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UnitingJustice AUSTRALIA

SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT ON

RECOMMENDATIONS FROM THE UNIVERSAL PERIODIC REVIEW

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Introductory comments

UnitingJustice Australia[1] is pleased to have the opportunity to continue our involvement in the Australian Government's engagement with the Universal Periodic Review process and commend the Government on its willingness and efforts to engage with the NGO sector throughout this process.

We note that in the consultation held at the Australian Human Rights Commission on 16 March 2011, representatives from the Attorney-General's Department indicated that many of the recommendations made in the UPR were consistent with Federal Government policy and so were seen to be "uncontroversial" (in that they would be agreed to without significant difficulty or opposition). Given the need to limit this submission to three pages, we are focusing on the recommendations which we believe are, although identified as "more controversial", crucial to the realisation of human rights and human dignity for all in the Australian community and crucial for Australia meeting all of its international human rights obligations.

Domestic implementation of international human rights commitments[2]

The lack of comprehensive legal protection in Australia for the human rights standards Australia has committed to uphold at the international level has been noted on numerous occasions by UN committees.[3] We believe that many of the persistent human rights problems identified in the recommendations of the UPR, by various UN treaty bodies and domestically in the National Human Rights Consultation and other public and parliamentary inquiries are (at least partially) symptoms of systemic and institutional problems in Australia's culture and its policy-making processes, and could be addressed through the enactment of this protection.

The implementation of legislation which clearly sets out, in one document, the rights and freedoms to which all people in Australia are entitled, would be an extremely useful tool in the prevention of human rights violations, in providing mechanisms for people to seek remedies when they feel their human rights have been abused, and in educating the public and all areas of government about human rights. We believe such an Act, and the government practices and public discussion which will occur around it, will help create a society in which the dignity of all people is upheld and protected and lead to increasing tolerance and respect in the Australian community for others, including those who are perceived to be 'different' (because of their race, religion, culture or social status).

We understand that the decision not to implement a Human Rights Act reflects current government policy. However, the weight of submissions from the National Human Rights Consultation which supported greater legal protection of human rights, alongside the evidence presented to the Consultation detailing the extent of the denial of human rights among many marginalised and vulnerable groups in Australia, leads us to believe that the recommendation made by the National Human Rights Consultation Committee that Australia enact a Human Rights Act should be reconsidered earlier than the Government's review date of 2014.

Rights of Aboriginal and Torres Strait Islander people

In the time since Australia's official support for the Declaration on the Rights of indigenous Peoples in 2009, we have seen very little to suggest its components are having an impact in Federal Government policy and as such support the many recommendations made in the UPR for the full implementation of the Declaration.

In our view, were the Australian Government to review and implement each of the recommendations made by the UN Special Rapporteur on the Rights of Indigenous Peoples following his visit to Australia in 2009, in real partnership with Aboriginal peoples, meeting the standards contained in the Declaration requiring genuine respect for cultural integrity and self-determination, this would improve Australia's compliance with the spirit and articles of the Declaration.

Core to the Declaration is the notion of genuine consultation, engagement and partnership between governments and indigenous peoples. The 2010

1 UnitingJustice Australia is the policy and advocacy unit of the Uniting Church in Australia's National Assembly. We engage in advocacy and education on national policy issues in the areas of social and economic justice, human rights, peace and the environment.

2 The Uniting Church in Australia, by resolution of the Church's Assembly Standing Committee in March 2008, supports the implementation of national human rights legislation. The text of this resolution is available at http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/assembly-resolutions/11_asc_humanrightslegislation2008.pdf

3 Recommendations for the comprehensive protection of Australia's human rights obligations in domestic law have been made by the CERD (2010), CEDAW (2010), HRC (2009), CESCE (2009) and CAT (2008), among others (http://www.hrlrc.org.au/files/UPR-Summary-of-Key-Issues-and-Recommendations.pdf).

Native Title report[4] from the Aboriginal and Torres Strait Islander Social Justice Commissioner provides a useful framework for the better implementation of the rights contained in the Declaration, particularly Articles 18 and 19 which refer to the right to consultation and cooperation in good faith and to 'participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'(Article 18). The Social Justice Commissioner stresses in this report that rigid, 'check-list' style approach to consultation is not conducive to relationship building, effective consultation or the right to self-determination and that consultation processes should be developed on a case-by-case basis. Nonetheless, several features may guide this development, including:

- Consultation processes should be products of consensus, in the nature of negotiations, and begin early and be ongoing, where necessary.
- Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance and be provided with all relevant information in an accessible way.
- Consultation processes should not pressure Aboriginal and Torres Strait Islander people into making a decision and should reach the communities affected by policy decisions.
- Consultation processes should be coordinated across government departments.

We also recommend that the Government focus on the recommendations made in relation to the treatment of Aboriginal people under the Northern Territory Emergency Response. The Special Rapporteur noted several aspects of the NTER Act which, in his opinion, constituted racial discrimination[5] and impaired a number of human rights, including 'rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity'[6].

