



**CASTAN
CENTRE FOR
HUMAN RIGHTS
LAW**

Castan Centre for Human Rights Law

**Submission to the OHCHR Working Group on
Discrimination against Women and Girls**

Women's and girls' sexual and reproductive health and
rights in situations of crisis

August 2020

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PART I: INTRODUCTION

1.1 Castan Centre for Human Rights Law

The Castan Centre for Human Rights Law ([Castan Centre](#)) is an academic research centre within the Faculty of Law at Monash University in Melbourne, Australia. We aim to inform government policy and legislation, provide accessible public education and student programs on human rights. The Castan Centre undertakes academic research, policy work, student programs and public engagement. One of the thematic priority areas across all of our programs is the promotion of women's rights, including a focus on sexual and reproductive health and rights (SRHR). For example, work by Castan Centre academic members, Drs Tania Penović and Ronli Sifris, includes qualitative empirical research into barriers to abortion access and, in particular, the impact of anti-abortion picketing outside health clinics which has influenced important judicial decisions¹ and legislative reform and facilitated advances in understanding the dimensions of the problem.² This report is written by Karin Frodé and Andrea Olivares Jones, Tania Penović and Ronli Sifris, with research assistance from Zoë Tripovich, Sarah Hult and Victoria Vassallo.

1.2 Terms of Reference

We are grateful for the opportunity to provide a submission to the Working Group on Discrimination against Women and Girls (WG) in response to its Questionnaire concerning the SRHR of women and girls in situations of crisis. Our submission seeks to address a number of questions set out in the WG's questionnaire in respect of Australia's approach to SRHR of women and girls in situations of crisis.

We support the WG's broad definition of 'crisis' as encompassing emergencies, as well as 'long-standing situations of crisis resulting from structural discrimination' and other crises based on women's lived experiences. Our submission covers both categories of crises, including the impact on SRHR of emergency measures introduced in response to the COVID-19 pandemic and systemic crises, including the marginalisation of women with disabilities, Aboriginal and Torres Strait Islander women and refugees and asylum seekers held offshore in Nauru. While the primary focus of our submission is Australia's legal and policy framework, we will also address responses to crises overseas insofar as they engage Australia's humanitarian aid programs.

Time constraints have prevented us from addressing each sub-question in the questionnaire and we have chosen to focus primarily on the Australia's federal jurisdiction, with state and territory jurisdictions considered in the context of specific legislative and policy frameworks. We are happy to provide further information on request.

1.3 Definitions

Modern linguistic usage suggests that the present age is one of "emergencies", "crises", "dangers" and "intense difficulties", of "scourges" and other problems. They relate to things as diverse as terrorism, water

¹ See generally *Submission of the Castan Centre for Human Rights Law Seeking Leave to Appear as Amicus Curiae* (25 May 2018) <https://cdn.hcourt.gov.au/assets/cases/06-Melbourne/m46-2018/Clubb-Edwards_CastanCentre.pdf>; *Clubb v Edwards & Anor*, *Preston v Avery & Anor* [2019] HCA 11, 10 April 2019.

² See for example: Tania Penovic and Ronli Sifris, 'Expanding the Feminisation Dimension of International Law: Targeted Anti-Abortion Protest as Violence against Women' (2018) 7(2) *Cambridge International Law Journal* 241-267; Ronli Sifris and Tania Penovic, 'Anti-abortion protest and the effectiveness of Victoria's Safe Access Zones: An Analysis' (2018) 44 *Monash University Law Review* 317-340; Ronli Sifris, Tania Penovic and Caroline Henckels, 'Advancing Reproductive Rights Through Legal Reform: The example of abortion clinic safe access zones' (2020) 43(3) *University of New South Wales Law Journal*.

shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. Crises can therefore fall under several different labels. For the purposes of this submission, two broad categories of crisis will be examined: ‘emergency crises’ which are both *serious and immediate* and ‘systemic crises’ which are *ongoing* or protracted. Crises undermine SRHR and their underlying determinants. For example, increases in gender-based violence have been observed in the aftermath of natural disasters such as earthquakes, hurricanes, bushfires, floods³ and the COVID-19 pandemic has been associated with an increase in family violence and reproductive coercion which have undermined access to SRHR.

For the purpose of clarity, our submission welcomes and adopts the WG’s broad definitions of the terms ‘crisis’ and ‘SRHR’.

SRHR includes the following:

- **Right** to make free and responsible decisions and choices (free of violence, coercion and discrimination) regarding matters concerning one’s body and sexual and reproductive health;
- **Entitlements** to health facilities, goods, service and information on sexual and reproductive health including:
 - Maternal health
 - Contraceptives
 - Family planning
 - Sexually Transmitted Infections (STI)
 - HIV prevention
 - Safe abortion
 - Post-abortion care
 - Infertility and fertility options
 - Reproductive cancer; and
- **Underlying determinants** of health that impact patterns of sexual and reproductive health:
 - Access to safe and potable drinking water
 - Adequate sanitation
 - Adequate food and nutrition
 - Adequate housing
 - Protection from violence, torture and discrimination
 - Human rights violations
 - Social determinants (gender, ethnic origin, age, disability, discrimination, marginalisation).

Crisis, as defined by the WG encompasses:

- **Humanitarian crises**, e.g. natural disasters, man-made disasters, famine, and pandemics;

³ Debra Parkinson and Claire Zara, ‘The hidden disaster: domestic violence in the aftermath of natural disaster’ (2013) 28 (2) *Australian Journal of Emergency Management*, April 2013.

- **Long-standing situations of crisis resulting from structural discrimination** deeply embedded in histories of patriarchy, colonisation, conquest and marginalisation; and
- **Other types of crisis based on lived experiences of women**, e.g. political and socio-economic crises, refugee and migrant crises and more.

I.4 Executive Summary

We begin this submission by providing the WG with a brief overview of Australia’s legal system and the concept of ‘crisis’ in Australian law (**Part II**). The first category of crisis that we seek to examine, namely ‘emergency crises’ is examined in the context of Australian law and policy (**Part III**). COVID-19 is a notable example of an ‘emergency crisis’ and Part III examines the measures introduced in response to the pandemic and their impact on the SRHR of women and girls.

The next part of our submission turns to consider systemic crises in Australia with a specific focus on the marginalisation of Indigenous women and girls and refugee and asylum-seeking women and girls (**Part IV**). We examine some of the legal and policy frameworks relating specifically to these systemic crises, considering policies which impact upon SRHR and the challenges that these women and girls face when seeking to access justice and obtaining reparations following violations of SRHR.

In **Part V**, we consider Australia’s approach to SRHR of women and girls overseas, notably in the Asia Pacific region through its humanitarian aid programs, discussing existing policies and examples of initiatives that specifically fund and support SRHR. We also consider Australia’s foreign aid response to COVID-19.

PART II: OVERVIEW OF CRISES IN AUSTRALIAN LAW AND POLICY

This part addresses the following questions:

Concept/definition of crisis

1. Please provide information on the legal and policy framework used by your State to manage situations of crisis and on how the concept of “crisis” has been defined or framed.
2. Please list the type of situations that would fit the concept of “crisis” in your State and indicate what situations are excluded.
3. What institutional mechanisms are in place for managing a crisis and how are priorities determined?

2.1 Defining Crisis

The Commonwealth of Australia is a federation of six states (Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania) and two self-governing territories (Australian Capital Territory and Northern Territory).⁴ The *Australian Constitution* sets out the division of powers between the Commonwealth (i.e. federal government) and the states, while the territories have their own constitutions and power arrangements.⁵

There are three ‘arms of power’ in each jurisdiction – the executive, the legislature and the judiciary. The executive power is vested in the Queen’s representative in the jurisdiction (the Governor-General for Commonwealth, the Governor for states), but in practice it is exercised by the head of government (Prime Minister for Commonwealth, Premier for states) and their ‘cabinet’ of ministers. The executive is responsible for *carrying out and enforcing* the law. The Legislature, made up of the Queen’s representative and the members of Parliament, is charged with *making the law*. Finally, the courts exist independently of the other two arms of power and serve to *interpret* the law.

