles suggest that removing judicial discretion in sentencing may place a country in breach of its obligations.¹⁰⁵ For example, Article 9 of the ICCPR prohibits arbitrary detention, and requires a consideration of principles of justice and proportionality when a penalty is imposed under law.¹⁰⁶
148. Imposing mandatory minimum sentences that cannot be subject to appeal is also in breach of Article 14(5) of the ICCPR which provides that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.¹⁰⁷ The United Nations Human Rights Committee has also commented that a sentence of imprisonment which is grossly disproportionate to the gravity of the offence is likely to amount to a clear violation of Article 7 which prohibits torture or cruel, inhuman or degrading treatment or punishment.¹⁰⁸
149. In 2008, the UN Committee Against Torture in its Concluding Observations on Australia’s 3rd Periodic Report recommended that mandatory sentencing should be abolished.¹⁰⁹

¹⁰³ For example, see s.297(5) *Criminal Code* (WA) . For further discussion of these regimes see Law Institute of Victoria, Mandatory Minimum Sentencing, Submission to Victorian Attorney General, 30 June 2011, p.6 available at <http://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/Mandatory-Minimum-Sentencing.aspx>

¹⁰⁴ The ‘National Inquiry into Children in the Legal Process’, jointly published by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) in 1997, criticised relevant NT and WA Laws because, in contravention of ICCPR and CROC, the laws violated the principle of proportionality in sentencing, did not represent a sentence of “last resort” and the sentences were not reviewable by a higher court, cited in LCA submission on *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 29 February 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_amendment_2012/submissions.htm

¹⁰⁵ For further discussion on this issue, see submission by Professor Ben Saul to the Senate Legal and Constitutional Affairs Committee’s Inquiry into the *Migration Amendment (Removal of Mandatory Minimum Sentences) Bill 2012*, 21 February 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_amendment_2012/submissions.htm

¹⁰⁶ *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2] (italics added). See also *Van Alphen v The Netherlands*, HRC, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8]. See also Australian Human Rights Commission -Human Rights Brief No. 2 at http://www.hreoc.gov.au/human_rights/brief/h_9_2.html, cited in LCA submission on *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 21 February 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_amendment_2012/submissions.htm

¹⁰⁷ For further discussion see Sarah Pritchard, ‘International Perspectives on Mandatory Sentencing’ [2001] Australian Journal of Human Rights 17, cited in LCA submission on *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 21 February 2012. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/migration_amendment_2012/submissions.htm

¹⁰⁸ UN Human Rights Committee’s General Comment No. 34 on Article 7 of the ICCPR, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>

¹⁰⁹ United Nations Committee Against Torture, Concluding Observations on Australia’s 3rd Periodic Report, CAT/C/AUS/CO/3, 22 May 2008, p.7. Available from <http://www.unhcr.org/refworld/country,,CAT,,AUS,,4885cf7f0,0.html>

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150. There is also judicial support for the contention that Australia is in breach of its international obligations. For example, in *Ferguson vs Setter and Gokel* (1997) 7 NTLR 118, Kearney J of the Northern Territory Supreme Court expressed the opinion that the mandatory sentencing provisions introduced into the then *Juvenile Justice Act 1993* (NT) were "directly contrary to article 37(b) of the ICCPR."
151. Moreover, in those jurisdictions that apply mandatory sentencing to offences committed by minors, Australia's human rights obligations under Articles 3, 37 and 40 of the Convention on the Rights of the Child (CROC) are also breached. Articles 3, 37 and 40 of the CROC require that in dealing with children, courts should have the best interests of the child as the primary consideration;¹¹⁰ detention must be used as a last resort and for the shortest appropriate period;¹¹¹ and sentences must be proportionate to the circumstances of the offence and subject to appeal.¹¹²
152. Given the impact that mandatory sentencing can have on a person's human rights; its arbitrariness and often disproportionate response to the crime in question, the Law Council is disappointed to see that there is no commitment in the Action plan by the Commonwealth or relevant State/Territory Governments to address or review this type of sentencing.
153. The Law Council submits that the Action Plan should be amended to include an initiative that commits the Commonwealth and State and Territory Governments to reviewing mandatory minimum sentencing.

Anti-Bikie/ Anti-Association Legislation

154. Another issue that the Law Council does not believe is adequately addressed in the Action Plan is the issue of anti-association or 'anti-bikie' legislation and the impact that this type of legislation has on human rights in Australia.
155. The Law Council has previously raised concerns about the enactment of non-association provisions in Australian criminal legislation.¹¹³ These provisions are modelled on pre-existing provisions directed at terrorist organisations, and seek to extend the traditional boundaries of criminal liability to capture conduct which is not linked to the commission or planned commission of any specific offence, but which is alleged to facilitate criminal activity on a broader level.¹¹⁴
156. The Law Council submits that by shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction.
157. Over the last few years, a number of non-association provisions have been incorporated into State and Territory criminal laws and the Commonwealth Criminal

¹¹⁰ Article 3, *Convention on the Rights of the Child*

¹¹¹ *Ibid.*, Article 37

¹¹² *Ibid.*, Article 40

¹¹³ See for example, Law Council submission to Australian Human Rights Commission on *Universal Periodic Review: Draft Report*, 2 June 2010. Available from

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=544C9430-F5CF-8249-FFB3-570E35A53E3A&siteName=lca

¹¹⁴ *Ibid.*

Code.¹¹⁵ These laws have been justified by a perceived need to address serious and organised crime, and in some jurisdictions, have aimed to target motorcycle gangs. However, these laws have often been drafted very broadly and as a result the Law Council believes that this type of legislation has the potential to unduly burden freedom of association.

158. Due to the impact of these broad provisions on freedom of association, the Law Council submits that these provisions do not conform with Australia's international human rights obligations under Article 22 of the ICCPR, and that this is an issue that should be addressed in the Action Plan.

Information Sharing

159. In its submission on the Baseline Study, the Law Council submitted that the Action Plan should contain initiatives that address privacy rights and the adequacy of restrictions and safeguards regarding the collection, storage and sharing of personal information - particularly by law enforcement and other regulatory agencies.
160. The Law Council has previously expressed concerns about information sharing by agencies and the need to ensure that individuals' privacy rights are not breached by such sharing arrangements.¹¹⁶
161. As the right to privacy is protected under Article 17 of the ICCPR, the Law Council is disappointed to see that the Action Plan fails to address human rights concerns relating to privacy and suggests that the Action Plan should be amended so that it addresses these important concerns.

The human rights experience of specific groups in Australia

162. The Law Council has a number of concerns in relation to the ways in which the human rights experiences of specific groups in Australia are dealt with in the Action Plan. Whilst the Law Council commends the Government on its efforts to deal with the disadvantage and human rights abuses that many vulnerable groups in Australia experience, the Law Council submits that the Action Plan could be improved through the inclusion of more detailed initiatives that actively address the issues facing these groups.

Aboriginal and Torres Strait Islander peoples

163. The Law Council notes that 'targeted legal assistance' is mentioned as one of the law and justice initiatives that the Government will continue to support in an effort to address the over-representation of Indigenous Australians in the justice system. Despite the reference to such legal assistance, the Law Council is concerned about

¹¹⁵ See for example, *Crimes Legislation Amendment (Serious and Organised Crime) Act No 2 (Cth)*; *Serious and Organised Crime (Control) Act 2008 (SA)*.

¹¹⁶ See for example, Law Council submission on *Crimes Legislation Amendment (Powers and Offences) Bill 2011*, 9 January 2012. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=11EB3BFF-97E0-0339-A9B1-0CF847438667&siteName=lca. See also Law Council submission to Australian Law Reform Commission Privacy Inquiry, 20 Dec 2007. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca

the lack of any further detail in the Action Plan regarding funding for Indigenous legal assistance services.

