



**Submission on the Draft Baseline Study**

**National Human Rights Action Plan**

**September 2011**

## Response to Baseline Study by Kingsford Legal Centre

The Kingsford Legal Centre (KLC) welcomes the opportunity to make this submission to the Attorney-General's Department about its Baseline Study for the National Human Rights Action Plan. KLC endorses the National Association of Community Legal Centres (NACLC) submission on the Baseline Study. The attached submissions by NACLC to the Attorney - General's Discrimination Law Consolidation Project (**Discrimination Law Consolidation**)<sup>1</sup> should be read in conjunction with this submission.

### About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides specialist legal advice in areas such as discrimination (NSW wide), employment law and victims' compensation. KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.<sup>2</sup> KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC is also involved in monitoring Australia's compliance with human rights mechanisms and working with other organisations to provide shadow reports to United Nations Committees on the attainment of human rights in Australia. We do this through identifying areas where our clients have experienced human rights breaches and monitoring the operation of laws and policies in Australia. Since 2006 KLC has co-ordinated numerous NGO reports on UN treaty body monitoring including the following NGO treaty monitoring reports:

- International Covenant on Civil and Political Rights (**ICCPR**);
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**)
- Convention on the Elimination of Discrimination Against Women (**CEDAW**)
- UN Universal Periodic Review (**UPR**)

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<sup>1</sup> NACLC Submission to the Commonwealth Attorney-General *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation* March 2011 and *Areas for increased protection in discrimination law: Consolidation of Federal Discrimination Legislation* April 2011. KLC contributed to these submissions drawing on our expertise in discrimination law.

<sup>2</sup> In 2010 KLC provided 1,580 legal advices and opened 161 new cases.

## **Recommendations for the National Human Rights Action Plan:**

1. Comprehensive Constitutional reform including Constitutional protection of human rights or; enactment of a statutory Human Rights Act;
2. Better funding, resourcing and wider powers of enforcement for key human rights organisations such as the AHRC;
3. Comprehensive discrimination laws;
4. Increased funding of civil society and non-Government agencies that undertake human rights work.
5. A focus on economic, social and cultural rights to reflect the paramount importance that people in the community place on these rights;
6. The National Human Rights Action Plan needs to take an intersectional approach when addressing human rights issues.
7. A study of legal need should be conducted to establish the baseline in relation to access to justice;
8. Increased funding for civil law services, across Legal Aid, ALS and community legal centres;
9. Reform of discrimination law to increase the ability of Indigenous people to bring discrimination complaints;
10. The Australian Human Rights Commission (AHRC) be given the power to enforce recommendations from a AHRC Inquiry;
11. A statutory reparation scheme established for people who were part of The Stolen Generations;
12. Increased time for consultation and engagement with Indigenous communities on the issue of Constitutional recognition;
13. The development of a funded network of Aboriginal women's legal services;
14. Reform of discrimination law (including reversal of the onus in discrimination cases), to allow more effective complaints processes as well as stronger provisions for the AHRC to deal with systemic discrimination;
15. Government funding of the Equal Pay case to clearly establish the commitment of Government to non-discrimination in work;
16. National Plan to reduce violence against women should be monitored and evaluated by an independent body with input from the Australian Women against Violence;
17. The Government should adopt the measures outlined in the CEDAW Action Plan produced by the YWCA.
18. National legislation to prohibit the non therapeutic sterilisation of women with a disability.

19. The development of targets of 30% female representation of Boards;
20. The provision adequate and affordable childcare for all women who need to access it;
21. Further development of the right to flexible working conditions and support by Government for employers to create such flexible positions.
22. Immediate amendment of discrimination law to make discrimination on the basis of gender identity or sexual orientation unlawful;
23. Amendment of the *Marriage Act* to allow same sex marriage and access to the Family Court for property division on dissolution;
24. The right to adequate housing be enshrined as a statutory right;
25. The Government should require State and Territory Governments to legislate to protect the right to adequate housing, including protection from arbitrary eviction;
26. Increased funding for emergency accommodation and social housing and the administration of such assistance in way which is consistent with human rights;
27. Funding to make long term access to stable accommodation and mental health services provided in the community available for people with a mental illness.
28. Developing and implementing the National Disability Scheme as a matter of urgency;
29. Legislation which reflects the right to the highest attainable health care;
30. Strategies to reduce the overrepresentation of ATSI people incarcerated, including funding of diversionary services;
31. Ensuring people in prison have a right to rehabilitation and education, and ensuring State and Territory Governments develop positive rights in this regard;
32. Establishing the right of all prisoners to vote;
33. Increasing protection from discrimination on the basis of criminal record;
34. Abolition visa cancellation on the basis of the character test;
35. Ensuring prisoners have access to affordable housing on release;
36. Guaranteeing asylum seekers who arrive in Australia by boat should have access to the same legal protections and assessment process as for people who arrive by other means. This should occur in Australia;
37. Ensuring all asylum seekers can live in the community until their claims are determined;
38. Australia should end mandatory detention of asylum seekers due to the deleterious impact on the welfare of those detained and Australia's human rights obligations.