The Commonwealth’s executive and legislative powers are specifically enumerated under the Constitution. The states in turn assume the powers that are ‘concurrent’ (managed by *both* the Commonwealth and others) or ‘residual’ (managed only by states). Territory constitutions set out the powers of the Australian Capital Territory and the Northern Territory.

State powers are broad and include the ‘primary responsibility for the protection of life, property and the environment’ within their jurisdictions.⁶ This means that in crisis situations, it is the state jurisdictions that

⁴ Parliament of Australia, ‘The Australian system of government: Fact Sheet 20’, *Australian Parliament* (Web Page, 2020) <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government>.

⁵ Ibid.

⁶ Karen Elphic, ‘National emergency and disaster response arrangements in Australia: a quick guide’, *Parliament of Australia* (Research Paper, 28 April 2020) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/NationalEmergencyDisasterManagement#_Toc38969109>; Holly Mclean and Ben Huf, ‘Emergency Powers, Public Health and

are the 'first responders', with significantly broader legislative and executive authority, as well as greater coordination capacity and resources to dedicate to crisis response.⁷ The Commonwealth in practice therefore takes on a 'supporting' role.⁸ The following section provides further detail on the legislative and policy framework around crisis management in Australia.

2.2 The Concept of 'Crisis' in Australian Law

'Crises' are not specifically defined under Australian law. The term has been recognised by the High Court of Australia (High Court) as highly imprecise, encompassing 'things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs'.⁹

Our submission will examine two broad categories of crisis: 'emergency crises' and 'systemic crises'. The former refers to crises that are both *serious and immediate*, while the latter refers to crises that are *serious and ongoing* or protracted. These have been categorised as such because the category of crisis informs the very nature of response to the threat under Australian law. For emergency crises, Australian jurisdictions can invoke extraordinary powers that go beyond the law applicable in non-emergency/non-disaster situations in order to respond to the threat. Conversely, for systemic crises, Australian jurisdictions must respond within the ordinary operation of law, through a patchwork of legislation.

There is no 'constitutionalised framework of emergency powers' to enable the executive arm of Australia's Commonwealth (i.e., federal) government to declare a state of emergency.¹⁰ But powers associated with emergencies and disasters are dealt with in legislation enacted by the Commonwealth of Australia and its states and territories.¹¹ Australian jurisdictions are 'generally free to define an emergency as they see fit' (constrained only by limited matters reserved for the Commonwealth government under the Constitution).¹² Jurisdictions vary in their definitions but tend to categorise the immediate threats to the *safety, property and integrity of a jurisdiction* as 'State of Disaster', 'State of Emergency' or similar.¹³ Some

COVID-19', *Parliament of Australia* (Research Paper No. 2, August 2020), 5

<<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

⁷ Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19', *Parliament of Australia* (Research Paper No. 2, August 2020), 5 <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

⁸ *Ibid.*

⁹ *Pape v Commissioner of Taxation* [2009] HCA 23, [352] (Hayne and Kiefel JJ), [551] (Heydon JJ).

¹⁰ H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 7.

¹¹ The Commonwealth of Australia is a federation of six states (Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania) and two self-governing territories (Australian Capital Territory and Northern Territory). See generally Parliament of Australia, 'The Australian system of government: Fact Sheet 20', *Australian Parliament* (Web Page, 2020) <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government>.

¹² Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19', *Parliament of Australia* (Research Paper No. 2, August 2020), 5 <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

¹³ 'State of Emergency' is used in NSW, while 'State of Disaster' is used in Victoria and Queensland; Royal Commission into National Natural Disaster Arrangements, *Issues Paper: Constitutional Framework for the Declaration of a State of National Emergency* (Report, 8 May 2020) 6 <https://naturaldisaster.royalcommission.gov.au/system/files/2020-05/Issues%20Paper%20-%20Constitutional%20Framework%20for%20the%20Declaration%20of%20a%20State%20of%20National%20Emergency_0.pdf>; Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19', *Parliament of Australia* (Research Paper No. 2,

jurisdictions have single categories of emergency declaration, while others have multiple categories of emergency with different names, requirements and durations.¹⁴ The declaration of such states and the subsequent exercise of extraordinary powers has taken place in response to natural disasters such as bushfires and floods, as well as public health emergencies such as the COVID-19 pandemic.¹⁵

For systemic crises, no Australian jurisdiction has an established definition. Nevertheless, academics, non-profits and community organisations have identified several ongoing crises in Australia. These include Indigenous marginalisation, the treatment of refugees and asylum seekers, climate change, domestic violence and more. These crises do not trigger the immediate action in law or in policy - instead, the issues are addressed in a piecemeal manner through ordinary legal frameworks. Approaches to ongoing crises vary considerably from jurisdiction to jurisdiction.

August 2020), 5 <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

¹⁴ Tasmania, South Australia, the Australian Capital Territory and the Northern Territory have multiple categories of crisis/emergency, while Western Australia has staged declarations; Royal Commission into National Disaster Response Arrangements, *Framework for the Declaration of State National Emergency*, Victorian Department of Parliamentary Services, Research paper No.2, August 2020, Appendix (tables 1-4).

¹⁵ See Emergency Management Victoria, 'State of Disaster declared in Victoria', *Victorian State Government* (Web Page, 3 January 2020) <<https://www.emv.vic.gov.au/news/state-of-disaster-declared-in-victoria>>; Daniel Andrews, Premier, 'Statement On Changes To Melbourne's Restrictions' (Media Release, 2 August 2020) <<https://www.premier.vic.gov.au/statement-changes-melbournes-restrictions>>.

PART III: EMERGENCY CRISES IN AUSTRALIA

This part addresses the following questions:

Concept/definition of crisis

1. Please provide information on the legal and policy framework used by your State to manage situations of crisis and on how the concept of “crisis” has been defined or framed.
2. Please list the type of situations that would fit the concept of “crisis” in your State and indicate what situations are excluded.
3. What institutional mechanisms are in place for managing a crisis and how are priorities determined?

Experiences of crisis

5. Please list the situations of crisis experienced by your State in the last five years.
6. What was the impact of those crises on women and girls?

3.1 Introduction

As outlined in Part II above (and in line with the WG’s broad definition of the term crisis), ‘emergency crises’ is one of the categories of crises that this submission examines. The current COVID-19 pandemic is a notable example and one which we will consider in detail in this Part of our submission. The pandemic has resulted in declarations of a state of emergency (and in Victoria a state of disaster) in States and Territories. This Part examines the legislative and policy frameworks at the Commonwealth and Victorian levels in the context of emergency crises. We apply these frameworks in the context of the pandemic and include a specific case study of the frameworks at play during the COVID-19 response, as well as the impacts on the SRHR of women and girls as a result of the pandemic.

3.2 Commonwealth

Legal and Policy Framework

Commonwealth Law

The Commonwealth has no express legal authority to declare a ‘crisis’.¹⁶ Therefore, declarations of crises and emergency situations by the Commonwealth Government have a symbolic, rather than a legal impact.¹⁷ Further, the Commonwealth does not have express constitutional authority to engage any

¹⁶ Royal Commission into National Natural Disaster Arrangements, *Issues Paper: Constitutional Framework for the Declaration of a State of National Emergency* (Report, 8 May 2020) 6 <https://naturaldisaster.royalcommission.gov.au/system/files/2020-05/Issues%20Paper%20-%20Constitutional%20Framework%20for%20the%20Declaration%20of%20a%20State%20of%20National%20Emergency_0.pdf> [28].

