



19 August 2011

H16, 78.11  
RB;rp

Mr Bill Grant  
Secretary-General  
The Law Council of Australia  
GPO Box 1989  
CANBERRA ACT 2601

Attn: Ms Rosemary Budavari

Dear Bill

### **Baseline Study for a National Human Rights Action Plan**

I refer to your memorandum of 12 July 2011 and thank you for inviting the Society to consider the June 2011 draft of the Commonwealth Governments National Human Rights Action Plan Baseline Study ("Baseline Study").

The matter has been considered by the Society's Human Rights, Justice Access, Criminal Law and Children and the Law Committees. We provide the following comments

The Society welcomes the proposal to establish a comprehensive Baseline Study surveying the status of Human Rights in Australia. We consider that this is an important step towards the establishment of a comprehensive National Action Plan on Human Rights in this country. We also support certain actions which the Australian Government is taking to promote human rights in Australia, including

- establishing Human Rights education in primary and secondary schools
- developing a public sector Human Rights Education Programme
- allocating greater funds to the Australian Human Rights Commission to expand it's community education role
- signing the Optional Protocol to the Convention Against Torture and acceding to the Optional Protocols to the Convention on the Elimination of all Forms of Discrimination and the Convention on the Rights of the Child
- supporting the Declaration on the Rights of Indigenous People.

However the Society considers that in certain ways the draft Baseline Study could be improved and clarified so as to strengthen human rights in this country. We make the following comments having regard to this objective:

1. Whilst welcoming the involvement of the Australian Government in certain areas of the United Nations Human Rights organisations and systems, we consider that there could be greater engagement with the UN and monitoring bodies, including more effort made to have regard to the recommendations of Special Rapporteurs and to the recommendations of the UN Periodic Review. We also note the comments from the Regional Office for the Pacific UN Office of the High Commissioner for Human Rights on the Baseline Study, and consider that many of those comments could be adopted and supported by the Law Council in its submission.
2. The study does not address ways in which international instruments may be given greater weight in the Courts and through domestic legislation. Although the current Government has decided not to progress a Human Rights Act at this time, the UN Periodic Review has commented on the absence of such legislation in Australia and the need to provide a comprehensive statutory framework for human rights in this country. The absence of such legislation and the difficulties arising from this should be specifically addressed in the Baseline Study. We also support Recommendation 11 of the Report of the National Human Rights Consultation Committee ("the Brennan Report") which states "that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended so as to make a definitive list of Australia's international human rights obligations a relevant consideration in Government decision making."
3. We share the concern of the Law Council in that the references at the end of each section or chapter of the Baseline Study entitled "Issues a National Action Plan Could Address" are couched in quite vague terms with little reference to specific initiatives. The Study would be a much more relevant document if it provided a description of specific actions or initiatives for the National Action Plan and provided appropriate timeframes for those actions to be implemented. It should also specify who will be responsible for carrying out these actions and the budget or financial support for such programmes.
4. We consider that the section dealing with refugees and asylum seekers is inadequate. We refer to our letter to the Law Council of 27 July 2011 concerning our comments in relation to the work of the Joint Select Committee on Australia's Immigration Detention Network. In summary the Society considers that the following should be addressed in the Baseline Study
  - the need to abolish mandatory detention for all asylum seekers, and at the very least, the abolition of mandatory detention of children, having regard to Australia's International human rights obligations
  - a discontinuance of the practice of placing Detention Centres in remote locations with harsh conditions
  - a critique of the "Malaysia solution" and the concerns expressed by United Nations Human Rights bodies
  - better access for asylum seekers to health services, education, cultural and recreational facilities and appropriate legal representation
  - the need to reduce periods of time spent in detention, including limiting time spent in detention to a minimum required for the review of claims

- an appropriate independent inspector of detention facilities.
5. The Baseline Study refers to a number of important initiatives in relation to Aboriginal and Torres Strait Islander people, including Australia's endorsement of the U.N. Declaration on the Rights of Indigenous People. The Baseline Study should state that programmes should be implemented in a manner consistent with the U.N. Declaration including full consultation with and involvement of the affected indigenous communities.
  6. The Baseline Study does not adequately address how the Federal Public Service and Agencies might better coordinate and implement human rights initiatives in their role and the delivery of their programmes. We refer to Recommendation 8 of the Brennan Report which states: "that the Federal Government develop a "whole-of-Government framework" for ensuring that human rights are better integrated in to public sector policy and legislative decision making, service delivery and practice."
  7. We recommend that the elements of the proposed submission referred to in paragraphs 5 and 6 (in particular sub-paragraph (d)) of your memorandum are amended to specifically include access to justice issues faced by
    - people suffering from mental and other disabilities; and
    - people excluded from full participation in society due to poverty.
  8. In relation to Counter-Terrorism Measures (Chapter 2.2 of the Study) we maintain the concern raised (refer p11) by the National Consultation participants about control orders, preventative detention orders and powers available to law enforcement entities and ASIO.