## **General Overview**

### **Australia's engagement with UN System**

KLC recognises the positive steps the Australian government is taking in its engagement with the UN human rights system. The Australian Government actively and constructively engages with civil society and with UN bodies over human rights issues. For example there were numerous roundtable discussions conducted between the Attorney General's Department and NGO representatives and the Australian Human Rights Commission (AHRC), both before and after the review of Australia under the Universal Periodic Review. This constructive approach enables full and frank discussion of human rights issues between government and other stakeholders.

However, KLC recommends the Australian Government adopt a uniform approach in its dealings with NGOs and treaty monitoring bodies. There are currently various models in use, including a reporting mechanism which is split between the Attorney General's Department, the Department of Foreign Affairs and Trade and the Office of Women. This proves to be problematic as each takes a substantively different approach. KLC's preferred model would be an adaption of the one currently used by the Office of Women where there is funding available to enable thorough consultation and development of NGO reports. There is also constructive engagement with NGOs and active consultation between government and the Office of Women. This effectively progresses the development of policy around women's equality in Australia. We recommend that UN reporting within Australian government departments adopt a uniform, funded and constructive relationship with NGOs.

### **Human Rights Protection in Australia**

Despite Australia's long engagement with the United Nations and the ratification of key international instruments protecting human rights, Australia falls short in the domestic enactment of these protections. This remains a long standing concern of KLC and is an issue that was identified strongly by the Australian community in the National Human Rights Consultation (**the Consultation**).<sup>3</sup> While we commend the Government for its commitment to a National Human Rights Action Plan we also must comment that this remains insufficient to adequately protect

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<sup>3</sup> National Human Rights Consultation Report September 2009 Commonwealth of Australia p103

human rights in Australia. Australia's protection of human rights will remain limited without adequate Constitutional protection and domestic enactment of the international human rights Australia has recognised through ratification of international instruments. In the absence of this protection, a statutory *Human Rights Act* is the only other option that would adequately protect human rights in Australia and allow for their enforcement where a person has experienced a breach of those rights. The overwhelming response by the Australian community to the National Human Rights Consultation revealed the importance the Australian community places on the protection of human rights, and in particular the need for domestic legal protection.

In this context it is important to note the limited nature of current Constitutional protection of human rights as outlined in the draft Baseline Study<sup>4</sup> – these rights are not comprehensive and do not reflect Australia's international obligations. They are also not readily accessible and do not provide comprehensive human rights protection. It is not desirable that presently only some rights are reflected in the Constitution. For example, we are concerned by an interpretation of the Constitution which allowed the enactment of law and regulations in the Northern Territory with racially discriminatory effect during the 'Northern Territory Intervention'.

Furthermore, the development of implied rights through interpretation by the High Court has added to the patchwork nature of Australia's human rights protections. As highlighted by submissions to the Consultation these rights are limited and have been narrowly interpreted by the Court. These rights also do not give individuals an independent cause of action.<sup>5</sup> This remains insufficient and inadequate in our view to adequately protect human rights in Australia.

As has been well documented the common law does not adequately protect human rights and can be subject to legislation which is incompatible with human rights principles.<sup>6</sup>

While Victoria and the Australian Capital Territory have developed state-based statutory charters of rights, this has not provided any added human rights protection for people living outside those states. As human rights are universal it is not desirable that such differing protection currently exists based on geographic location. For this reason human rights protection must be approached as a national issue for the federal Government to address.

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<sup>4</sup> National Human Rights Action Plan Baseline Study June 2011 at 1.2.1

<sup>5</sup> National Human Rights Consultation Report at note 1 p113

<sup>6</sup> National Human Rights Consultation Report at note p122, cited the case of *Al-Kateb v Godwin* (2004) 219 CLR 562.

## **Deficiencies in discrimination laws**

There are also significant current deficiencies in Australia's discrimination laws, with significant areas of life remaining unprotected from unlawful discrimination. The current deficiencies have recently been highlighted in the NACLC submissions<sup>7</sup> in relation to the Discrimination Law Consolidation. Those submissions outline that as well as not protecting significant areas of public life, current federal law does not provide an effective complaints process and prohibits many people from accessing justice when they have experienced discrimination. We welcome the Government's commitment to strengthening current discrimination protection and see this as essential in relation to strengthening human rights protection in Australia.

## **Role of the AHRC**

While the Australian Human Rights Commission (AHRC) is an important human rights institution there are limitations on the extent to which it has been able to address systemic disadvantage in Australia. The NACLC submission to the Consolidation outlines some of those limitations in further detail, in particular the limitations of the AHRC in addressing issues of systemic human rights abuse.<sup>8</sup> While the AHRC has important inquiry powers, it has limited power to implement recommendations. For example, The '*Bringing them Home Report*'<sup>9</sup> recommendations have still not been fully implemented, despite numerous recommendations from UN treaty bodies that they should be implemented.<sup>10</sup>

## **Areas a National Human Rights Action Plan should address on human rights protection in Australia**

- comprehensive Constitutional reform including Constitutional protection of human rights or;
- enactment of a statutory Human Rights Act;

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<sup>7</sup> NACLC Submission to the Commonwealth Attorney-General *Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation* March 2011 and *Areas for increased protection in discrimination law: Consolidation of Federal Discrimination Legislation* April 2011. KIC contributed to these submissions.