¹⁷ Ibid; Michael Eburn, ‘What is a ‘national emergency’?’, *Australian Emergency Law* (Blog, 25 December 2019) <<https://emergencylaw.wordpress.com/2019/12/25/what-is-a-national-emergency/>>.

extraordinary powers in times of crisis or emergency. Indeed, the Constitution does not directly refer to 'crises' or 'emergencies' at all, let alone as part of the enumerated powers of the Commonwealth.¹⁸ The Commonwealth must therefore rely on existing and ordinary frameworks of law to respond to such situations. The Commonwealth may have some jurisdiction to act in crisis situations under its executive and legislative powers, express and implied under the *Constitution* and High Court jurisprudence. It should be noted that the extent of these powers in crisis situations has not yet been clearly determined by the High Court, which relies on legal challenges to be made before rulings can be handed down.

Executive Power

'Executive Power' may be exercised by the Governor-General, on the advice of their ministers under section 61 of the Constitution.¹⁹ Executive power is limited by both the 'distribution of executive powers' between governments and by the 'source of power and its status in the hierarchy of laws.'²⁰ The former limits Commonwealth executive power to matters strictly within the Commonwealth's jurisdiction (i.e., matters included in the legislative heads of power under the Australian Constitution, considered below). The latter sees Commonwealth executive power limited depending on the source of the power (i.e. the Constitution, statutes, prerogatives and the status of the Commonwealth as a person).²¹ Therefore, for example, if the power comes from the Constitution, it is bound by constitutional limits, and if the power is conferred by statute it is bound by the terms of that statute, as well as other statutory, administrative and common law requirements.²²

There is no exhaustive definition of executive power, and the scope of executive power is not expressly delineated in the text of the Constitution. Nevertheless, High Court jurisprudence has limited the scope of the power,²³ which encompasses the following:²⁴

- (a) powers necessary or incidental to the execution and maintenance of a law of the Commonwealth;
- (b) powers conferred by statute;
- (c) powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;
- (d) powers defined by the capacities of the Commonwealth common to legal persons;
- (e) inherent authority derived from the character and status of the Commonwealth as the national government.²⁵

¹⁸ Stephanie Brenker, 'An Executive Grab for Power During COVID-19?', *AusPubLaw* (Blog, 13 May 2020) <<https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/>>.

¹⁹ *Australian Constitution* s 61; Max Spry, 'The Executive Power of the Commonwealth: its Scope and Limits', *Australian Parliament* (Research Paper No. 28, 1995-1996) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp28#EXECUTIVE>.

²⁰ Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne Law Review* 313, 321.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Cameron Moore, *Crown and Sword: Executive power and the use of force by the Australian Defence Force* (ANU Press; 2017) 35; See also *Williams v Commonwealth* [2013] HCA 23 [342] (Crennan J).

²⁵ *Williams v. Commonwealth* (2012) 248 CLR 156, 184–85 [22] (French CJ)

Most emergency powers exercised by the Executive are conferred by federal statute,²⁶ and are encompassed within categories (a) and (b). Category (d) concerns the Commonwealth's common capacities with ordinary juridical persons and is of limited utility in the context of crisis response²⁷ while categories (c) and (e) encompass non-statutory Executive power.

(a) Commonwealth Prerogatives

The prerogative powers set out in (c) are derived from common law, historically exercised by the Queen and were inherited by the Commonwealth at federation.²⁸ These powers include the capacity to declare war and peace, to control of the armed forces and manage foreign affairs.²⁹ Like the powers set out in paragraph (e), the prerogative powers enable the Commonwealth to act without statutory authority.³⁰ The prerogative powers are varied, and include the 'executive prerogatives' (i.e. the capacity to declare war and peace, control of the armed forces, manage foreign affairs etc.).³¹ While there are significant limits on the prerogative powers, it has been suggested that the prerogative 'power of self-protection' could be invoked in crisis situations as it encompasses the power to respond to 'a national emergency' where 'extreme steps for the protection of the realm' are necessary.³² Because the High Court has not determined this point, the scope of prerogative power in times of emergency remains uncertain.³³

(b) Nationhood Power

The non-statutory power set out in (e) encompasses powers necessary for 'the protection of the body politic or nation of Australia'.³⁴ This power exists to enable the Commonwealth to protect the internal security of the State against 'disaffection and subversion', and extends to activities 'peculiarly adapted to the government of the nation', that is to say activities that only the Commonwealth as a national power can exercise.³⁵ Examples of exercise of the nationhood power include the enactment of laws to protect

²⁶ H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 8.

²⁷ *Ibid* 70-71.

²⁸ Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne Law Review* 313, 325; *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Davis).

²⁹ Max Spry, 'The Executive Power of the Commonwealth: its Scope and Limits', *Australian Parliament* (Research Paper No. 28, 1995-1996).

³⁰ Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions', *AusPubLaw* (Blog, 13 May 2020) <<https://auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19/>> ('The Scope of the Nationhood Power during COVID-19').

³¹ Max Spry, 'The Executive Power of the Commonwealth: its Scope and Limits', *Australian Parliament* (Research Paper No. 28, 1995-1996).

³² Stephanie Brenker, 'An Executive Grab for Power During COVID-19?', *AusPubLaw* (Blog, 13 May 2020) <<https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/>>; *Burmah Oil Co Ltd v Lord Advocate* [1956] UKHL 6.

³³ Royal Commission into National Natural Disaster Arrangements, *Issues Paper: Constitutional Framework for the Declaration of a State of National Emergency* (Report, 8 May 2020) 11 <https://naturaldisaster.royalcommission.gov.au/system/files/2020-05/Issues%20Paper%20-%20Constitutional%20Framework%20for%20the%20Declaration%20of%20a%20State%20of%20National%20Emergency_0.pdf>

³⁴ *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [215] (Gummow, Crennan and Bell JJ).

³⁵ *Ibid*; See *Victoria v The Commonwealth* [1975] HCA 52 (Mason JJ); See also *Davis v Commonwealth* [1988] HCA 63 (Wilson and Dawson JJ).

Commonwealth institutions from internal attack, or the creation of Commonwealth criminal offences to address 'subversive activities'.³⁶

The Commonwealth has in the past sought to rely upon the nationhood power in a 'crisis' situation – namely the Global Financial Crisis in 2008-2009.³⁷ The High Court of Australia was called upon to interpret the validity of such action in the case of *Pape v Commissioner of Taxation* (2009). In that case, Chief Justice French indicated that the Commonwealth executive could have some authority to respond to crises such as war, natural disaster or financial crisis 'for the purpose of avoiding or mitigating large scale adverse effects'.³⁸

Legislative Power

Legislation may only be passed with respect to matters that fall within (or are incidental to the exercise of) its express or implied powers.³⁹ Australia's Constitution makes no express reference to 'crises' or 'emergencies' but contains a number of 'heads of power' which enable the Commonwealth parliament to enact legislation concerning the declaration of-and responses to-national emergencies or crises. These heads of power include the power to make laws for the peace, order, and good government of the Commonwealth with respect to the following:

- naval and military defence;⁴⁰
- quarantine⁴¹
- naturalization and aliens;⁴²
- the provision of allowances (i.e. maternity, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services, benefits to students and family allowances);⁴³
- immigration and emigration;⁴⁴
- external affairs;⁴⁵
- matters incidental to the execution of any constitutional power vested in the Parliament;⁴⁶ and
- the power to grant financial assistance to the states.⁴⁷

Example: Naval and Military Powers

The Commonwealth's power over naval and military defence (defence power) is understood to be dynamic, with the scope expanding where emergency situations intensify and contracting as threats abate.⁴⁸ The power extends to emergencies threatening the survival of the nation, such as external

³⁶ Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions', *AusPubLaw* (Blog, 13 May 2020) <<https://auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19/>>; see also *Australian Communist Party v Commonwealth* [1951] HCA 5.

³⁷ See *Pape v Commissioner for Taxation* [2009] HCA 23.

³⁸ *Ibid.*

³⁹ *Australian Constitution* ss 51, 52; *Burton v Honan* (1952) 86 CLR 169 at 177.

⁴⁰ *Australian Constitution* ss 51 (vi), 119.

⁴¹ *Australian Constitution* s 51 (ix).

⁴² *Australian Constitution* s 51 (xix).

⁴³ *Australian Constitution* s 51 (xxiiiA).

⁴⁴ *Australian Constitution* s 51 (xxvii).