164. A number of the Law Council's Constituent Bodies have also raised concerns with other aspects of this section of the Action Plan. For instance, the LIV notes that the introductory paragraph mentions the Closing the Gap Strategy. The LIV suggests that the action items that follow should include consideration of adding justice targets to the Closing the Gap Strategy. In addition to this, two of the Law Council's Constituent Bodies, namely the LSSA and LSNT, have also suggested that this section of the Action Plan should be implemented in accordance with the UN Declaration of the Rights of Indigenous Peoples. That is, affected Indigenous communities should be fully consulted and involved in the implementation of the initiatives outlined in this section.

Self-determination and consultation

Item 63

165. Item 63 of the Action Plan outlines the Government's commitment to working with the National Congress of Australia's First Peoples. This item includes considering priorities identified by both the Australian Government and the National Congress, providing \$29.2 million for its establishment, and negotiating an engagement framework for communication between all parties. This Action Item then outlines some of the key priorities for the National Congress over the next 12 months.
166. The Law Council is pleased to see that the Australian Government is committed to working with the National Congress of Australia's First Peoples in an effort to better address the concerns and needs of Indigenous Australians. However, there are a number of improvements that the Law Council suggests should be made to the Action Plan in this regard.
167. Firstly, the Law Council does not believe that the implementation of the *United Nations Declaration on the Rights of Indigenous People* (the Declaration) is adequately addressed in the Action Plan. In fact, the only mention of the Declaration is in Item 63, where "building a policy platform underpinned by the UN Declaration on the Rights of Indigenous Peoples" is described as a key priority for the National Congress of Australia's First Peoples over the next 12 months.
168. The Law Council has previously raised concerns in relation to Australia's slow progress with respect to the implementation of this Declaration. For example, in its submission on the Consultation on Universal Periodic Review Recommendations in March 2011¹¹⁷, the Law Council noted that since providing formal support to the Declaration in April 2009, the Commonwealth Government has yet to commit to fully incorporating the rights and obligations contained in the Declaration into domestic laws and policies.
169. Given the Declaration provides a set of internationally endorsed objective standards to guide the relationship with indigenous peoples, and to promote actions that respect and protect indigenous cultures, the Law Council submits that the Action Plan should more explicitly outline the Government's commitment to using these

¹¹⁷ See Law Council submission to the Attorney General's Department on the *Consultation on UPR Recommendations*, 31 March 2011, pp.3-4. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=1DBE6FCE-F97B-4770-E7AC-A88E605CF680&siteName=lca

standards to assess existing and proposed legislation and policies and to ensure the full participation of indigenous peoples in decision making that affects them. The Action Plan should address the implementation of the UN Declaration on the Rights of Indigenous People in domestic law. The Law Council suggests that one of the ways in which this could be achieved is by attaching the Declaration as a Schedule to the *Australian Human Rights Commission Act*.¹¹⁸

170. Another concern that the Law Council has with Item 63 relates to the agencies and governments that are identified as 'lead agencies' for this initiative. The Action Plan currently states that the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the Department of Education, Employment and Workplace Relations (DEEWR), the Attorney-General's Department (AGD), the Department of Health and Ageing (DoHA), the Department of Prime Minister and Cabinet (PMC) and the Northern Territory Government will be the lead agencies for this initiative. The Law Council believes that all State and Territory Governments should be required to take responsibility for the development of the National Congress. Accordingly, the Law Council submits that the Action Plan should be amended to better reflect this shared sense of responsibility.

Item 64

171. Item 64 of the Action Plan outlines the Government's commitment to continuing to strengthen native title arrangements.

172. In its submission on the Baseline Study, the Law Council made a number of suggestions about how the Action Plan should address the issue of native title. Central to these suggestions was that the Action Plan should note that further reforms to the *Native Title Act 1993* are necessary in order to address the imbalance in negotiating positions between native title claimants and respondent parties.¹¹⁹ The Law Council is disappointed to see that this suggestion has not been adopted in the Action Plan, which instead, refers to a number of initiatives based on funding for research scholarships and an anthropologist grants program.

173. The Law Council believes that one of the practical ways in which the native title initiatives in the Action Plan could be strengthened is by the Government committing to establishing a presumption of continuous possession of traditional lands and observance of traditional law and custom.

174. In many cases Aboriginal communities face an incredibly difficult task of proving an unbroken connection with their traditional lands. The creation of a presumption of continuity would address this difficulty and would be consistent with the purpose of the *Native Title Act 1993*.

Item 65

175. Item 65 in the Action Plan outlines the Government's commitment to continuing to work to embed its Indigenous Engagement Framework at an agency level. The Government has also introduced legislation based on the results of the Stronger Futures Consultations to provide for a sustainable, long-term approach to supporting Aboriginal People in the Northern Territory.

¹¹⁸Op.cit., Law Council submission on the *Baseline Study for a National Human Rights Action Plan*, p.14

¹¹⁹Ibid., p.15.

176. One of the Law Council's Constituent Bodies, the LSNT, has raised a number of concerns with respect to this section of the Action Plan. One such concern is that the Final Report on the Stronger Futures Consultations did not adequately reflect many of the criticisms that were raised in relation to this consultation process.¹²⁰ Accordingly, the LSNT suggests that the consultations involved in Stronger Futures should not be relied on as a basis for a policy decision without the further input and consent of those affected.

177. The Law Council notes that in order for consultation to be effective and result in change, it is important that Indigenous people are provided with the opportunity to participate and provide input into the frameworks that will ultimately affect them. This view was also reflected by the Australian Human Rights Commission in their submission to the Inquiry on the *Stronger Futures in the Northern Territory Bill 2011* and related legislation, where it stated:

*"the Commission submits that laws and policies should promote Aboriginal and Torres Strait Islander peoples' choice, participation and control. Aboriginal and Torres Strait Islander peoples should be actively involved in the making of policy and legislative decisions, and actively engaged in the implementation and delivery of the mechanisms that arise from the legislative changes. Policies and legislation should be non-discriminatory. Where disadvantage exists, laws and policies should be targeted at alleviating that disadvantage and promoting substantive equality."*¹²¹

178. Accordingly, the Law Council submits that the Government should commit in the Action Plan to more rigorous consultations with and mechanisms for participation of Indigenous people in decision-making which affects them.

The stolen generation and stolen wages

Item 79

179. Item 79 in the Action Plan states that the Victorian Government will provide \$6.24 million over four years for services specifically for members of the Stolen Generations. This includes Connecting Home, which delivers a range of public education; advocacy; case management; healing and support; and service co-ordination activities for Aboriginal people affected by past child removal policies.

180. The Law Council notes that whilst this initiative is described under the 'priority' heading of 'The stolen generations and stolen wages', the Action Plan fails to mention any initiatives that are concerned with stolen wages.

181. Both Items 79 and 80 are concerned with the stolen generations, and more specifically, the programs and services that are designed to heal and address the trauma experienced by those who were forcibly taken from their families.

182. The Law Council submits that the Action Plan should be amended so that the issue of stolen wages and initiatives dedicated to addressing this problem are also included in the actions column.