<sup>8</sup> NACLC Submission to the Commonwealth Attorney General at 4..

<sup>9</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, AHRC known as the "Bringing Them Home Report".

<sup>10</sup> Concluding Observations ICESCR 2009 , Concluding Observations ICCPR 2009, Universal Periodic Review, 2011 Recommendation 97.

- better funding, resourcing and wider powers of enforcement for key human rights organisations such as the AHRC.;
- comprehensive discrimination laws;
- increased funding of civil society and non-Government agencies that undertake human rights work.

## **Human Rights Concerns and the General Community**

The overwhelming response to the Consultation highlighted the importance of human rights concerns to the general community. The Consultation received more responses than any consultation in Australia.<sup>11</sup> The Report highlighted the importance of ‘survival’ rights to the community – the right to freedom from violence, right to sufficient food, clothing and water.<sup>12</sup> The importance of economic, social and cultural rights was also reiterated by KLC’s local community and our submission to the Consultation where we commented:

For many clients who access KLC for legal advice, breaches of economic, social or cultural rights in their lives are all consuming and often prevent them from actively pursuing their legal rights. Homeless people in particular often cannot consider protecting or enforcing their legal rights in other areas while they remain homeless. Clients who have been denied income support from Centrelink or who have been “breached” often put all other aspects of their life on hold while they try to re-establish their right to income support.<sup>13</sup>

Expert evidence to the Consultation also identified that economic, social and cultural rights are interdependent and that civil and political rights rely on the attainment of such rights as the right to housing and the right to an adequate standard of living.<sup>14</sup> Evidence was also provided that economic, social and cultural rights are the most important human rights to people who are disadvantaged.<sup>15</sup> KLC supports this view - for many clients who access KLC for legal advice, breaches of economic, social or cultural rights in their lives are all consuming and often prevent them from actively pursuing their legal rights.

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<sup>11</sup> National Human Rights Consultation Report p5.

<sup>12</sup> National Human Rights Consultation Report p5.

<sup>13</sup> Submission to the National Human Rights Consultation, Kingsford Legal Centre, June 2009.

<sup>14</sup> National Human Rights Consultation Report p79 -80.

<sup>15</sup> National Human Rights Consultation Report p79.

**Casestudy: *The Right to Health Care and Adequate Housing for people experiencing mental illness***<sup>16</sup>

*Mary was a woman with acute mental health issues. She had killed her husband but had been found not guilty for reasons of mental illness. She was placed in a hospital and released conditionally, eventually finding housing in accommodation run by a non-government organisation which provides services to disabled people. Mary's mental health issues continued, and she made numerous suicide attempts.*

*After taking a dislike to her new partner, the non-government organisation evicted her from her accommodation with only four hours notice, because they "couldn't provide mental health support".*

**Casestudy: *The Right to Adequate Housing***<sup>17</sup>

*Olga is an elderly woman from a non English speaking background who had been waiting for Department of Housing accommodation for 6 years. When she and her husband were finally offered housing, they were offered a unit which was in extremely poor condition and unfit for anyone to live in. The front door could not be locked. They were pressured into accepting the unit. The poor standard of living they were forced to endure had a negative impact on their health.*

*Olga and her husband have repeatedly complained to the Department about the state of the premises, but this has proved a long and frustrating process and Olga and her husband were forced to undertake many of the repairs themselves.*

The Baseline Study does not adequately recognise that economic, social and cultural rights are key human rights concerns of the community. Rights commonly identified by KLC's local community as important include the right to an adequate standard of living, right to adequate health care, right to housing, right to family life, right to be treated with dignity, right to health, right to self determination and right to an education. A common view was that without a house, an education or the access to health care, many civil and political rights were rendered meaningless.

While there is a debate concerning the extent to which economic, social and cultural rights should be recognised and protected, we would like to impress upon the Committee that for most people the distinction between civil and political rights and economic, social and cultural human rights is an academic debate. In the everyday lives of people affected by human rights breaches, economic, social and cultural rights are identified as having equal, if not in some cases, paramount importance.

In order for Australia to develop a meaningful culture of human rights protection it is important that the

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<sup>16</sup> Based on a case of a KLC client.

<sup>17</sup> Based on a case of a KLC client.

Committee considers the protection of both civil and political rights and economic, social and cultural rights. It is also necessary to incorporate economic, social and cultural rights in order for Australia to meet its current international law obligations. We note that in the Vienna Declaration and Programme of Action the interdependence and indivisibility of all rights was affirmed.<sup>18</sup> This legal recognition affirms the experience of our clients and our work in a community legal centre. Any Human Rights Act should include economic, social and cultural rights and civil and political rights.<sup>19</sup>

The National Human Rights Action Plan must have a specific focus on ensuring the attainment of economic, social and cultural rights, especially for disadvantaged communities in order to ensure an improvement in human rights protection in Australia.