⁴⁵ *Australian Constitution* s 51 (xxix).

⁴⁶ *Australian Constitution* s 51 (xxxix).

⁴⁷ *Australian Constitution* s 96.

⁴⁸ The defence power is provided for in s 51 (vi) of the Constitution, (extended by s51 (xxix) [matters incidental to a head of power], s 61 [executive power] and s 119 [in relation to states and territories]; H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 19; See also *Richardson v. Forestry*

conflicts against state actors (i.e. World Wars I and II) as well as internal threats from the public or sections thereof (e.g. terrorist groups).⁴⁹ The defence power is *purposive* meaning that any statutes exercising this power must be *for* defence purposes, rather than *in relation to* the relevant head of power.⁵⁰ As a result, a proportionality test must be applied to ensure that powers are exercised to meet the prevailing needs of an existing threat and are *conducive* to achieving a desired outcome.⁵¹ The engagement of Australia's defence forces can and has been used in crisis situations by the Commonwealth Government. Foremost, these forces are called upon during times of interstate conflict such as during World Wars I and II. The Commonwealth Government has also engaged defence in domestic crises, including for example the use of Air Force personnel and aircraft in protracted industrial disputes with the airline industry in 1989 and most recently as part of the response to COVID-19 in 2020.⁵²

In times of crisis, the Australian Defence Force may be called upon to assist. Per section 28 of the *Defence Act 1903 (Cth) (Defence Act)*, the Governor-General may issue a call out order to call out reserves of the defence force under a range of circumstances. Such order may only be issued on the advice of the Executive Council or a minister who is satisfied (after consulting with the Prime Minister) that urgency justifies the Governor-General acting solely based on the Minister's advice. On 4 January 2020, the Governor-General acted on this power by enacting a call out order to the Australian Defence Force Reserves under the relevant provision of the *Defence Act* in response to the bushfires.⁵³ This call saw 3,000 Australian Defence Force reserves deployed to assist with bushfire recovery.⁵⁴

Example: Quarantine

Quarantine powers may also be engaged to manage crisis situations. This head of power enables the creation of legislation 'with respect to' quarantine, and must not be insubstantially, tenuously or distantly connected to the matter of quarantine.⁵⁵ It may however extend to matters 'ancillary or incidental' to quarantine.⁵⁶ While the power has never been directly examined by the High Court, obiter comments suggest that the quarantine power in the Constitution can 'devise and put into operation a whole compulsory system of quarantine under which duties can be imposed upon persons and penalties inflicted

Commission (1988) 164 CLR 261, 326 (Dawson J); Kate Chetty, 'A History of the Defence Power: Its Uniqueness, Elasticity and Use in Limiting Rights' (2016) 16 *Macquarie Law Journal* 17, 18.

⁴⁸ H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018), 45; See *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ); *Thomas v. Mowbray* [2007] HCA 33, [7], [388-9] (Kirby J).

⁴⁹ H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 45; See *Farey v Burvett* (1916) 21 CLR 433, 440 (Griffith CJ); *Thomas v. Mowbray* [2007] HCA 33, [7], [388-9] (Kirby J).

⁵⁰ *Stenhouse v Coleman* (1944) 69 CLR 457, 464 (Latham CJ), 466 (Starke J); Kate Chetty, 'A History of the Defence Power: Its Uniqueness, Elasticity and Use in Limiting Rights' (2016) 16 *Macquarie Law Journal* 17, 18.

⁵¹ *Stenhouse v Coleman* (1944) 69 CLR 457, 469; H.P. Lee, Michael Adams, Colin Campbell and Patrick Emerton, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2018) 24.

⁵² Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters' *Australian Parliament* (Research Paper, 1997-98)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9798/98rp08>; Australian Department of Defence, 'Defence COVID-19 Taskforce', *Australian Government* (Web Page, 2020) <<https://www.defence.gov.au/covid-19/>>.

⁵³ Parliament of Australia, '2019–20 Australian bushfires—frequently asked questions: a quick guide' (Web page, 12 March 2020)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/AustralianBushfires>.

⁵⁴ *Ibid.*

⁵⁵ *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, [368]-[369].

⁵⁶ *Wragg v New South Wales* (1953) 88 CLR 353, [386].

for breach of the law'.⁵⁷ This power enabled the creation of the *Quarantine Act 1980* (Cth), and its successor, the current *Biosecurity Act 2015* (Cth) which has been invoked to manage the COVID-19 pandemic.

Commonwealth Policy

A Whole-of-Government decision-making framework exists in Australia for responses to all kinds of emergencies. This framework is underpinned by the 2017 Australian Government Crisis Management Framework (AGCMF) which designates specific entities with responsibilities during a crisis.⁵⁸ This includes, the Council of Australian Governments (now replaced by the National Cabinet – see section 3.4 below), the National Crisis Committee and the National Security Committee of Cabinet.⁵⁹

The Commonwealth Government Disaster Response Plan (COMDISPLAN) 2017 outlines how the States and Territories can request Commonwealth non-financial assistance in an emergency or disaster within Australia or its offshore territories.⁶⁰ While state and territory governments are responsible for coordination, response and recovery from disasters that occur within their state or territory borders, they may apply for support in times of emergency.⁶¹ The COMDISPLAN sets out a process for engaging federal government agencies to assist with emergencies and has been used to assist in bushfire response in a number of states.⁶² COMDISPLAN requests are overseen by the Crisis Coordination Centre within the Department of Home Affairs.

3.3 States and Territories

Managing crises is generally understood to fall within under the duty of States and Territories, which can in turn engage and enforce emergency powers. While it is beyond the scope of this submission to engage in an extensive examination of the approach taken by each State and Territory, we will consider the relevant laws which operate in the State of Victoria as an example of state emergency powers. Victoria has experienced severe bushfire emergencies in 2009 and 2020 and the highest rates of COVID-19 infection and invoked the most wide-ranging measures under its emergency powers.

Legal and Policy Framework

Victorian Law

Defining 'emergency' crises

In Victoria, the term 'emergency' is defined under section 4 of the *Emergency Management Act 1986* (EMA) as an:

'actual or imminent occurrence of an event which in any way endangers or threatens to endanger the safety or health of any person in Victoria or which destroys or damages, or threatens to destroy or damage,

⁵⁷ *Attorney-General (Vic) v The Commonwealth ("Pharmaceutical Benefits Case")* (1945) 71 CLR 237, 257 (Latham CJ).

⁵⁸ Holly Mclean and Ben Huf, *Emergency Powers, Public Health and COVID-19*, Department of Parliamentary Services, Parliament of Victoria (Research paper, August 2020) 13 < <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

⁵⁹ *Ibid* 13-14.

⁶⁰ Australian Government, *COMDISPLAN 2017: Australian Government Disaster Response Plan* (2017).

⁶¹ *Ibid*.

⁶² The Hon David Littleproud MP, Minister for Agriculture, Drought and Emergency Management, 'Joint Media Release with Senator the Hon Linda Reynolds CSC, Minister for Defence - Bushfires in QLD and NSW' (Media release, 7 September 2019) < <https://minister.homeaffairs.gov.au/davidlittleproud/Pages/bushfires-qld-nsw-07092019.aspx>>.

any property in Victoria or endangers or threatens to endanger the environment or an element of the environment in Victoria.⁶³

The legislation then provides a non-exhaustive list of examples of emergencies such as fire, explosion, earthquake, flood, plague, siege or war-like act.

In addition, the term 'serious risk to public health' is defined in section 3 of the *Public Health and Wellbeing Act 2008* (PHWA).⁶⁴ Such a risk refers to a 'material risk that substantial injury or prejudice to the health of human being has or may occur', having specific regard to the number of persons affected, the location, immediacy and seriousness of the risk, the nature, scale and effects of harm, injury or illness that may develop, and finally the availability and effectiveness of precautions, safeguards, treatments or other measures to reduce or eliminate the risk to human beings.⁶⁵ An example of such a risk would be the COVID-19 pandemic.