¹²⁰ See Australian Government, *Stronger Futures in the Northern Territory Report on Consultations*. Available from <http://www.indigenous.gov.au/stronger-futures-in-the-northern-territory-report-on-consultations/>

¹²¹ See Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee on the Stronger Futures in the Northern Territory Bill 2011 and two related Bills*, 6 February 2012, p.6. Available from http://www.hreoc.gov.au/legal/submissions/2012/20120206_stronger.pdf

Freedom from discrimination

Item 81

183. Item 81 of the Action Plan states that the *Racial Discrimination Act 1975* has been fully reinstated in relation to the Northern Territory Emergency Response as of 31 December 2010.
184. The Law Council is pleased to see that the Action Plan refers to the Government's decision to reinstate the RDA under the *Northern Territory Emergency Response Act 2007* (NTER Act) and related legislation. However, the Law Council submits that the Action Plan should also refer to the commitment to complete the reinstatement process by including a *non obstante* clause in order to clarify that the RDA survives to the extent of any inconsistency with later enactments.
185. Whilst the performance indicator for this initiative states that "all future actions taken by the Government will be designed to comply with the RDA, either because they are non-discriminatory, or because they are special measures,"¹²² one of the Law Council's Constituent Bodies, the LSNT, notes that neither the *Stronger Futures in the Northern Territory Bill 2011* (the Stronger Futures Bill), nor the two related bills¹²³ which followed the reinstatement of the RDA, refer to the RDA.
186. The Stronger Futures Bill and related legislation, namely, the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* ("Consequential Provisions Bill") and the *Social Security Legislation Amendment Bill 2011*, were introduced by the Government in 2011. The Stronger Futures Bill repeals the *Northern Territory National Emergency Response Act 2007* (Cth) (NTER Act), and includes measures aimed at tackling alcohol abuse, land reform and food security in Aboriginal communities.¹²⁴

Item 82

187. Item 82 in the Action Plan states that the Australian Government will implement Stronger Futures in the Northern Territory, which follows the reinstatement of the RDA, and seeks to ensure the engagement of Aboriginal people in the decisions and application of future policies and programs.
188. The Law Council has raised a number of concerns in relation to the Stronger Futures Bill and related legislation.¹²⁵
189. One of the Law Council's concerns in relation to these Bills is that the Bills do not provide any mechanisms by which those affected can seek legal advice about their circumstances.

¹²² Op.cit., Item 81, *Exposure Draft - Australia's National Human Rights Action Plan 2012*.

¹²³ *Social Security Legislation Amendment Bill 2011* and *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011*.

¹²⁴ Explanatory Memorandum to *Stronger Futures in the Northern Territory Bill 2011*. Available from <http://www.comlaw.gov.au/Details/C2011B00242/Explanatory%20Memorandum/Text>

¹²⁵ See LCA submission to Senate Community Affairs Legislation Committee on the *Stronger Futures in the Northern Territory Bill 2011 and Related Legislation*, 3 February 2012. Available from http://aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_cte/strong_future_nt_1/submissions.htm

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190. The Law Council believes that the *Social Security Legislation Amendment Bill 2011* is particularly problematic insofar as it extends the existing referral power of Federal Government agencies to enable referrals by state and territory government agencies for income management. It also provides that a parent's income support payment may be suspended for failing to attend a compulsory conference to discuss their child's attendance at school or failing to comply with a school attendance plan for their child.¹²⁶ Given the nature of these provisions, the Law Council believes that there is a very real likelihood that these provisions will increase the number of people referred for income management, and who will accordingly, wish to seek legal advice about their situation.
191. The Law Council is concerned about the fact that the *Social Security Amendment Bill 2011* does not outline any mechanism by which those affected can seek legal advice in relation to their circumstances. As mentioned by the Law Council in its submission on the Stronger Futures Bill,¹²⁷ there is also no recognition in the Bill of the additional impost this will create for already under-funded legal assistance bodies.¹²⁸
192. The Law Council believes that there should be recognition of the legal needs created by the framework and adequate funding to ensure those needs are met. At present, the Action Plan does not include initiatives that adequately address such concerns.
193. Finally, the LSNT has suggested that a number of additional issues should be addressed in this section of the Action Plan. These issues include:
- Modification of the framework to allow access to existing decision making review mechanisms available through Centrelink; and
 - Express provisions subjecting the framework to the RDA.

Community Safety and the Justice System

Item 83

194. Item 83 of the Action Plan states that the Australian Government is working with States and Territories and Indigenous people to improve community safety and to address the over-representation of Indigenous people in the criminal justice system, both as offenders and as victims. As part of this initiative, the Government has indicated that it will provide a formal response to the '*Doing time – Time for Doing' Report*¹²⁹ and work with the States and Territories to address the key issues identified in that report. The Government has also expressed its commitment to reinvigorating discussion with the States and Territories to develop a national Indigenous Safe Communities Strategy.
195. In August 2011, the Productivity Commission released a report titled *Overcoming Indigenous Disadvantage: Key Indicators 2011 Report*.¹³⁰ This report revealed some

¹²⁶Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm

¹³⁰ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*. Available from <http://www.pc.gov.au/gsp/reports/indigenous/key-indicators-2011>

alarming statistics in relation to the incarceration rates of Indigenous Australians such as:

- The rate of incarceration of Indigenous males is now 14.2 times that of the non-Indigenous population;
- That the number of Indigenous juveniles in detention increased by 55.2% between 2001 and 2009; and
- That across Australia, Indigenous Australians make up over 25% of the total prison population, despite making up only 1.9% of the total adult population.

196. There is an urgent need for the Government to address these high levels of incarceration in a practical way. However, the Action Plan column relating to performance indicators and timelines simply refers to 'ongoing' monitoring and the tabling of the Government response to the *'Doing Time- Time for Doing Report'*. While the Law Council acknowledges that the Government response accepts several recommendations of the report, which will involve specific actions with specific performance indicators and timelines, the Law Council notes that many of the report's recommendations are only accepted in principle or in part. Therefore the Law Council submits that the Action Plan needs to address the issue of the high levels of incarceration of Indigenous people more specifically and with detailed timelines and performance indicators.

197. Similar views have been expressed by the LIV and QLS who do not consider that the Action Plan addresses the over-representation of Aboriginal and Torres Strait Islander adults in the justice system adequately. The QLS notes that the Queensland Government recently released the *Just Futures 2012-2015 Strategy* which outlines Queensland's response to this issue. The QLS recognises that nationwide resolve is needed to address these issues in a consistent manner.

Item 85

198. Item 85 of the Action Plan reiterates the Government's commitment to continuing to monitor Indigenous deaths in custody through the Australian Institute of Criminology's Deaths in Custody Monitoring Program. The timeline for this initiative is simply listed as 'ongoing'.

199. The Law Council is concerned about the lack of attention that is afforded to this important human rights issue in the Action Plan. As currently drafted, this initiative fails to outline concrete actions that the Australian Government will commit to carrying out in order to actively reduce the rates of deaths in custody for Indigenous people. The Law Council submits that simply monitoring the rates of Indigenous deaths in custody will do little to reduce the incidence of these types of incidents, if there are no follow-up actions based on the outcomes of this monitoring.

200. In an effort to better address this issue, one of the Law Council's Constituent Bodies, the LIV, has suggested that further commitments made in relation to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991)¹³¹ should be included under this Action Item.

¹³¹ See <http://www.austlii.edu.au/au/other/IndigLRes/rciadid/>

201. In order for real progress to be made, it is imperative that the Government turns its mind to practical ways in which Aboriginal deaths in custody can be effectively prevented. To help facilitate this, the Law Council submits that it would be beneficial for this Action Item to be further developed with more concrete, active language, including clear, measurable targets.

Item 87

202. Item 87 of the Action Plan reiterates the Government's commitment to continuing to provide funding for legal assistance services, including Aboriginal and Torres Strait Islander Legal Services (ATSILS); Family Violence Protection Legal Services (FVPLS) and Indigenous women's legal services.