### **Structure of the report: general community and specific groups**

KLC believes that the way in which the Baseline Study report is structured unnecessarily separates the human rights issues of those groups identified as being 'distinct' from the human rights concerns of the general community. Human rights abuses for particular groups impact on the concerns of the general community, and should not be separated. As the Study is currently structured it gives the false impression that the human rights concerns of the general community are distinct from those of particular groups. This is a false division as there is no general community which is not made up of specific groups.

Furthermore, the specific groups are not self-contained, but rather are made up of a diversity of groups within them. For example 'women' includes, women with disability, women in prison and women from culturally and linguistically diverse backgrounds. This structure negates the importance of an intersectional analysis. The way these issues are grouped can be essentialising and does not promote an intersectional approach in understanding disadvantage and the protection of human rights. An intersectional analysis would allow a better understanding of the cumulative effect of human rights abuses for people by recognising their complex identities.

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<sup>18</sup> General Assembly of the United Nations, World Conference on Human Rights, Note by the Secretariat, 12 July 1993.

<sup>19</sup> Submission to the National Human Rights Consultation, Kingsford Legal Centre June 2009.

## **Areas a National Human Rights Action Plan should address in relation to the human rights concerns of the general community:**

- There needs to be a particular focus on economic, social and cultural rights to reflect the paramount importance that people in the community place on these rights.
- The National Human Rights Action Plan needs to take an intersectional analysis when addressing human rights issues.

### **Access to Justice**

The Consultation Report highlights that the attainment of human rights in Australia relies on the accessibility of the Court system to protect those rights.<sup>20</sup> KLC supports this view. We strongly believe that for there to be adequate protection of human rights in Australia there must be access to justice. Unfortunately, the Australian legal system is increasingly unaffordable for all but the wealthy.

Many people who are faced with breaches of their human rights cannot afford to pursue these breaches in the Courts. As outlined in the NACLC submissions on the Consolidation Discrimination Law, access to federal discrimination law is costly and results in many people not pursuing breaches of their human rights.<sup>21</sup>

As highlighted by the Senate Committee Report into Access to Justice<sup>22</sup>, the legal aid system in Australia remains inadequately funded, and community legal centres are not adequately funded to meet demand. Likewise Indigenous legal services were found to need more core funding.<sup>23</sup> KLC supports this view. While Aboriginal people are over represented in the criminal justice system, the current funding provided to Aboriginal Legal Services (ALS) is inadequate. The additional \$154 million provided to Legal Aid Commissions, ALS and community legal centres<sup>24</sup> in 2010-2011 is very small and not necessarily targeted to the areas of need which we would identify as priority areas.

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<sup>20</sup> National Human Rights Consultation Report p16

<sup>21</sup> NACLC Submissions to the Commonwealth Attorney-General at note 6.

<sup>22</sup> Senate Committee Report Access to Justice 8 December 2009 at [http://www.aph.gov.au/senate/committee/legcon\\_cte/access\\_to\\_justice/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_cte/access_to_justice/report/report.pdf).

<sup>23</sup> Senate Committee Report Access to Justice 8 December 2009 at [http://www.aph.gov.au/senate/committee/legcon\\_cte/access\\_to\\_justice/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_cte/access_to_justice/report/report.pdf).. Overview and conclusions xv.

<sup>24</sup> National Human Rights Action Plan, Baseline Study, 2.1.1

Access to free legal advice or legal aid remains limited in many matters concerning human rights. The current legal aid means test in New South Wales excludes most people who are in receipt of an income beyond a social security payment. This prevents many people on low incomes from accessing legal aid, with community legal centres required to fill this legal need.

As was outlined in the Senate Committee Report<sup>25</sup> access to civil law advice is also extremely limited and is a severe restriction to access to justice. Many human rights abuses are civil law matters and without adequate funding of civil law services any rights that individuals have are meaningless. In particular, a lack of access to civil law services can impact disproportionately on disadvantaged people and can result in further breaches of human rights. For example, without access to advice about housing law, a person may easily become homeless. In order to improve the protection of human rights in Australia there must be increased access to publically funded civil law advice and representation, especially for people who are experiencing disadvantage. KLC strongly supports increased funding in particular for ALS services, which are generally not able to provide civil law services.

For people outside major metropolitan areas, access to legal assistance and access to the Courts is also problematic. Many people in these areas are unable to obtain the legal help they need to protect their rights and are therefore unable to pursue their claims.

We recommend that a full study of 'legal need' should be carried out in order to determine the baseline for this area. This could draw on previous enquiries and reports into access to justice. After completing this type of analysis, recommendations about areas of priority should be developed.

**Areas a National Human Rights Action Plan should address for access to justice:**

- a study of legal need should be conducted to establish the baseline in relation to access to justice;
- increased funding for civil law services, across Legal Aid, ALS and community legal centres.