Importantly, these examples do not extend to protracted and systemic crises such as Indigenous marginalisation.

Legislative Framework

At present, the legislative framework around crisis varies depending on the type of crisis in question. Crises considered to be most immediate and serious by the Victorian Government can result in the invocation of a 'State of Emergency' or a 'State of Disaster', and the subsequent engagement of emergency powers in order to respond to crises. The difference between a State of Emergency and a State of Disaster is that the granting of different powers to different authorities. A State of Emergency, for example, grants powers related to public health emergencies to the Chief Health Officer, while the State of Disaster grants broader powers to the Minister for Police and Emergency Services (see below).⁶⁶ In contrast, crises of an ongoing and systemic nature do not at present engage the operation of emergency powers. Instead, such crises are managed by way of ordinary and existing legislative power and policy.

The following section will examine the legislative framework pertaining to immediate and serious crises such as pandemics and natural disasters.

(a) State of Emergency

Pursuant to section 198 of the PHWA, the Minister for Health may declare a State of Emergency arising out of any circumstances causing a 'serious risk to public health'.⁶⁷ This must be on the advice of the Chief Health Officer (CHO) and in consultation with the Emergency Management Commissioner.⁶⁸ The *Emergency Management Act 1986* (Vic) also requires that this declaration be made in consultation with the Minister for Police and Emergency Services.⁶⁹

⁶³ *Emergency Management Act 1986* (Vic) s 4.

⁶⁴ *Public Health and Wellbeing Act 2008* (Vic) s 4 ('PHWA').

⁶⁵ PHWA s 3.

⁶⁶ Anne Twomey, 'Explainer: what is a 'state of disaster' and what powers does it confer?', *The Conversation* (online, 2 August 2020) <<https://theconversation.com/explainer-what-is-a-state-of-disaster-and-what-powers-does-it-confer-143807>>.

⁶⁷ *Public Health and Wellbeing Act 2008* (Vic) s 198.

⁶⁸ *Public Health and Wellbeing Act 2008* (Vic) s 198(1).

⁶⁹ *Emergency Management Act 1986* (Vic).

A State of Emergency declaration gives the Victorian CHO broad ‘emergency powers’ to eliminate or reduce a serious risk to public health by, for example, detaining people, restricting movement, preventing entry to premises, or providing any other directions considered reasonable to protect public health, to slow the spread of infection and minimise the risks of a public health emergency.⁷⁰

In the event of crises, the emergency powers are to be used in conjunction with the ‘public health powers’ contained in Part 9 of the PHWA. Under this legislation, the Victorian CHO may allow authorised officers to exercise certain public health powers necessary to investigate, eliminate or reduce a risk to public health.⁷¹ This includes closing any premises, directing a person or group to enter, not to enter, to remain at, or leave, a particular premise, enter a premise without a warrant, request information, inspect any premises, require sanitation of premises, require destruction or disposal of anything; or direct owner or occupier of any premise to take particular action.⁷² The PHWA also enables authorised officers to ask for assistance from the Victoria Police when exercising the public health powers and the emergency powers.⁷³ This has allowed the police to exercise broad powers under the PHWA.

Pursuant to section 117 of the PHWA, if someone has an infectious disease, or is exposed in circumstances that make it likely that a person has contracted the disease, *and* that infection poses a serious risk to public health, then a public health order may be issued by the CHO.⁷⁴ Such an order can only be handed down if it is necessary for the infected person to take particular action, or refrain from action to prevent the disease from constituting a serious risk to public health, and a reasonable attempt has been made to provide the person with information and it is necessary to make the public health order to reduce risk.⁷⁵

A number of factors must be taken into consideration when making a public health order such as the nature of the disease, the availability and effectiveness of treatment, the possible side-effects and discomfort that may be caused, whether urgent action will affect the public health outcome and the capacity of the person to understand the risk to public health.⁷⁶ A public health order can restrict certain activities, forms of behaviour, and visitation to specified places.⁷⁷ It may also require a person to participate in counselling, receive specified pharmacological treatment, including a vaccination, reside at a specific place of residence, and submit to being detained or isolated. Importantly however, there are certain measures in place to protect the rights of persons subject to a public health order, including notice in writing and a recommendation to seek independent legal advice, as well as the requirements that order be proportionate and not exceed 6 months in duration.⁷⁸

There are some limitations on the exercise of emergency powers under the PHWA. Firstly, the powers contained therein are guided by numerous principles which constrain the arbitrary exercise of authority.⁷⁹ For example, the *precautionary principle* provides that emergency measures must not be contingent on full scientific certainty where there is a serious threat to public health.⁸⁰ This enables a rapid response to

⁷⁰ *Public Health and Wellbeing Act 2008* (Vic) s 200.

⁷¹ *Public Health and Wellbeing Act 2008* (Vic) s 189.

⁷² *Public Health and Wellbeing Act 2008* (Vic) s 190.

⁷³ *Public Health and Wellbeing Act 2008* (Vic) s 202.

⁷⁴ *Public Health and Wellbeing Act 2008* (Vic) s 117.

⁷⁵ *Ibid.*

⁷⁶ *Public Health and Wellbeing Act 2008* (Vic) s 117(2).

⁷⁷ *Public Health and Wellbeing Act 2008* (Vic) s 117(5).

⁷⁸ *Public Health and Wellbeing Act 2008* (Vic) s 117(3)-(4).

⁷⁹ *Public Health and Wellbeing Act 2008* (Vic) ss 6-10.

⁸⁰ *Public Health and Wellbeing Act 2008* (Vic) s 6.

public health crises as they arise.⁸¹ Further, the proportionality principle requires that measures to respond to emergencies are *proportionate* to the risk sought to be prevented, and should not be made or taken in an arbitrary manner. This is intended to protect against government overreach in crisis situations.⁸² In addition, the principle of accountability requires persons engaged in decision-making in emergency situation to 'as far as practicable, ensure that decisions are transparent, systematic and appropriate'.⁸³

There are also temporal constraints on powers in crisis and emergency situations. The declaration of a State of Emergency cannot exceed 4 weeks unless another declaration is made.⁸⁴ The total period of a State of Emergency cannot exceed 6 months.⁸⁵

(b) State of Disaster

The Premier of Victoria also has the power to declare a State of Disaster pursuant to section 23 of the EMA.⁸⁶ 'Disaster' is not clearly defined under the Act, however a declaration of a State of Disaster may occur where 'there is an emergency which... constitutes or is likely to constitute a significant and widespread danger to life or property in Victoria'.⁸⁷

A State of Disaster gives broad, discretionary and delegable powers to the Minister for Police and Emergency Services.⁸⁸ This includes directing and coordinating the activities of government agencies, suspending parts of legislation where they may inhibit the response or recovery to a disaster, taking possession of property necessary for responding to a disaster, restricting movement to and from the disaster area, and evacuating people from part of Victoria. The State of Disaster can be revoked by the Premier at any time.

A State of Disaster under the EMA has only been enacted twice in Australian history. This was in response to the 2019-2020 Australian bushfires on 2 January 2020, and COVID-19 on 2 August 2020.⁸⁹

Victorian Policy

The Victorian *Emergency Response Manual* (ERM) contains the policy and planning documents for all emergency management in the state of Victoria.⁹⁰ The ERM details what the definition of emergencies at a policy level, what the emergency management arrangements are, the role of various emergency response organisations, and the planning and management arrangements for such situations.⁹¹ Under the ERM 'emergency' refers to:

⁸¹ Ibid.

⁸² *Public Health and Wellbeing Act 2008* (Vic) s 9.

⁸³ *Public Health and Wellbeing Act 2008* (Vic) s 8; An important manifestation of this right is the requirement that declarations of emergency be broadcast as soon as practicable after a declaration is made. See *Public Health and Wellbeing Act 2008* (Vic) s 198(5)(a).

⁸⁴ *Public Health and Wellbeing Act 2008* (Vic) s 198(5).

⁸⁵ *Public Health and Wellbeing Act 2008* (Vic) s 198(7)(c).