203. In its submission on the Baseline Study, the Law Council noted the significant disparity between funding provided to Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions on a per case load basis. The Law Council suggested that the Action Plan should include the need for funding for ATSILS to be increased to parity with legal aid commissions on a per case load basis, taking into consideration the additional costs associated with servicing remote communities.¹³²

204. A similar view was expressed by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in their report, *Doing Time: Time for Doing*¹³³ where they recommended that the Commonwealth Government should:

*"increase funding for Aboriginal and Torres Strait Islander Legal Services to achieve parity per case load with Legal Aid Commission funding in the 2012-13 Federal Budget, with appropriate loadings to cover additional costs in service delivery to regional and remote areas."*¹³⁴

205. The Law Council submits that Item 87 as currently drafted, does not go far enough in ensuring that Aboriginal and Torres Strait Islanders are able to access legal assistance services.

206. The Law Council submits that this Action Item should be redrafted to clarify exactly what action is being undertaken by the Government to address the lack of funding these legal assistance services currently receive, and that the Government should commit to increasing funding to these important services, as opposed to merely 'continuing to fund' them.

Item 88

207. Item 88 of the Action Plan states that the Australian Government and the Northern Territory will continue to provide capacity building funding to the Northern Territory Aboriginal Interpreter Service (NTAIS), with Australian Government funding committed to 2011-2012 under the Closing the Gap in the Northern Territory National Partnerships Agreement. Governments are working together to encourage agencies to increase their use of Indigenous interpreters when needed, as an ongoing service delivery practice, in the rollout of service and programs in the Northern Territory.

¹³²Op.cit., Law Council submission on the *Baseline Study for a National Human Rights Action Plan*, p.15.

¹³³Op.cit., *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*.

¹³⁴Ibid., Recommendation 26.

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208. One of the Law Council's Constituent Bodies, the LSNT, supports the provision of capacity building funding to the NTAIS by the Australian Government and the Northern Territory Government. According to the LSNT, the development of a well-resourced Aboriginal Interpreter Service significantly enhances the ability of governments and service providers to better engage with Aboriginal people who do not speak English as their first language. Despite this, however, the LSNT notes that the provision of a professional Aboriginal Interpreter Service will not in and of itself address the issues of miscommunication that currently exist between government officers and Aboriginal people whose first language may not be English.
209. The LSNT is concerned at the lack of basic language awareness skills demonstrated by a large number of government officials including police officers, members of the judiciary, lawyers and corrections staff. The LSNT is also concerned that service providers often fail to seek the services of an interpreter because they overestimate a client's level of English proficiency. The LSNT submits that the lack of understanding about the nature of language and its complexity, intercultural communication and interpreting means that many service providers act in ways, or use interpreters in ways, that make accurate interpreting very difficult.
210. For the reasons mentioned above, the LSNT suggests that in order to truly alleviate the pervasive issues associated with miscommunication with Aboriginal people in the justice system, a number of other steps need to be put in place. These include:
- Language awareness and communication training, on the proper use of interpreters by legal users (police, lawyers, courts, corrections staff).
 - Development of consistent policies across government in relation to the use of interpreters.
 - Development of protocols that interpreters could refer to in legal interpreting contexts to assist police, the courts and the legal profession. In particular, the courts should be encouraged to adopt practice directions on the use of Aboriginal interpreters. Additionally, the Police General Orders¹³⁵ should be modified to encourage better use of interpreters and incorporate a robust system of assessing a suspect or witness' level of English.
211. These initiatives should be led by the Commonwealth and Northern Territory Governments and should be included in the Action Plan.

Item 89

212. Item 89 of the Action Plan states that the Australian Government will trial the Sworn Community Engagement Officers Program in the Northern Territory and will consider rolling out the model in other Indigenous communities.
213. One of the Law Council's Constituent Bodies, the LSNT, has expressed support for the two year community policing trial. However, notwithstanding this, LSNT has expressed concern that the important partnership fostered by such an initiative is severely undermined by the use of excessive police powers as part of the Northern Territory Emergency Response (NTER).

¹³⁵ Northern Territory Police General Orders available from Northern Territory Police.

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214. The LSNT cites the power to enter and search people's houses and vehicles in alcohol protected areas without warrant, and based upon a "reasonable suspicion" that there is alcohol, as an example of the excessive use of police powers in this regard.¹³⁶ The LSNT submits that people are still uncertain as to whether the sweeping and discretionary powers of police will continue to apply to remote communities under the Stronger Futures Bill. The LSNT hopes to see the abolition of these broad powers and that search powers without warrant are applied consistently throughout the Northern Territory.
215. In light of these concerns, the Law Council submits that the evaluation of the trial of the Community Engagement Officers Program in the Action Plan should include evaluation of the police powers granted under the NTER and any such powers continued under the Stronger Futures Bill.

Item 93

216. Item 93 in the Action Plan states that in the Northern Territory, the *Justice (Corrections) and Other Legislation Amendment Act 2011* will introduce two new sentencing options in the *Sentencing Act*, called Community-Based Orders and Community Custody Orders.
217. One of the Law Council's Constituent Bodies, the LSNT, welcomes the introduction of Community Based Orders and Community Custody Orders as new sentencing options in the *Sentencing Act (NT)*. The LSNT notes that the Northern Territory's prison population has grown steadily over the last 20 years – a fact supported by the Australian Bureau of Statistics which has found that the Northern Territory has the highest incarceration rate in the country, at more than four times the national average and increasing faster than any other jurisdiction.¹³⁷
218. Given the impact of prison on the physical and mental health of Indigenous offenders as well as the high rates of re-offending, the LSNT submits that resourcing of community based options must be a priority for the Government. The LSNT notes that offenders who are eligible for Community Based Orders and Community Custody Orders will now have the option to remain in the community and engage in employment or community work.
219. The LSNT notes that the *Justice (Corrections) and other Legislation Amendment Act 2011* is designed to support the rehabilitation of offenders and consequently contribute to decreased prison numbers and recidivism in the NT. However, the LSNT has expressed concern that rehabilitation services and other programs are not currently available and that there are difficulties involved in attracting and retaining a skilled workforce to provide such services and programs. As a result, LSNT submits that adequate resourcing of these programs must be a priority for the Government.
220. The Law Council submits that the Commonwealth and the Northern Territory Governments should commit in the Action Plan to providing resources for rehabilitation services and programs in addition to the introduction of Community Based Orders and Community Custody Orders.

¹³⁶ See for example, s.12 NTER declaring that proscribed areas were "general restricted areas" for the purposes of the *Liquor Act* (NT).

¹³⁷ Australian Bureau of Statistics, *4512.0 -Corrective Services in Australia*, September Quarter 2011, p. 7. Available from [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/E9DDB05C68AD2185CA257951000F74A4/\\$File/45120_sep%202011.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/E9DDB05C68AD2185CA257951000F74A4/$File/45120_sep%202011.pdf)

Item 94

221. Item 94 in the Action Plan outlines the Victorian Government's commitment to continuing to support the Koori Courts, which allow greater participation by Aboriginal and Torres Strait Islander people in the court and sentencing processes.
222. In its submission on the Baseline Study, the Law Council suggested that the Action Plan should address the need for greater funding to be provided for Aboriginal and Torres Strait Islander sentencing court programs, to ensure that they can function effectively and expand where necessary. Disappointingly, Action Item 94 does not reflect a commitment on behalf of the Victorian Government to increase funding for the Koori Courts, but instead, merely outlines the Victorian Government's commitment to continue to support the Koori Courts.
223. One of the Law Council's Constituent Bodies, the LIV, considers that because funding for the Victorian Aboriginal Legal Service (VALS) does not achieve parity with legal aid, the ability of VALS to service the Koori Courts is increasingly difficult. In this regard, the Law Council submits that Action Item 94 should also include a commitment by the Commonwealth and Victorian Governments to increased funding for VALS, as opposed to merely 'continuing to support' it.
224. In addition to this, the LIV, suggests that Item 94 of the Action Plan should also refer to any equivalent initiatives or plans to evaluate and replicate the Victorian system in other Australian jurisdictions.