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<sup>25</sup> Senate Committee Report Access to Justice at 20, p 50 -54

## **The Human Rights Experience of Specific Groups in Australia**

### **Aboriginal and Torres Strait Islander peoples**

#### **Equality and anti-discrimination laws**

Aboriginal and Torres Strait Islander (ATSI) people remain the most disadvantaged group in relation to human rights abuses, and in particular human rights abuses by Government. The need for comprehensive Constitutional protection of human rights in Australia is highlighted by the failure of current human rights processes and protections to address the systemic human rights abuses experienced by ATSI people. In particular, there has been a failure of discrimination law to address systemic disadvantage.

The *Racial Discrimination Act* (RDA) 1975 has not been effective in reducing the incidence of human rights breaches against ATSI people. The suspension of the operation of the RDA in relation to the Northern Territory Intervention also highlighted that the statutory protection of human rights through discrimination legislation is not adequate. For Australia to meet its international human rights obligations these fundamental protections cannot be subject to removal by the Government.

Discrimination laws in Australia make it extremely difficult to prove that a person has been unfairly treated because of their race. Our discrimination laws place an unnecessary burden on the individual complainant. There have been limited examples of ATSI people effectively using discrimination law to redress discrimination. As outlined in the NACLC submissions on the Consolidation of Discrimination Law<sup>26</sup>, the current law is particularly difficult for Indigenous people to access. As also outlined by those submissions, Indigenous people (in particular women) are likely to experience discrimination on more than one “ground” or “characteristic”. The failure of discrimination law to adequately recognise this through an intersectional understanding of discrimination has impacted most on Indigenous people. Discrimination law has also failed to encompass a readily accessible legal test and retains a comparator test that often reinforces a white male as the “norm”. Our comments in relation to women later in this document should also be read in reference to this section.

The difficulties with bringing an individual discrimination complaint for Indigenous people, as well as the significant human rights abuses experienced by Indigenous people, also highlights the need for

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<sup>26</sup> NACLC Submissions to the Commonwealth Attorney-General at note 6.

strong human rights institutions that are able to deal with systemic issues. As outlined earlier with respect to the '*Bringing them Home Report*' the AHRC has lacked power to ensure that its recommendations are implemented. In accordance with the recommendations of the ICESCR and UPR we submit that proper recognition of the harms experienced by the 'stolen generations' is key to full enjoyment of human rights of Indigenous peoples. Any Human Rights Action Plan should include all those recommendations from the '*Bringing Them Home report*' which have not yet been fully implemented. The establishment of a scheme for adequate reparation including compensation should be a priority<sup>27</sup>.

Likewise, as outlined in the NACLC submissions on the Consolidation of Discrimination Law, current provisions do not adequately allow for the AHRC, through Commissioners and representative complaints to bring matters of discrimination affecting groups.

### **Constitutional recognition**

As well as Constitutional reform for the protection of human rights we also support Constitutional recognition of ATSI people. We support the establishment of the Expert Panel to guide and shape communities' input to this process. We are concerned that the time frames may be too short for full participation of Aboriginal communities in this process. The National Human Rights Consultation may be a model which could be followed for effective consultation with the community about this issue.

### **Closing the Gap initiatives and diversity within the ATSI community**

We agree that health and education as addressed in the 'Closing the Gap' initiatives are fundamental to the achievement of equality for Indigenous peoples in Australia.

We are concerned about the lack of adequate recognition of the diversity of experience within the ATSI community in this section of the Study. Indigenous women's concerns are not properly reflected within this section. This Study should record and reflect an intersectional identity, which

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<sup>27</sup> We note that in response to Recommendation 97 of the UPR, the Australian Government rejected the call to implement the Bringing Them Home recommendations, including the recommendation that compensation be paid. The Government stated : *"In February 2008, the Australian Government offered the National Apology in recognition of the grief and suffering inflicted on Stolen Generations. The Australian Government will continue to work in partnership to address the immediate and practical needs of the Stolen Generations. Some States have introduced compensation schemes for children abused in state care or removed from their families."*

means properly including Indigenous women's experience in the Indigenous section. Family violence is a significant issue within Aboriginal communities. In accordance with the recommendations of the CEDAW committee in 2010, a well funded network of Aboriginal Women's legal services should be established to properly represent the needs of Aboriginal women.

**Areas a National Human Rights Action Plan should address for ATSI people:**

- reform of discrimination law to increase the ability of Indigenous people to bring discrimination complaints;
- the ability of the AHRC to enforce recommendations from an Inquiry;
- a statutory reparation scheme established for people who were part of The Stolen Generations;
- increased time for consultation and engagement with Indigenous communities on the issue of Constitutional recognition;
- the development of a funded network of Aboriginal women's legal services.