⁸⁶ *Emergency Management Act 1986* (Vic) s 23.

⁸⁷ *Emergency Management Act 1986* (Vic) s 23(1).

⁸⁸ *Emergency Management Act 1986* (Vic) s 24.

⁸⁹ Sherryn Groch, 'Victoria is in a State of Disaster. What does that mean and what are the rules now?', *The Age* (online, 5 August 2020) <<https://www.theage.com.au/national/victoria/victoria-is-in-a-state-of-disaster-what-does-that-mean-and-what-are-the-rules-now-20200803-p55i12.html>>.

⁹⁰ Emergency Response Victoria, *Emergency Response Manual* (2020) <<https://www.emv.vic.gov.au/policies/emmv>>.

⁹¹ Ibid.

'the actual or imminent occurrence of an event which in any way endangers, or threatens to endanger the safety or health of any person..., or which damages, threatens to destroy or damage any property..., or threatens to endanger the environment or any element [thereof]'.⁹²

The ERM provides a non-exhaustive list of examples, including natural disasters, plagues or epidemics, 'warlike' act or acts of terrorism, sieges and riots and more.⁹³ The ERM also contains a definition of a 'major emergency' which refers to an emergency that has the potential to cause, or is causing loss of life and extensive damage to property, infrastructure or the environment; or has the potential to have 'adverse consequences' for the Victorian Community, or requires multiple agencies to be involved in the response.⁹⁴

The manual identifies three major response areas critical to responding to crises: prevention, response and recovery.⁹⁵ The first involves the 'elimination or reduction of the incidence or severity of the incidence' and the mitigations of their effects.⁹⁶ The second involves the combatting emergencies, providing rescue and immediate relief services.⁹⁷ Finally, recovery involves assisting individuals and communities impacted by emergency to adequately and effectively function.⁹⁸

3.4 COVID-19 response and SRHR

Commonwealth response

Law and Policy

As noted above, the Commonwealth Government does not have public health powers as such, but it may still exercise powers pursuant to the quarantine power under the Constitution to respond to health crises, which it does through the *Biosecurity Act 2015* (Cth) (*Biosecurity Act*). It also plays a role in coordinating and guiding the responses in the States and Territories through various structures, frameworks and support.⁹⁹

Coordination and guidance

In its coordinating function during a health emergency such as COVID-19, the Commonwealth Government enacts legislation to incorporate the International Health Regulations to which Australia is a signatory; sets up emergency management structures and entities and develops and implements plans of emergency response through those structures and entities.¹⁰⁰

The coordination mechanism is underpinned by the *National Health Security Act 2007* (Cth) which enables the Commonwealth, State and Territory governments to share information and coordinate responses.¹⁰¹

⁹² Ibid 1-5 – 1-6.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid, 1-2.

⁹⁶ Ibid 1-7.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Holly Mclean and Ben Huf, *Emergency Powers, Public Health and COVID-19*, Department of Parliamentary Services, Parliament of Victoria (Research paper, August 2020) 11 < <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

¹⁰⁰ Ibid 12.

¹⁰¹ Ibid.

It designates the Secretary of the Department of Health as a National Focal Point in this regard to liaise with and report to the World Health Organization (WHO), and Australian entities involved in the response.¹⁰² While some powers are given to the Commonwealth Government to enact national health security regulations, the framework explicitly recognises the responsibility on part of States and Territories to respond to significant health events in their respective jurisdictions.¹⁰³

As noted above, the existing Council of Australian Governments (COAG) established for crises response was replaced in May 2020 by the formation of a National Cabinet in response to the pandemic.¹⁰⁴ The National Cabinet is a crisis cabinet comprised of the Prime Minister, state Premiers and the territory Chief Ministers. In contrast with the COAG, the National Cabinet is not required to make decisions public which is at the prerogative of the Prime Minister.¹⁰⁵ The National Cabinet will form the centre of a new 'National Federation Reform Council' (NFRC).¹⁰⁶

Decisions by the National Cabinet in response to COVID-19 have included, for example, decisions concerning restrictions on number of people gathering to decisions on which elective surgeries may take place in public and private hospitals, with restrictions on elective surgeries operating between March and April.¹⁰⁷ These decisions guide the States and Territories who still remain responsible for implementation through powers within their specific legislative and policy frameworks.

Under the AGCMF discussed under section 3.2 above, the Australian Health Protection Principal Committee, led by the Australian Chief Medical Officer, is the national health emergency committee that specifically coordinates responses to health emergencies, such as COVID-19.¹⁰⁸ Below this Principal Committee there are a number of standing committees, including for example the National Health Emergency Management Standing Committee.¹⁰⁹

A number of emergency response plans have been enacted to coordinate the management of health emergencies. A specific COVID-19 response plan was created in February 2020 and the Chief Medical Officer also activated the existing plan which provides guidance on how other sectors can support the health sector in responding to health emergencies.¹¹⁰

Biosecurity Act

The COVID-19 pandemic has resulted in the use of powers under the *Biosecurity Act* not previously exercised. Pursuant to section 475 of the *Biosecurity Act*, a biosecurity emergency was declared in Australia

¹⁰² Ibid.

¹⁰³ Ibid 12-13.

¹⁰⁴ Ibid 17;

¹⁰⁵ Ibid 16.

¹⁰⁶ Australian Government Department of the Prime Minister and Cabinet, 'COAG becomes National Cabinet' (Media release, 2 June 2020) < <https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet>>.

¹⁰⁷ Holly Mclean and Ben Huf, *Emergency Powers, Public Health and COVID-19*, Department of Parliamentary Services, Parliament of Victoria (Research paper, August 2020) 17-18 < <https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

¹⁰⁸ Ibid 14.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 16.

on 18 March 2020 in response to the COVID-19 pandemic. Under the *Biosecurity Act*, the Governor-General may declare that a human biosecurity emergency exists. This culminated in the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*. Under these emergency circumstances, per sections 477 and 478 of the *Biosecurity Act*, the Health Minister can determine emergency requirements and make directions during the emergency period. Under this section, the Health Minister Greg Hunt, made several directions responding to the COVID-19 pandemic. For example, these directions prevented international cruise ships entering Australian ports¹¹¹, imposed an international travel ban¹¹², created emergency requirements for remote communities¹¹³, and prevented price gouging of essential items and a requirement to surrender essential goods under conditions.¹¹⁴

It is important to also note powers under the *Biosecurity Act* which are not dependent upon a declaration of a human biosecurity emergency as the one discussed above. Under section 60 of the *Biosecurity Act*, the designated officers can make orders that restrict the behaviour of persons ‘suspected of having symptoms of a listed human disease or exposure to a person with such symptoms’. Such restrictions may include, for example, the need to isolate or provide contact information.

State response

Law and Policy

The restrictions introduced by the Commonwealth were supplemented by the exercise of emergency powers by the states and territories. When these restrictions were introduced in March, there was a degree of uniformity amongst them. Limits were placed on social gatherings and stay at home measures required people to remain home unless they had a valid excuse for leaving. This list of valid excuses evolved over time and by May, some jurisdictions announced an easing of restrictions.¹¹⁵ The most stringent restrictions have been introduced and maintained in Victoria due to significant increase in community transmission (or ‘second wave’) in Melbourne.

Under Victoria’s PHWA, a ‘state of emergency throughout the State of Victoria’ was declared in response to ‘the serious risk to public health in Victoria from Coronavirus’¹¹⁶ on 16 March 2020 and has been extended six times. Directions made by the Minister for Health under the Declaration of a State of Emergency include the requirement that people arriving in Victoria from overseas go into immediate 14 day quarantine and a series of ‘Stay at Home’ directions which restrict movement outside the home.

¹¹¹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020*; *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020*.

¹¹² *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020*.

¹¹³ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020*.

¹¹⁴ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020*.