Item 97

225. Item 97 in the Action Plan states that the Victorian Government will implement the second phase of the Victorian Aboriginal Justice Agreement, which is a multi-dimensional approach to improve justice outcomes.
226. The LIV understands that Phase 2 began in 2006. Accordingly, the LIV questions whether this Action Item should instead refer to the implementation of the third phase of this Agreement.

Women

Freedom from Violence

Item 100

227. Item 100 in the Action Plan outlines the Commonwealth, State and Territory Governments' commitment to implementing the *National Plan to Reduce Violence Against Women and their Children* (the National Plan).
228. The National Plan provides a framework for addressing violence against women and children over the next 12 years. It has a number of objectives including:
- "to reduce violence against women and their children; and

- to improve how governments work together, increase support for women and their children, and create innovative and targeted ways to bring about change.”¹³⁸

229. The Law Council supports the Government’s commitment to implementing the National Plan. However, one of its Constituent Bodies, the LIV, has raised concerns with respect to how the National Plan will operate in practice given that differing definitions of ‘family violence’ currently exist in Australia, as opposed to a single definition.
230. The LIV notes that the *Family Law Act 1975* (Cth), defines family violence as “conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.” In Victoria, family violence is defined in section 5 of the *Family Violence Protection Act 2008* (Vic) as behaviour by a person towards a family member of that person if that behaviour is physically, sexually, emotionally or psychologically or economically abusive; or threatening or coercive.¹³⁹ Definitions in other states and territories, such as NSW and the ACT are different again.¹⁴⁰
231. The LIV believes that it is appropriate and desirable to aim for a common definition and understanding of what constitutes family violence across the different legislative schemes. The LIV considers that the definition contained in the recent Family Violence Report issued by the NSW and Australian Law Reform Commissions should be adopted. Recommendation 6-4 of the Family Violence Report states that family violence should be defined as “violent or threatening behaviour, or another form of behaviour, that coerces or controls a family member or causes that family member to be fearful”.¹⁴¹ The report then proceeds to describe what type of behaviour could fall into this definition of family violence.
232. The LIV suggests that the governments should commit to considering a common definition of family violence in Action Item 100.

Gender Equality in Public Life

Item 112

233. Item 112 in the Action Plan states that non public-sector organisations with more than 100 employees will be required to report on key gender equality indicators, demonstrating the actual figures of the gender compositions of their organisations and governing bodies; on their employment conditions; and whether they have flexible work practices for men and women.
234. In 2009, the then Minister for the status of women, the Hon. Tanya Plibersek MP, announced a review of the *Equal Opportunity for Women in the Workplace Act* (1999) (EOWWA) and the Equal Opportunity for Women in the Workplace Agency (the Agency). The aim of this review was to look at the effectiveness and efficiency of the EOWWA and the Agency in relation to how they facilitated the promotion of women in the workplace. It was hoped that following the review, the Government

¹³⁸ See <http://www.fahcsia.gov.au/sa/women/progserv/violence/nationalplan/Pages/default.aspx>

¹³⁹ s.5(1)(a)(i) to (v), *Family Violence Protection Act 2008* (Vic)

¹⁴⁰ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, October 2010, Volume 1, p. 193 at para 515.

¹⁴¹ *Ibid.*, Recommendation 6-4, p.19.

would have a better idea of how it could support employers to ensure that barriers to equal opportunities for women in the workplace were overcome.¹⁴²

235. Two of the questions posed in the review were whether the current coverage of the EOWWA was appropriate, and whether the current coverage of organisations or employees should be expanded or decreased. In its submission on the review,¹⁴³ the Law Council noted that issues such as inequity in opportunities for women in the workplace and discrimination were more likely to occur in workplaces with less than 100 employees. The Law Council suggested that this could largely be attributed to the fact that in these types of organisations, there is less likelihood of there being a 'formal human rights system' or collective bargaining arrangement for employees.¹⁴⁴ In light of this, the Law Council submitted that the coverage of the EOWWA should be expanded so that it captures a larger number of organisations.

236. The EOWWA provides that organisations with more than 100 employees must report on the measures they have in place in relation to the following employment matters¹⁴⁵:

- Recruitment and selection;
- Promotion, transfer and termination;
- Training and development;
- Work organisation;
- Conditions of service;
- Arrangements for dealing with gender based harassment;
- Arrangements for dealing with pregnancy and related matters.

237. In its submission on the Review of the EOWWA, the Law Council submitted that all employers (regardless of whether they are subject to the Act or not), should be encouraged to consider developing a workplace profile that refers to the organisation's policies in relation to these criteria and that these policies should then be conveyed to the organisation's employees. Indeed, according to one of the Law Council's Constituent Bodies, the QLS, an important feature of gathering a holistic picture of an organisation's commitment to equal opportunities is substantive information on the application of organisational policies.

238. On 1 March 2012, the *Equal Opportunity for Women in the Workplace Amendment Bill 2012* was introduced in the House of Representatives. In addition to changing the name of the EOWWA to the *Workplace Gender Equality Act 2012*, this Bill also broadens the coverage of the EOWWA to include men as well as women; enhances the Agency's education functions so that smaller organisations with less than 100 employees, while not required to report, will be able to access the Agency's advice, education and incentive activities; and introduces a new reporting framework in which relevant employers are required to report against gender equality indicators.¹⁴⁶

¹⁴² See http://www.eowa.gov.au/About_EOWA/Review_2009.asp

¹⁴³ See Law Council Submission to FAHCSIA on *Review of the Equal Opportunity for Women in the Workplace Act 1999*, 23 October 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=9439C358-1E4F-17FA-D29C-E08B6FECF96D&siteName=lca

¹⁴⁴ Ibid.

¹⁴⁵ See definition of 'employment matters' in s.3, *Equal Opportunity for Women in the Workplace Act 1999*

¹⁴⁶ Explanatory Memorandum, *Equal Opportunity for Women in the Workplace Amendment Bill 2012*. Available from http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld:%22legislation/ems/r4765_ems_21d75f48-2ce0-4719-aa15-c92c4b78dae5%22

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239. The Law Council supports the inclusion of expanded reporting requirements outlined in this Action Item. However, one of the Law Council's constituent Bodies, the QLS, submits that whilst receiving statistical data (in the form of figures and percentages) would be helpful, it is equally important to determine whether the policies are being adhered to and utilised as the standard practice.
240. The QLS suggests that perhaps the reporting obligations could be teamed with the publication of material setting out strategies for better gender representation and successful flexible work practices.
241. Finally, the QLS also suggests that compliance would have significant financial ramifications for the organisations involved, and stresses that reporting requirements should be accessible (for example, through online mechanisms) and streamlined. In an effort to facilitate this, the QLS suggests that tools could be developed to assist organisations in record-keeping and data collection for these purposes.
242. The Law Council submits that in addition to the requirement in Item 112, there should be a requirement for FaHCSIA and the EOWWA to provide accessible materials to assist employers to report and consider expanding the range of employers obliged to report.