**Women**

**Discrimination**

As noted in the NACLC submissions to the Consolidation project<sup>28</sup>, anti discrimination laws have significant flaws which impact on women particularly. The reliance on an individual complaint based system places a heavy burden on women complainants, particularly where the nature of the complaint includes sexual harassment. The ability to emotionally sustain legal process is particularly challenging for women when they have been sexually harassed. We support the recommendation in the NACLC submissions which would reverse the burden of proof in discrimination cases once a prima facie case has been made out.

The enactment of the *Fair Work Act* provides accessible and relatively timely remedies for women and in particular reverses the onus of proof in discrimination cases<sup>29</sup>. It also provides another avenue for addressing unequal treatment in employment for women. We note that the Equal pay

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<sup>28</sup> NACLC Submission to the Commonwealth Attorney-General at note 6.

<sup>29</sup> Sections 351 and 361, *Fair Work Act* 2009

case<sup>30</sup> provides an example of women's rights to equality being protected currently within law. We are following closely the discussions about proper resourcing of any implications of this decision at State and Federal levels of government.

### **Violence against women**

We note the range of recommendations which the CEDAW Committee made in 2010 around violence against women. We are pleased that the Federal Government has now released a National Plan to reduce violence against women and recommend the proper resourcing of this plan to ensure its thorough implementation. We also recommend that the Government follow the range of measures outlined in the CEDAW Action plan produced by the YWCA<sup>31</sup> in 2011. Specifically the National Plan should be monitored and evaluated by an independent body with input from the Australian Women against Violence Alliance..

We also recommend that domestic and family violence specialist services should be funded to respond appropriately to the needs of ATSI women, culturally and linguistically diverse women and women with disability as well as lesbians and gender diverse women. We support Action Plan point 13 calling for national legislation to prohibit the non therapeutic sterilisation of women with disability. We also recommend that culturally appropriate legal services for Aboriginal women be established throughout Australia in rural and urban areas.

### **Political and public life**

We support CEDAW Action Plan points 3 and 4 to ensure full participation of women and specifically Aboriginal women in public life. Specifically we note that women are not adequately represented on Boards and support the use of 30% targets to ensure better representation of diverse women on Boards. We support the Study's comment that the lack of affordable and appropriate child care continues to limit women's ability to return to the paid work force.

We note the continued lack of flexible working conditions for all workers, including men, impacts on women's ability to participate in paid employment.

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<sup>30</sup>*Fair Work Australia, Equal Remuneration Case: Australian Municipal, Administrative, Clerical and Services Union and Others* (C2010/3131), 16 May 2011

<sup>31</sup> <http://www.ywca.org.au/sites/ywca.org.au/files/CEDAW%20Action%20Plan%20final.pdf>

## Areas a National Human Rights Action Plan should address in relation to women:

- reform of discrimination law (including reversal of the onus in discrimination cases), to allow more effective complaints processes as well as stronger provisions for the AHRC to deal with systemic discrimination;
- Government funding of the Equal Pay case to clearly establish the commitment of Government to non-discrimination in work;
- National Plan to reduce violence against women should be monitored and evaluated by an independent body with input from the Australian Women against Violence Alliance.
- the Government should adopt the measures outlined in the CEDAW Action Plan produced by the YWCA.
- national legislation to prohibit the non therapeutic sterilisation of women with a disability.
- the development of targets of 30% female representation of Boards;
- the provision of adequate and affordable childcare for all women who need to access it;
- further development of the right to flexible working conditions and support by Government for employers to create such flexible positions.

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

We commend the Government's commitment to enact Federal legislation which outlaws discrimination on the basis of someone being gay, lesbian, transgender or gender diverse<sup>32</sup>. We refer to the NACLC submissions to the Consolidation project and KLC submissions to the Australian Human Rights Commission Inquiry on the need to provide comprehensive protection from discrimination for these groups. Australia needs to comprehensively protect people with these attributes (or perceived attributes) from discrimination through effective discrimination law.

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<sup>32</sup> In the formal response to the Human Rights Council recommendations to Australia in the UPR, the Australian Government stated in relation to "**Recommendations 42, 44, Accepted:** The consolidation of federal anti-discrimination law into a single streamlined Act will enhance the regime and give effect to the Government's commitment to prohibit discrimination on the grounds of sexual orientation and gender identity in addition to existing grounds of protection." [http://www.ag.gov.au/www/agd/agd.nsf/Page/Human\\_rights\\_and\\_anti-discriminationInternational\\_Human\\_Rights](http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationInternational_Human_Rights).

## **Same sex marriage**

We recommend that marriage should be available to those in same sex relationships as stated in the UPR recommendations<sup>33</sup>. While the Government has rejected any amendment to the *Marriage Act 1961*, we submit that not allowing those in same sex relationships to marry implies that same sex relationships are of lesser status than heterosexual relationships. While it is correct to say that relationship recognition is available in some states or territories such as the ACT and Tasmania it is not fully available in all states and territories. For example, in NSW there is recognition to the extent that those in same sex relationships are treated legally as de facto relationships in some areas, such as in the area of property division. But there is no formal recognition of the relationship itself, such as civil partnership or civil union, available in NSW.