¹¹⁵ See generally Steve Vivian, Australia’s coronavirus restrictions are easing — here’s what you can and can’t do, ABC News (1 May 2020) <<https://www.abc.net.au/news/2020-05-01/coronavirus-restrictions-easing-around-australia-explained/12198078>>

¹¹⁶ Victoria, *Victoria Government Gazette*, No. 129 (2020) 1; Premier of Victoria, ‘State Of Emergency Declared In Victoria Over COVID-19’ (Media Release, 16 March 2020) <<https://www.premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19>>.

Regulations issued under the PHWA in March introduced infringement offences including failing or refusing to comply with emergency directions and the power to enforce these measures, and issue on-the-spot fines for non-compliance, was delegated to police.¹¹⁷ On 22 July, the regulations were again amended to introduce the failure to wear a face covering as an infringement offence subject to a fine for non-compliance.¹¹⁸ Further restrictions were introduced on 2 August, which will remain in place until at least 13 September, including the direction that people in metropolitan Melbourne stay at home unless they are shopping for food or other essential items, exercising outdoors (subject to further restrictions) or are engaged in work with respect to which a permit has been issued. A curfew now operates between 8 pm and 5 am and additional powers to ensure compliance with these directions were conferred on police with the declaration of a 'state of disaster' under the EMA.

Measures in place in other states and territories have been relaxed in recent months due to low rates of community transmission. For example, in New South Wales, employers must allow employees to work from home where it is reasonably practical and businesses can operate subject to a 'one person per 4 square metre' rule.¹¹⁹

Interstate border restrictions have been a key measure adopted by the states and territories to curb the spread of COVID-19. They have been the subject of ongoing negotiation and discussion between states and the Commonwealth government.¹²⁰ By early July, discussions around the relaxation of border restrictions were overtaken by Victoria's 'second wave'. Travel from Victoria into South Australia and New South Wales has been restricted while other states have closed their borders to non-essential travel.¹²¹

Impacts on SRHR

The pandemic and measures introduced in response have created barriers to SRHR that have amplified healthcare inequality and intersectional disadvantage. These impacts are examined below.

Family Violence and Reproductive Coercion

Protection from violence is a key determinant of SRHR and women experiencing reproductive coercion and other forms of family violence may face additional obstacles to accessing sexual and reproductive healthcare.¹²² The COVID-19 pandemic has had a devastating economic impact and had led to significant job losses and household stress. Financial stress has been linked with increases in family violence¹²³ and a study of 166 practitioners supporting women experiencing violence in Victoria has found that the

¹¹⁷ *Public Health and Wellbeing Act ss 209-210; Public Health and Wellbeing Amendment (Infringements) Regulations 2020.*

¹¹⁸ *Public Health and Wellbeing Amendment (Further Infringement Offences) Regulations 2020.*

¹¹⁹ See i.e. NSW Government, 'Four Square Metre Rule', NSW Government (Web Page, 2020) <<https://www.nsw.gov.au/covid-19/what-you-can-and-cant-do-under-rules/four-square-metre-rule>>.

¹²⁰ Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19', *Parliament of Australia* (Research Paper No. 2, August 2020), 36 <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13962-emergency-powers-public-health-and-covid-19>>.

¹²¹ See i.e. Australian Interstate Quarantine, 'State and Territory Border Closures Due to COVID-19', *Australian Interstate Quarantine* (Web Page, 2020) <<https://www.interstatequarantine.org.au/state-and-territory-border-closures/>>.

¹²² See generally Heather Douglas and Katherine Kerr, 'Domestic and Family Violence, Reproductive Coercion and the Role for Law' (2018) 26 *Journal of Law and Medicine* 341; Marie Stopes Australia 2018, 'Hidden Forces: Shining a Light on Reproductive Coercion' (White Paper, 26 November 2018) <<https://www.mariestopes.org.au/advocacy-policy/reproductivecoercion/>>.

¹²³ Christopher D. Maxwell, Rebecca J. G. Stone, National Institute of Justice, 'The Nexus between Economics and Family Violence: The Expected Impact of Recent Economic Declines on the Rates and Patterns of Intimate, Child and Elder Abuse' (Report, 2010) <<https://nij.ojp.gov/library/publications/nexus-between-economics-and-family-violence-expected-impact-recent-economic>>.

pandemic has increased women's vulnerability to all forms of gender-based violence.¹²⁴ More than half of the study's respondents reported an increase in the frequency and severity of violence against women, 42% observed that the COVID-19 pandemic had resulted in an increase in first-time family violence reporting and 86% reported that the pandemic had increased the complexity of women's needs, with 55% reporting a significant increase in complexity.¹²⁵ Stay-at-home measures and restrictions on social movement have curtailed opportunities for women to engage with services,¹²⁶ with practitioners observing that COVID-19 restrictions have '*facilitated perpetrators' isolation of women experiencing violence and inhibited their ability to seek support and help.*'¹²⁷ One practitioner observed '[i]t has been much easier for the perpetrator to get the victim/survivor to isolate from friends and family'¹²⁸ and an increase was observed in the surveillance of women's communication devices and online activities. Practitioner observations in this regard include the following:

*Partners who are monitoring phone use now have an increased amount of power and control in this domain as the phone is now quite literally the only connection with the outside world.*¹²⁹

*Women have been very concerned about their phone calls being overheard and not having a safe space to speak freely. Women have often ended phone calls, changed the topic or called back later when it is safe to talk.*¹³⁰

In May 2020, the Australian Institute of Criminology conducted an online survey of 15,000 women aged 18 years and over to gauge the impact of COVID-19 on domestic violence. 33.1% of respondents reported that the period between February and May 2020 was the first time their partner had been violent towards them with 19.9% of women who had experienced coercive control said that this was the first time they had experienced emotionally abusive, harassing or controlling behaviour within their relationship.¹³¹

Reproductive coercion is a further form of family violence which can be a corollary of coercive control. In research undertaken prior to the COVID-19 pandemic, the Australian Institute of Family Services has charted reproductive coercion in research in which 'women described various ways in which abusive partners had controlled their reproductive and sexual choices including sabotaging their contraception;

¹²⁴Naomi Pfitzner, Kate Fitz-Gibbon and Jacqui True, 'Responding to the 'shadow pandemic': practitioner views on the nature of and responses to violence against women in Victoria, Australia during the COVID-19 restrictions', *Monash Gender and Family Violence Prevention Centre*, (Report, 8 June 2020) <<https://doi.org/10.26180/5ed9d5198497c>>.

¹²⁵ Ibid 10.

¹²⁶ Ibid 6,7,10; K. Fitz-Gibbon and S. Meyer 'Coronavirus: Fear of family violence spike as COVID-19 impact hits households. Melbourne', Monash University (Report, 2020) <<https://lens.monash.edu/@politics-society/2020/03/18/1379841>>; R. Morton, 'Family violence increasing during Covid-19 lockdown', *The Saturday Paper*, (online, 4 April 2020) <<https://www.thesaturdaypaper.com.au/news/law-crime/2020/04/04/family-violence-increasing-during-covid-19-lockdown/15859188009641>>.

¹²⁷ Naomi Pfitzner, Kate Fitz-Gibbon and Jacqui True, 'Responding to the 'shadow pandemic': practitioner views on the nature of and responses to violence against women in Victoria, Australia during the COVID-19 restrictions', *Monash Gender and Family Violence Prevention Centre*, (Report, 8 June 2020) <<https://doi.org/10.26180/5ed9d5198497c>>.

¹²⁸ Ibid.

¹²⁹ Ibid

¹³⁰ Ibid. See also Jewel Gausman, 'Sex and Gender Disparities in the COVID-19 Pandemic' (2020) 29(4) *Journal of Women's Health* 465; See Also Kun Tang et al, 'Sexual and reproductive health (SHR): a key issue in the emergency response to the coronavirus disease (COVID-19) outbreak' (2020) 17(59) *Reproductive Health*; International Planned Parenthood Federation, *IMAP Statement on COVID-19 and Sexual and Reproductive Health and Rights*, (April 2020).