Item 113

243. Item 113 in the Action Plan outlines the Australian Government's commitment to achieving at least 40% representation of both women and men on its public sector boards and that through the EOWA it will continue to work with the private sector to achieve gender balance in private sector ranks and forums.
244. The Law Council's EOL Committee supports this Action Item as an important step towards achieving gender equality.
245. The QLS has also indicated that it particularly believes that the public sector should lead the way to alter the stereotypical image of an appropriate board member. The QLS notes that the EOWA 'Australian Census of Women in Leadership 2010' shows that only 8.4% of Board Directorships are held by women. The QLS submits that private sector boards are also an issue of concern and that more needs to be done to encourage better representation of women in this sector.

Children and young people

Federal Children's Commissioner

Item 121

246. Item 121 in the Action Plan states that the Australian Government will explore options for establishing a new National Children's Commissioner.
247. In December 2010, the LIV provided comments to the Senate Committee on Legal and Constitutional Affairs supporting the concept of a Commonwealth Children's Commissioner, but raising concerns about the particular role of the Commissioner provided for in the *Commonwealth Commissioner for Children and Young People Bill 2010*, which was introduced by Greens Senator Hanson-Young. In January 2011, the Law Council also provided a submission to the same committee supporting a

Commonwealth Children's Commissioner and has continued to advocate for such a commissioner.¹⁴⁷

248. While the Senate Committee recommended that the Bill not be passed, it also recommended that the matters raised before the Committee be given full consideration in the Government's deliberations on the role of a Children's Commissioner. The Law Council notes that the Government has been deliberating on the role of a Children's Commissioner since the approval of the 2009 Council of Australian Governments' *National Framework for Protecting Australia's Children*. The relevant initiative under that framework has a 3 year timeframe and involves delivery by the Commonwealth in consultation with the states and territories. Therefore, the Law Council submits that the performance indicator and timeframe in the Action Plan should be aligned with this framework initiative rather than being noted as 'ongoing'.

Suicide and Self-harm

Item 125

249. Item 125 in the Action Plan outlines the Government's commitment to expanding Headspace to 90 centres nationally, and will also support the development of the Outreach Teams to Schools measure which supports mental health promotion as well as suicide prevention services. Additionally, the Government has outlined its support for the MindMatters program in secondary schools.
250. The LIV is supportive of the Australian Government's commitment to promoting and supporting mental health and suicide prevention services. However, the LIV suggests that Action Item 125 should be amended to commit to specific training for police to deal with young people in crisis. The LIV suggests that compulsory training should be devised that would educate police and focus on how to respond effectively to situations involving a young person in crisis, and that the Australian Government give consideration to the recommendations made by the Victoria Coroner, Jennifer Coate in the Tyler Cassidy case.¹⁴⁸

Older people

Item 131

251. Item 131 of the Action Plan states that the Australian Government will continue to ensure that older people receiving Australian Government funded services are protected under the *Aged Care Act 1997*. The QLS submits that this Action Item should be extended to apply the complaints regime under the Aged Care Act to all aged care facilities.

Item 133

252. Item 133 of the Action Plan states that the Australian Government will continue to provide funding through the Commonwealth Community Legal Services Program to ensure that older Australians have access to legal services to uphold their rights.

¹⁴⁷ Op.cit., Law Council submission on the *Commonwealth Commissioner for Children and Young People Bill 2011*; and also Law Council letter to Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon. Jenny Macklin MP, 10 June 2011.

¹⁴⁸ See Coroner's Court of Victoria, Inquest into the Death of Tyler Cassidy. Available from <http://www.coronerscourt.vic.gov.au/home/case+findings/coroners2+-+findings+-+inquest+into+the+death+of+tyler+cassidy>

253. The QLS recommends that the Commonwealth improve access to legal assistance for older people for all civil and criminal law matters. Currently, access to legal assistance in civil matters is very limited.

Item 136

254. Item 136 of the Action Plan states that the Australian Law Reform Commission, with the involvement of Australia's new Age Discrimination Commissioner, will undertake a review of Commonwealth laws to identify provisions that create barriers to workforce participation of older people.

255. The LSSA has particularly expressed support for this initiative. The Law Council has also supported the important role of a full-time Age Discrimination Commissioner in previous submissions.¹⁴⁹

Gay, lesbian, bisexual and sex and/or gender diverse people

Sex and/or gender diverse people

Item 144

256. Item 144 of the Action Plan states that the Government is co-ordinating a review on how and why the Federal Government collects sex and gender information, with the aim of developing national guidelines to ensure sex and gender information is collected consistently across government and only where there is a legitimate purpose.

257. The Law Council supports the review outlined in Item 144, and understands that a number of initiatives are currently being undertaken to pursue this review. The Law Council also supports the timeline of 2012 for the release of draft guidelines to ensure that sex and gender identity information is collected consistently across government and only where there is a legitimate purpose..

People at risk of and/or experiencing homelessness

Housing

Item 149

258. Item 149 of the Action Plan states that the Northern Territory Government will continue to work towards a reduction of homelessness in the Northern Territory under the NT's Territory 2030 Strategic Plan through measures including:

- Increased managed and supported accommodation facilities and tenant support programs;
- Commissioning a study on rough sleeping in Darwin; and
- Providing assistance for individuals leaving child protection to access and maintain stable and affordable accommodation.

¹⁴⁹ See Law Council submission to Senate Committee on Legal and Constitutional Affairs Committee on Sex and Age Discrimination Legislation Amendment Bill 2010, 1 Nov 2010. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=98E548FF-BEE6-4CC0-E219-F821886DB8B2&siteName=lca

259. The LSNT believes that the right to housing is a basic human right. The LSNT supports improving housing outcomes, connecting people to services and reducing homelessness. The LSNT notes that nationwide housing affordability, in terms of both homeownership and private rental, is becoming increasingly limited. Due to the increasing demand for affordable accommodation more people are in “housing stress” (spending 30% or more of income on accommodation) than ever before.

260. The LSNT also notes that the inability to access affordable, appropriate housing leads to increasing demand for public housing and impacts negatively on health and education outcomes.

261. The LSNT submits that the following are social housing and local government issues unique to the NT that need to be evaluated and the level of demand regularly assessed:

- Indigenous factors

Housing in the Northern Territory is largely shaped by a significant Indigenous population – 30% compared to a national average of 2% - and by the general remoteness of the Territory’s Indigenous communities and outstations. This remoteness factor, which leads to increased construction and maintenance costs, coupled with a lack of rental options in Indigenous communities, a backlog of community housing maintenance, poor life skills, and a young and growing population means that Territory Housing is impacted like no other state or territory social housing provider in Australia.

- Homelessness

Homelessness is becoming an increasing problem in the Northern Territory with greater numbers of people gravitating towards urban centres to visit family and access services. A lack of available short and medium term accommodation options exerts additional pressure on service providers and infrastructure.

262. The LSNT supports the commitment by the Northern Territory Government to work towards a reduction in homelessness under Action Item 149.

263. The LSNT also submits that further measures should be included in the Action plan to address particular circumstances relating to housing in the Northern Territory. The reforms to remote housing, which started in 2009, see all the tenants in Aboriginal community controlled housing in the Northern Territory become tenants of the public housing authority. This has resulted in residents entering a new legal relationship – that of landlord and tenant with many Aboriginal people entering tenancy agreements for the first time. Navigating this relationship has caused confusion, disputes and problems for the already disenfranchised. While tenants in Darwin have access to free legal assistance through the Darwin Community Legal Service Tenants Advice Service, this service is inadequately funded to assist people outside of Darwin. The Aboriginal and Torres Strait Islander Legal Service (ATSILS) and the NT Legal Aid Commission (NTLAC) have provided some assistance to ‘bridge the gap’ where possible; however have been unable to assist people to the level of demand. It is thus essential and overdue that remote tenants have access to an independent advice service and appropriate support.