In 2009, the Twelfth Assembly meeting of the Uniting Church in Australia stated, by resolution, that in response to the NTER in particular, negotiation should

- bring Aboriginal Peoples together from across the Northern Territory;
- allow a diversity of Aboriginal voices to be heard, including those community people who are connected on the ground as well as those who are representing organisations;
- develop a position on an appropriate policy response to the issues facing Aboriginal communities in the Northern Territory; agree to appropriate protocols;
- agree to an appropriate methodology that recognises and affirms the diversity of Aboriginal ways of meeting, making decisions and developing processes; and
- ensure that Governments are negotiating with spokespeople who are true and authentic community voices, elected and endorsed by the communities they are representing and especially include the voices of the Traditional owners[7]

We would support a review of all procedural and legislative measures implemented as part of the NTER (as recommended by a number of states at the UPR), undertaken according to the guidelines for consultation and negotiation outlined in the 2010 Native Title Report referenced above. Some components of the NTER have received the support of Aboriginal people in the Northern Territory, however many other policies (and the manner in which they have been formulated and implemented) have caused great mistrust and despair and without such a comprehensive review we do not think the relationship between Aboriginal people and governments can be fully reset.

As noted by the Northern Synod of the Uniting Church, the changes implemented in the Australian Government's *Future Directions for the Northern Territory Emergency Response* policy of December 2009, 'missed the main point… which is that the relationship between the Commonwealth and Indigenous Australians needs to be re-set.'[8]

Rights of refugees and asylum seekers

Incidents such as the protests which recently occurred at the Christmas Island detention facility and the tragic suicides of asylum seekers at mainland detention facilities confirm the total inappropriateness of the immigration detention environment and the use of mandatory detention in Australia. The Uniting Church in Australia has for many years had particular concerns about the detention of unaccompanied minors and families and the particular effects detention has on the mental health of these young people. We are therefore very welcoming of the Government's decision to move children and families into community detention, and continue to work with the Department of Immigration and Citizenship in this process. The establishment of an independent Commissioner for Children, to act as a guardian for unaccompanied minor asylum seekers

4 Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, 2010 Native Title Report, Australian Human Rights Commission, available: http://humanrights.gov.au/social_justice/nt_report/ntreport10/pdf/ntr2010_full.pdf, pp.58-66

5 The specific sections of legislation are listed in Appendix 2 of the Special Rapporteur's report, para. 13, pp.28-9

6 Appendix 2, para. 16, p.30

7 Uniting Church in Australia Twelfth Assembly (July 2009), 'Matters affecting Indigenous Peoples', available: http://www.unitingjustice.org.au/images/pdfs/issues/indigenous-justice/assembly/12_mattersaffectingindigenouspeoples2009.pdf

8 Northern Synod, Uniting Church in Australia (March 2010), 'Statement on the Northern Territory Emergency Response Act 2007 (Intervention)', available: http://www.ns.uca.org.au/wp-content/uploads/2010/05/2010-UCANS-Statement-on-Northern-Territory-Intervention.pdf

would also assist in this regard, given that the Minister for Immigration and Citizenship is currently conflicted in his or her role as guardian whilst also determining an unaccompanied minor's place and duration of detention.

However, we do not believe that the enactment of the policy of moving children and families into community detention will alone bring Australia's immigration policy in line with international human rights standards, given that the imprisonment of single men will continue. The prison-like conditions at Australia's offshore and onshore detention facilities have been well-documented in the Australian Human Rights Commission's reports on its visits to Leonora, Darwin and Christmas Island[9] and the effects of the detention environment on mental health has been well-documented by leading Australian mental health professionals. The swift ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and, pursuant to this Optional Protocol, the regular visitation and monitoring of independent national and international bodies to places of immigration detention may improve this situation.

The solution, however, to over-crowding, an inadequate provision of services including healthcare, pastoral care and recreation and educational opportunities is not to establish more detention facilities but rather to implement a new, alternative policy to mandatory detention.

The Australian Government has failed to legislate many of the values articulated in the *New Directions in Detention* policy, first released in 2008, which, if implemented, would improve Australia's treatment of refugees and asylum seekers. Of particular importance, we believe, is to legislate for regular independent review of the appropriateness of the length and conditions of detention for each individual and that detention in immigration detention centres only be used as a last resort and for the shortest practicable time.

For many years, the Uniting Church along with many other organisations working in the refugee advocacy sector have been calling for the implementation of an alternative system to mandatory detention which sees detention used only as a last resort after initial health, security and identity checks have been carried out. The need for detention would be assessed on an individual case-by-case basis and subject to regular, independent oversight. The *A better way: refugees, detention and Australians* policy document[10], produced by the Justice for Asylum Seekers alliance proposes a system which involves community based accommodation for low-security; hostel accommodation for medium security; and full detention only for those assessed as posing a security risk. This system would see all asylum seekers should be processed on-shore and be entitled to adequate judicial oversight.

9 These reports are available at http://humanrights.gov.au/human_rights/immigration/index.html

10 This document is available at http://www.apo.org.au/sites/default/files/The_Better_Way.pdf