### **Areas a National Human Rights Action Plan should address in relation to gay, lesbian, bisexual and sex or gender diverse people:**

- immediate amendment of discrimination law to make discrimination on the basis of gender identity or sexual orientation unlawful;
- amend the *Marriage Act* to allow same sex marriage and access to the Family Court for property division on dissolution.

## **People at risk or experiencing homelessness**

As outlined by *'The Road Home: A National Approach to Homelessness'*, homelessness is not just a housing problem, it is connected to other issues such as lack of mental health services, drug and alcohol addiction, long term unemployment, lack of access to education, family breakdown and family violence.<sup>34</sup> A person who is homeless is likely to experience multiple human rights abuses that extend beyond the right to housing. We commend the Government for the 'White Paper' and support the full implementation of the recommendations.

As part of the Consultation, KLC spoke to our local community at length about what they thought about human rights in Australia. It was no surprise that the right to housing was often raised as being one of the most important human rights values that Australia should protect, both because it was fundamental to the pursuit of other rights – such as being able to work, have your family

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<sup>33</sup> Recommendation 70 of the UPR

<sup>34</sup> *'The Road Home: A National Approach to Reducing Homelessness'* White Paper Commonwealth of Australia 2008.

together and to engage in education- and also because the absence of housing had such a disastrous impact on other human rights – with no house often there is no job, no education and no desire to vote.

The National Human Rights Action Plan should have a particular focus on people experiencing homelessness as it is likely that these individuals have experienced multiple human rights abuses, the prevention of which could have had an impact on the prevention of their homelessness. Many groups such as Indigenous people, women and people with a disability experience homelessness disproportionately.

The right to adequate housing should be a right that is protected in Australian law, and the Government should make the provision of funding to the State and Territory Governments conditional on Governments ensuring there is statutory protection against arbitrary eviction and a right to adequate housing. The Government should also increase funding to temporary supported accommodation and also provide greater funding for public housing. The Government should require that public housing is administered in a way consistent with the protection of human rights, such as the right to family life. The Government should also provide incentives for the development of affordable housing models in new developments.

*'The Road Home'* identified the strong link between homelessness and people experiencing mental illness.<sup>35</sup> The Action Plan should identify that for some homeless people, long term service delivery and the provision of stable and affordable housing is the only prevention of future homelessness. The Action Plan should provide for increased funding for community based mental health services.

**Areas a National Human Rights Action Plan should address in relation to homelessness:**

- the right to adequate housing should be enshrined as a statutory right;
- the Government should require State and Territory Governments to legislate to protect the right to adequate housing, including protection from arbitrary eviction;
- increased funding for emergency accommodation and social housing and the administration of such assistance in way which is consistent with human rights;
- funding to make long term access to stable accommodation and mental health services provided in the community available for people with a mental illness.

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<sup>35</sup> *The Road Home: A National Approach to Reducing Homelessness* White Paper Commonwealth of Australia 2008, p8

## **People with a disability**

As outlined in the NACLC submission on the Consolidation of discrimination laws, discrimination law has not worked effectively in ensuring the attainment of equality for people with a disability.<sup>36</sup> In particular, discrimination law has not been effective in ensuring a reduction systemic discrimination against people with a disability. We support the recommendations made by the Consolidation Report in relation to increasing access to justice for people experiencing discrimination on the basis of a disability. We also note the comments in that submission in relation to intersectional discrimination and that people with a disability often face discrimination on multiple grounds.

We commend the Government on its commitment to a National Disability Scheme and recommend that the scheme be developed and implemented as quickly as possible. For people with catastrophic injuries it is inherently unjust that some have access to lifetime care where damages can be claimed, while those who cannot bring a Court action have no access to money for essential lifetime care.

We also wish to note the importance of economic, social and cultural rights for people with a disability, and in particular the importance of the right to adequate health care. We believe that Australia should enshrine the right to the highest attainable level of health care, regardless of a person's economic situation. We refer to the discussion under "Women", which calls for federal legislation outlawing non therapeutic sterilisation of women and girls with disability.

### **Areas a National Human Rights Action Plan should address in relation to people with a disability:**

- reform of discrimination legislation, with a particular focus on increasing access to justice and resolving systemic discrimination;
- developing and implementing the National Disability Scheme as a matter of urgency;
- legislating the right to the highest attainable health care;
- legislation which outlaws non therapeutic sterilisation of women and girls with disability.

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<sup>36</sup> As at note 4.

## **People in prison**

As mentioned in the Consultation Report, out of the 28,924 prisoners in Australia as at September 2010, 7,467 were of Aboriginal or Torres Strait Islander descent.<sup>37</sup> The over-representation of Aboriginal and Torres Strait Islander people in prison is not a new issue, and has been the subject of numerous reports and inquiries. These statistics show that Australia is not meeting its human rights obligations. Indigenous Australians are still over-represented in the criminal justice system due to over-policing and their disadvantaged social, economic and cultural position in Australian society.