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264. The LSNT and a number of Northern Territory Legal Services have been lobbying for a NT Remote Tenancy Legal Advice Service since August 2009, including holding meetings with relevant Commonwealth and Northern Territory officers, who have agreed that there is a need for such a service.
265. The LSNT submits that the Action Plan should include a commitment by the Commonwealth and Northern Territory Governments to fund a Remote Tenancy Legal Advice Centre for the Northern Territory.

Item 151

266. Item 151 of the Action Plan outlines the Government's commitment to introduce new homelessness legislation which will continue to highlight Australia's commitment to its international human rights obligations, and to work against discriminatory perceptions of people experiencing homelessness by promoting an understanding of their plight and their rights as members of Australian society.
267. The Law Society of Western Australia (LSWA) particularly commends the steps taken by the Australian Government in relation to putting homelessness on the agenda, including the commissioning of a number of reports, such as the *White Paper on Homelessness: "The Road Home"* by FaHCSIA in 2008; and the *Green Paper on Homelessness: Which Way Home? A New Approach to Homelessness* by FaHSCIA in May 2008. The LSWA also notes the *Housing the Homelessness: Report on the Inquiry into Homelessness Legislation* by the House of Representatives Standing Committee on Family, Community, Housing and Youth in November 2009 ('Housing the Homeless Report'). These reports highlight the need for law reform to ensure those who are experiencing or are at risk of homelessness are not further marginalised or excluded from participation in the Australian community or public and social life.
268. Whilst the LSWA agrees with Items 147 to 153 of the Action Plan, it submits that the following actions should also be included:
- In relation to Item 151, that this initiative should also include implementing all the recommendations in the Housing the Homeless Report as soon as possible – particularly recommendations 1, 2, 6, 7, 8, 9 and 10.
 - Reviewing the inadequacy of welfare payments under welfare legislation to ensure those who are experiencing or are at risk of homelessness are not further excluded and able to break the cycle.¹⁵⁰
 - Reviewing mechanisms for waiver of fines by the WA Government.
269. The clients of Street Law Centre WA Inc (a Community Legal Centre with a focus homeless persons) often present with issues relating to fines imposed by court orders and infringements. The use of fines as a penalty disproportionately impacts upon those experiencing homelessness or at risk of homelessness.
270. The LSNSW also supports the introduction of new homelessness legislation, and suggests that new homelessness legislation should, in accordance with Australia's

¹⁵⁰ See Human Rights Law Centre's submission to the Attorney-General's Department on the *Consultation Draft of the Baseline Study*, 9 September 2011. Available from <http://c742005.r5.cf2.rackcdn.com/files/Draft-Baseline-Study-HRLC-Submission-FINAL.pdf>

international human rights obligations,¹⁵¹ include a remedy for those whose right to adequate housing remains unmet.

271. The QLS also supports the proposed homelessness legislation. The QLS submits that the legislation should include increased funding for support services (including legal services) and appropriate complaint and review mechanisms for decisions that impact on persons experiencing homelessness, for example, police move-on powers.

People with disability

Freedom from discrimination

Item 154

272. Item 154 states that the Australian Government will continue to work on preparing a national action framework for implementing the National Disability Strategy.
273. The Law Council has expressed strong support for the Government's implementation of its obligations under the Convention on the Rights of Persons with Disabilities.¹⁵²
274. The Law Council supports the preparation of the Framework outlined in Item 154 as a further measure to implement Australia's obligations under the Convention.

People in prisons

Freedom from discrimination

Item 187

275. Item 187 in the Action Plan reiterates the Government's commitment to continuing to provide funding through the Commonwealth Community Legal Services Program to community legal centres providing legal help and information to people in custody.
276. The LSNT welcomes the continuation of funding to legal assistance providers by the Australian Government. In the Northern Territory access to justice is often more resource intensive than in other parts of the country. The need for greater resources in the Northern Territory is due in part to the geographical spread of the population and the long distances between homes, courts, prisons and other services, and partly due to the demographics of the population which includes many Indigenous people.
277. Natural justice and procedural fairness principles dictate that those subject to legislative provisions ought to have access to legal representation to assist them to address any concerns. As noted above, the Northern Territory has a high percentage of Indigenous people in its population and there are high rates of incarceration for Indigenous people. Therefore the LSNT supports increased funding for the provision of legal assistance to people in custody.

¹⁵¹ See Article 11(1) of the *International Covenant on Economic, Cultural and Social Rights*

¹⁵² See Law Council submission on the *Convention on the Rights of People with Disabilities*, 14 March 2008. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4ADDF5B-1C23-CACD-2233-7025BFFBF0E9&siteName=lca. See also Law Council submission on *Disability Discrimination and Other Human Rights Legislation Amendment Bill*, 14 January 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F2B9E3EA-1E4F-17FA-D24A-466702D7EDE0&siteName=lca

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278. The QLS also supports the enhancement of access to justice for prisoners. In furtherance of this aim, the QLS has been working with Queensland Corrective Services to improve standard operating procedures to facilitate legal representation and to grant prisoners access to computers and legal texts for legal purposes. These processes are essential in order to protect the rights of persons who are deprived of their liberty.
279. The QLS submits that Item 187 of the Action plan should be amended to commit State and Territory Governments to facilitate legal assistance.
280. The QLS also highlights the need for greater commitment to reducing recidivism and ensuring incarceration is a measure of last resort. Such a commitment should include access to appropriate parole, criminogenic and community-based programs. In the QLS' view, post-release assistance is vital in ensuring that a person does not re-enter the criminal justice system. The QLS also recommends further work on innovative criminal justice schemes such as restorative justice and alternative dispute resolution.
281. The QLS submits that the Action Plan should be amended to include an Item committing Commonwealth, State and Territory Governments to reviewing post release assistance to prisoners and restorative justice and Alternative Dispute Resolution (ADR) programs.
282. The LSWA, has suggested that the issue of indeterminate sentences be included as one of the matters requiring attention in this section of the Action Plan.
283. The LSWA is particularly concerned about legislation in WA that allows courts to impose indeterminate sentences but disallows judicial review at the instigation of a prisoner against a sentence of indefinite imprisonment. The LSWA has advocated for the amendment of the *Sentencing Act 1995* (WA) to allow indeterminate sentences to be subject to judicial review.
284. The Law Council has also raised concerns about indefinite sentencing in several jurisdictions.¹⁵³

Refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds

Assessment of protection claims and non-refoulement obligations

Items 188, 189 and 190

285. Item 188 in the Action Plan reiterates the Government's commitment to continuing to determine refugee status on an individual basis against the Refugee Convention criteria, with reference to up-to-date information on conditions in the applicant's home country.