It is no answer that there are currently safeguards for the protection of human rights in the existing national security legislation. The issue is whether safeguards are comprehensively provided for. We suggest they are not. For example, we refer to the ability of ASIO to question a person without a lawyer being present.

9. The Baseline Study examines the Use of Force by Police (Chapter 2.3). The misuse of force by police is a serious issue. As a minimum in each jurisdiction, we recommend
  - 1) that the use of weapons or implements which have the capacity to cause death or serious harm be conditional upon the prevention of serious injury or death
  - 2) that each use of such a weapon/implement be independently monitored and reviewed; and
  - 3) that the sanctions for misuse be specially provided for without limiting the application of existing criminal and civil law.

We acknowledge the dangerous and potentially life threatening situations the police, in the due execution of their duties, find themselves in when confronted with the use of force. Nevertheless, force has been misused in the past with fatal consequences in circumstances that could not be objectively justified. It is those scenarios that should be addressed nationally with a view to promoting and working towards zero tolerance for such conduct.

10. The Baseline Study examines the situation of People in prisons (Chapter 3.9). The Court imposed sanction of a custodial sentence is meant to be no more than a deprivation of liberty. The order of the sentencing court is that the gravity of the offence is such that the offender is not permitted to be at liberty. It is considered that poor prison conditions and many other negative (and avoidable) facets of prison life are punishments in themselves.

Those charged with the responsibility of looking after prisoners, including governments, must understand and act to create an environment where prison life itself is not a punishment.

In that regard we are most concerned with the moniker "correctional" when referring to prisons, prison authorities and prison legislation. Whilst to correct people is the ideal, the reality is far from that and to that extent the name is very misleading.

Politically, part of the problem for governments is the negative community attitude towards prisoners and the conditions in which the community believes they should be kept. An easy place to start to improve the deplorable prison conditions is to educate the public with a view to alter prevailing community attitudes.

In order to improve the Baseline Study so as to strengthen the human rights of children, we provide the following additional comments

11. the Baseline Study takes too narrow a focus in its consideration of children's rights by using as a "snap shot" the right to freedom from violence (3.3.1), the rights of children in care of the state (3.3.2) and the rights of children in the criminal justice system (3.3.3). While these are critical areas for exploration by the study, we suggest taking a broader rights perspective so as to enable the rights of all children, not just those in vulnerable circumstances, to be considered and addressed within a National Action Plan.
12. despite ratifying the United Nations Convention on the Rights of the Child in 1991 (the Convention), Australia has not effectively incorporated human rights into policy and legislative frameworks to nurture and support Australian children, resulting in gaps in the legal protection of children's rights<sup>1</sup>.
13. we recommend the Baseline Study investigate the implementation of a comprehensive legislative framework that fully incorporates obligations under the Convention into domestic legislation to ensure that all domestic Federal, State and Territory legislation is fully compatible with the Convention and that effective legal remedies are available in situations of violations of the rights of the child<sup>2</sup>.
14. child and youth homelessness remains a prevailing social problem in Australia. Almost half of all homeless people in Australia are aged under 18 years<sup>3</sup>. In South Australia there has also been a steady rise in the number of young people aged under 15 years accessing homelessness services<sup>4</sup>. This failure to protect children's right to an adequate standard of living should be included as an area for examination by the Baseline Study. The extent to which young people who are homeless are held on remand due to a lack of suitable accommodation in the community should also be a focus of investigation.

<sup>1</sup> *Listen to Children: 2011 Child Rights NGO Report Australia*, Report of the Child Rights Taskforce, p iii

<sup>2</sup> *Listen to Children*, Report of the Child Rights Taskforce Recommendation 1 at p 1

<sup>3</sup> *Listen to Children*, Report of the Child Rights Taskforce at p 23

<sup>4</sup> AIHW NDCA Annual Reports 2007-2010

15. we recommend that options for the establishment of an Independent National Children's Commissioner are included in the Baseline Study. While current State's Children's Commissioners and Guardians have played a valuable role, there remain significant gaps in the monitoring of the realisation of children's legal and human rights and the establishment of a strategic direction for evidence –based policy development<sup>5</sup>.

Thank you for the opportunity to provide these comments. We look forward to being provided with a final copy of the Law Council Submission to the Commonwealth Attorney Generals Department.

Should you have any questions or require further information concerning our comments please do not hesitate to contact me.

Yours sincerely



Ralph Bönig  
**PRESIDENT**

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<sup>5</sup> *Listen to Children*, Report of the Child Rights Taskforce at p 2