## **Access to education services in prison**

In 2003, Kingsford Legal Centre ran a case, *Middleton v Commissioner of Corrective Services of NSW and Anor [2003] NSWSC 136* concerning the ability of a prisoner who had transferred from Queensland to NSW to access a computer in order to complete his university studies. Despite the importance of access to education programs, our client, Mark Middleton was unable to access a computer in order to complete his studies. There was no effective legal remedy for this. We are concerned about the lack of access to adequate and appropriate education programs for prisoners and also the failure of the law to protect this right to education for prisoners.

## **Right to vote for prisoners**

Australian citizens who have been sentenced for more than three years in prison do not have the right to vote in federal elections, while they are serving their sentences. Article 25 of the ICCPR provides that all citizens of a country are to be afforded the right to vote and to participate in the conduct of public affairs 'without unreasonable restrictions'. The deprivation of the right to vote imposed on some prisoners does not meet the obligation in article 25.

## **Inadequate protection in anti discrimination law**

As outlined in the NACLC submission on the Consolidation of discrimination laws, Australia's anti-discrimination laws do not provide adequate protection from discrimination on the basis of a

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<sup>37</sup> National Human Rights Consultation Report p76.

person's criminal record. This is clearly inadequate, and perpetuates the disadvantages already being faced by those who have already been through the criminal justice system.

### **Cancellation of visas of long term permanent residents of Australia**

KLC is currently in partnership with the NSW Legal Aid Commission to represent those non citizens who have committed a serious criminal offence and whose visa may be cancelled by the Minister for Immigration on character grounds. We are concerned about the impact on long term permanent residents, who may have lived here almost their entire lives, of being forcibly removed from Australia.

Frequently these people have no firm connection with their country of citizenship, may not speak that language and be at risk of harm to be returned. Furthermore, they may have family and community ties here, and deportation under these provisions may result in the separation of a parent from their children. We are concerned that Australia may be breaching its obligations under the Convention on the Rights of the Child to return parents to their country of citizenship. Although the relevant Australian law requires the Minister to take the best interests of the child into consideration before cancelling a person's visa, the Commonwealth Ombudsman has found that in some cases, the Minister has proceeded to cancel visas even where the Minister has been advised that the cancellation will have a detrimental effect on the person's children<sup>38</sup>.

As many of these people have lived in Australia almost their entire lives, it is Australia's responsibility to rehabilitate them, rather than deport them to countries with which they have no or little recent connection..

### **Post release services**

Aboriginal Legal Services should be funded to provide preventative services to those in prison to help with post release. By providing these types of 'field officer' support services, Indigenous people can be supported in their transition back into the community. This then prevents the risk of reoffending. The lack of affordable and appropriate housing for Indigenous people leaving prison is a key factor in re-offending and reinforcing disadvantage. As outlined earlier in our submission there should be greater access to housing assistance upon release to prevent the large numbers of ex-prisoners who are released into homelessness.

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<sup>38</sup> Commonwealth Ombudsman, *Administration of s501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006 (2006) at paras 3.35- 3.36

### **Areas a National Human Rights Action Plan should address in relation to prisoners:**

- strategies to reduce the overrepresentation of ATSI people incarcerated, including funding of diversionary services;
- ensuring people in prison have a right to rehabilitation and education, and ensuring State and Territory Governments develop positive rights in this regard;
- establishing the right of all prisoners to vote;
- increasing protection from discrimination on the basis of criminal record;
- abolition visa cancellation on the basis of the character test;
- ensuring prisoners have access to affordable housing on release.

### **Refugees, asylum seekers and migrants**

#### **Processing of asylum seekers/use of detention**

We continue to be concerned about the approach used in processing asylum seekers who have arrived by boat. We submit that they should be accessing the same legal protections, and legal review system as those who arrive by other means and they should not be detained for long periods of time. This is consistent with the recommendations of the UPR<sup>39</sup>. We are concerned for the long term welfare of those who are detained beyond an initial health and security check. The increasing rates of self harm currently being investigated by the Commonwealth Ombudsman<sup>40</sup> are indicative of intolerable mental health impacts of long term detention on refugee applicants.

### **Areas a National Human Rights Action Plan should address in relation to refugees, asylum seekers and migrants:**

- Guaranteeing asylum seekers who arrive in Australia by boat should have access to the same legal protections and assessment process as for people who arrive by other means. This should occur in Australia;

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<sup>39</sup> Recommendations 86.121 to 86.133 of the UPR.

<sup>40</sup> Media Release, 29 July 2011 announcing an Inquiry to Examine Suicide and Self Harm in Immigration Detention <http://www.ombudsman.gov.au/media-releases/show/189>

- Ensuring all asylum seekers can live in the community until their claims are determined;
- Australia should end mandatory detention of asylum seekers due to the deleterious impact on the welfare of those detained and Australia's human rights obligations.

## **Conclusion**

As outlined above Australia still has major areas where work still is required to protect and promote human rights. We welcome the opportunity to provide comment on the Baseline Study and look forward to providing further comment on the draft Human Rights Action Plan.

**Kingsford Legal Centre**

**September 2011**