¹⁵³ See Law Council Supplementary Submission on the *Migration Amendment (Detention Reform and Procedural Fairness) Bill 2011*, 15 August 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=1309B9DA-A024-717C-D040-BB6E096F0CD8&siteName=lca

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286. Item 189 states that the Government will continue to undertake assessment prior to removal for people who meet certain identified risk criteria, and to allow for Ministerial intervention, to ensure that the principle of non-refoulement is respected.
287. Item 190 states that the Government will implement the recently passed amendments to the *Migration Act 1958* which establish a new process to allow the grant of a protection visa in circumstances that engage Australia's non-refoulement obligations under human rights treaties other than the Refugee Convention.
288. The Law Council has consistently expressed strong support in favour of Australia implementing its obligations under the Refugee Convention, the ICCPR and the Convention Against Torture.¹⁵⁴ Accordingly, the Law Council supports the initiatives outlined in Items 188 to 190 of the Action Plan.
289. The LSSA suggests that the Department of Immigration and Citizenship should conduct a review into the consistency and quality of decision-making for Protection Obligation Evaluations, which are conducted for asylum seekers arriving by boat and provide better training for decision makers. The LSSA also suggests that the two-tiered system of internal merits review for Offshore Entry Persons arriving by boat should be abolished, and suggests that an independent merits review of decisions should be permitted by the Refugee Review Tribunal. The LSSA and the Law Council note that although the Government has announced that the two-tiered system will be abolished from 2012 it has also announced that the 'architecture' for the system will be maintained.¹⁵⁵

Immigration detention

Item 191

290. Item 191 in the Action Plan states that the Government will review whether any treaty body recommendations can be accepted as consistent with the Government's immigration detention policies.
291. The Law Council does not believe that this initiative goes far enough in committing the Government to any real reforms in relation to Australia's immigration detention policies. The Law Council submits that Item 191 should be amended to commit the Government to accepting the recommendations arising from Australia's Universal Periodic Review, including bringing its policy of mandatory detention to an end.¹⁵⁶
292. Two of the Law Council's Constituent Bodies, namely, the QLS and the LSSA, have also expressed the view that the Australian Government should reconsider its policy of mandatory detention. The QLS believes that Australia's system of mandatory detention must be reformed as this will ensure compliance with Australia's international human rights and customary international law obligations, namely the right to be free from arbitrary detention, as stated in article 9 of the ICCPR.

¹⁵⁴ See for example, Law Council Submission on the *Migration Amendment (Complementary Protection) Bill 2009*, 29 September 2009. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3787E557-1E4F-17FA-D25C-A3CCE58D8EA6&siteName=lca

¹⁵⁵ See <http://www.chrisbowen.net/media-centre/media-releases.do?newsId=5240>

¹⁵⁶ See for example UPR recommendations 86.123, 86.126, 86.127, 86.13, United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Australia*, A/HRC/17/102011, Available from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>

293. In addition to its concerns about mandatory detention, the LSSA submits that there is no mention in the items relating to the assessment of protection claims and non-refoulement obligations of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The LSSA recommends that the Action Plan should be amended to commit the Government to an inquiry into Australia's obligations under these treaties should be undertaken, and that domestic legislation should be drafted in order to address issues arising as a result of statelessness.

Item 192

294. Item 192 in the Action Plan reiterates the Government's commitment to continuing to ensure that detention is not indefinite or otherwise arbitrary, and only for the following groups:

- All irregular arrivals for management of health, identity and security risks to the community;
- Unlawful non-citizens who present unacceptable risks to the community; and
- Unlawful non-citizens who repeatedly refuse to comply with their visa conditions.

295. The Law Council submits that this Action Item should be amended to provide that this policy should be enshrined in legislation.¹⁵⁷

Items 193, 194 and 195

296. Item 193 in the Action Plan states that the Australian Government will continue to subject length, and conditions of detention, including the appropriateness of both the accommodation and the services provided, to regular review.

297. Item 194 reiterates the Government's commitment to continuing to use the least restrictive form of immigration detention available whilst health and security checks are undertaken for children.

298. Item 195 states that the Government will continue to move more people in immigration detention into community-based detention arrangements, including, as a priority, all children (including unaccompanied children) and families following appropriate risk, security and health assessments.

299. The Law Council supports the initiatives outlined in these three Action Items.

Item 196

300. Item 196 in the Action Plan outlines the Government's commitment to continue to resource a dedicated Children's Unit to address complex policy issues relating to unaccompanied minors.

¹⁵⁷ See Law Council Submission to the *Inquiry into Australia's Immigration Detention Network*, 17 August 201. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=immigration_detention_cte/immigration_detention/submissions.htm

301. The Law Council submits that this Action Item should be amended to provide that the Children's Unit should consider, and the Government commit, to alternative arrangements for the guardianship of unaccompanied minors so that the Minister for Immigration no longer needs to continue as guardian.¹⁵⁸

Item 197

302. Item 197 in the Action Plan states that the Commonwealth Ombudsman and Australian Human Rights Commission (AHRC) will continue to have general powers that enable them to report on conditions within detention centres.

303. The Law Council supports this Action Item, but is concerned about recent comments made by the President of the AHRC, Catherine Branson, that due to a lack of resources, the AHRC will no longer be able to visit and report on conditions in immigration detention centres as frequently as it has in the past.¹⁵⁹

304. The Law Council has always found the detailed reports of the AHRC to provide valuable insights into the conditions in Australia's immigration detention facilities. Accordingly, the Law Council submits that Item 197 should also include a commitment by the Australian Government to increase funding to the AHRC so that it is able to continue its valuable reporting role.

Access to Justice

Item 206

305. Item 206 in the Action Plan states that the Australian Government will continue to fund community legal centres including those with a primary focus on providing legal information and help in relation to refugee and immigration matters.

306. The Law Council submits that this Action Item should be amended to commit the Government to additional funding to address several new areas of need.

307. The LSNT notes that it is predicted that the Wickham Point Immigration Detention Facility will hold 1200 detainees by June 2012.

308. There is no immigration legal service in Darwin or elsewhere in the NT similar to those operating interstate. Only a few legal service providers offer limited legal and advocacy assistance taking into account a range of service delivery requirements to the region and their existing budgetary constraints.

309. Larger jurisdictions have significantly more legal practitioners including a larger pool of pro bono practitioners. In the Northern Territory, the private profession is made up of approximately 35 firms the bulk of whom are sole practitioners, and many elect not to absorb this work for commercial reasons. The LSNT's Pro Bono Clearing House faces challenges specific to the region in meeting the eligible calls for assistance as the small pool of practitioners are already stretched.

310. The level of legal need is higher in the Northern Territory than in other parts of the country. Legal assistance providers including those providing legal information and

¹⁵⁸Op.cit., Law Council submission on the *Commonwealth Commissioner for Children and Young People Bill 2011*.

¹⁵⁹Comments were made at the 'Human Rights in Closed Environments Conference' in Melbourne from 21-22 February 2012.

help in relation to refugee and immigration matters are under-resourced and advocacy assistance to asylum seekers in the Northern Territory is limited. To achieve improvements in access to justice in the Northern Territory, a significant increase in funding for legal assistance services is required. It is thus essential and overdue that asylum seekers have access to an independent legal advice service and appropriate support in the Northern Territory.

311. The Law Council has also advocated for specific funding for legal assistance for offshore entry asylum seekers in relation to judicial review of adverse decisions.¹⁶⁰ The Law Council submits that the Government should commit to such funding in the Action Plan.

Conclusion

312. The Law Council welcomes the release of the Exposure Draft of the National Human Rights Action Plan and the large number of human rights issues that it seeks to address. The Law Council is pleased to see that the Government has committed, or will continue to commit, to action in a number of these areas.
313. However, the Law Council believes that there are a number of issues that the Action Plan either completely overlooks or fails to address in sufficient detail. This failure is particularly concerning to the Law Council given the serious human rights concerns that these particular issues raise.
314. This submission has sought to highlight these issues, and also outline some more general concerns with the Action Plan where the Law Council believes improvements could be made.
315. The Law Council once again thanks the Attorney-General's Department for providing it with the opportunity to comment on the Action Plan.

¹⁶⁰ Op.cit., Law Council submission to the *Inquiry into Australia's Immigration Detention Network*.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.