¹³¹ Hayley Boxall, Anthony Morgan and Rick Brown, *The prevalence of domestic violence among women during the COVID-19 pandemic*, Australian Institute of Criminology (Statistical Bulletin 28, July 2020) 11 <https://www.aic.gov.au/sites/default/files/2020-07/sb28_prevalence_of_domestic_violence_among_women_during_covid-19_pandemic.pdf>.

refusing to use contraception; rape; and attempting to influence the outcome of pregnancies.’¹³² Healthcare provided Marie Stopes has characterised reproductive coercion as encompassing any behaviour that has the intention of controlling or constraining another person’s reproductive health decision-making.¹³³ During the pandemic, Marie Stopes Australia has observed an increased number of people presenting with experiences of sexual and reproductive coercion, and noted that ‘[w]e are hearing about coercion increasingly linked to poverty, and that poverty being financial hardship linked to unemployment and economic insecurity due to the pandemic’ and that ‘[p]eople who already have restricted bodily autonomy are facing uniquely coercive contexts, e.g. people with disability, people on temporary visas, people who are incarcerated and people in state care.’¹³⁴ It has furthermore identified restrictions on movement and the prioritisation of the pandemic response within the healthcare system as forms of structural reproductive coercion.¹³⁵

Menstrual hygiene management

Panic buying has led to product shortages and a study by Plan International Australia found that more than half of the women surveyed experienced difficulties in accessing menstrual hygiene products and contraceptive pills in March and April 2020.¹³⁶

Menstruation continues to be a topic shrouded by stigma and silence¹³⁷ and ‘period poverty’, which undermines the dignity of women and girls,¹³⁸ has been exacerbated by the pandemic. This problem received a degree of acknowledgement due to the efforts of human rights groups¹³⁹ and has found some support from businesses¹⁴⁰ and the Victorian government, which will dispense free sanitary products in schools as part of an initiative to ‘promote positive menstrual health.’¹⁴¹

Nevertheless, ensuring access to menstrual hygiene products remains a challenge which is amplified for women living in situations of systemic crises, some of which are considered below. These include women in closed environments such as prisons and immigration detention and women with a disability, for whom

¹³² Monica Campo, ‘Domestic and family violence in pregnancy and early parenthood,’ *Australian Government, Australian Institute of Family Studies* (Web Page, December 2015) <[https://aifs.gov.au/cfca/publications/domestic-and-family-violence-pregnancy-and-early-parenthood#:~:text=Of%20those%20women%2C%2022%25%20experienced.violence%20first%20occurred%20during%20pregnancy.](https://aifs.gov.au/cfca/publications/domestic-and-family-violence-pregnancy-and-early-parenthood#:~:text=Of%20those%20women%2C%2022%25%20experienced.violence%20first%20occurred%20during%20pregnancy.;)>; The research referenced was: A. M. Moore, L. Frowirth and E. Miller, ‘Male reproductive control of women who have experienced intimate partner violence in the United States’ (2010) 70(11) *Social Science & Medicine* 1737–1744.

¹³³ Marie Stopes Australia, ‘Hidden Forces: Shining a Light on Reproductive Coercion’ Marie Stopes (White Paper, 2018) <https://www.mariestopes.org.au/wp-content/uploads/Hidden-Forces_MSA-RC-White-Paper_FINAL_WEB.pdf>.

¹³⁴ Marie Stopes Australia, *Situational Report: Sexual and Reproductive Health Rights in Australia A request for collaboration and action to maintain contraceptive and abortion care throughout the SARS-COV-2 / COVID-19 pandemic*, (Updated 24 July 2020), 7.

¹³⁵ *Ibid.*

¹³⁶ Plan International Australia, *Periods in a pandemic - From product shortages, pain and price gouging: new research reveals coronavirus is making periods worse for women and girls* (28 May 2020) <<https://www.plan.org.au/media/media-releases/periods-in-a-pandemic>>; Maani Truu, ‘Half of Australian women were impacted by period product shortages during coronavirus’, *SBS News* (28 May 2020) <<https://www.sbs.com.au/news/half-of-australian-women-were-impacted-by-period-product-shortages-during-coronavirus>>

¹³⁷ Carla Pascoe Leahy, ‘The ongoing taboo of menstruation in Australia’, *The Conversation* (online, 3 February 2016) <<https://theconversation.com/the-ongoing-taboo-of-menstruation-in-australia-53984>>.

¹³⁸ Women’s Agenda, ‘New study uncovers reality of period poverty in Australian schools’, *Women’s Agenda* (Web Page, June 2020) <<https://womensagenda.com.au/latest/new-study-uncovers-reality-of-period-poverty-in-australian-schools/>>

¹³⁹ See generally Share the Dignity <<https://www.sharethedignity.org.au/#>>.

¹⁴⁰ Woolworths Group, ‘Woolworths and Share the Dignity partner this August to help support the growing number of Aussie women experiencing period poverty due to COVID-19’, *Woolworths Group* (Web Page, 30 July 2020) <https://www.woolworthsgroup.com.au/page/media/Latest_News/woolworths-and-share-the-dignity-partner-this-august-to-help-support-the-growing-number-of-aussie-women-experiencing-period-poverty-due-to-covid-19>.

¹⁴¹ Victorian Department of Education and Training, ‘Free sanitary pads and tampons in all government schools’, *Victorian Government* (Web Page, 5 August 2020) <<https://www.education.vic.gov.au/about/programs/Pages/free-sanitary-pads.aspx>>

menstrual management has long been used as an express rationale for the involuntary sterilization, a serious violation of human rights which persists to the present day and is discussed further at Part 4.2 below.¹⁴²

Access to contraception and medical services

A recent study of the impact on reproductive health of lockdown measures between March and May (during which time there was a degree of consistency between jurisdictions) found that 9.2% of respondents had trouble accessing contraception, 4.6% had trouble accessing SRH products like pregnancy tests and lubrication and 32.7% had trouble accessing their usual feminine hygiene product.¹⁴³ While most women in the study could continue to access their usual contraception, barriers to access were experienced by younger women and women who were unemployed.¹⁴⁴ The study's findings are consistent with those of Plan international Australia, which raised concerns about the ability of young women and girls to stay informed about their sexual health in the face of reluctance to obtain medical advice about menstruation and contraception due to concerns about COVID-19.¹⁴⁵

Stay-at-home measures, movement restrictions and the dangers of community transmission have limited face-to-face medical appointments and increased the need for telehealth services. Adjustments have been made to the Commonwealth government's Medicare Benefits Scheme through which it subsidises the costs of medical treatment. From 13 March 2020, temporary telehealth item numbers¹⁴⁶ have been created in response to the COVID-19 pandemic. These item numbers enable people holding Medicare Cards to access subsidised medical services via telehealth. The director of Clinical Operations at Family Planning New South Wales Jodie Duggan, has observed that the telehealth item numbers have made a 'massive positive impact' on community health, and had resulted in increased access to time-sensitive services such as emergency contraception and post-exposure prophylaxis, as well as a range of reproductive health services, including the following: long-acting reversible contraceptives and complex contraceptive issues, services related to endometriosis and other causes of heavy menstrual bleeding, fertility and infertility issues, sexual health advice and cervical cancer screening.¹⁴⁷

Despite the pressing need for such services, access to subsidised services has been restricted from 20 July. For most patients, services can now only be accessed via a general practitioner,¹⁴⁸ and require patients to have consulted their regular general practitioners face-to-face at least once in the past year in order to obtain a rebate.¹⁴⁹ Funding for the temporary telehealth services is due to expire on 30 September 2020,

¹⁴² Bath Goldblatt and Linda Steele, 'Bloody Unfair: inequality related to menstruation – considering the role of discrimination law' (2019) 41(3) *Sydney Law Review* 293, 311-313.

¹⁴³ Jacqueline Coombe et al, 'The impact of COVID-19 on the reproductive health of people living in Australia: findings from an online survey' (2020) *MedRxiv* (pre-print) <<https://doi.org/10.1101/2020.08.10.20172163>>.

¹⁴⁴ *Ibid.*

¹⁴⁵ Plan International Australia, 'Periods in a pandemic - From product shortages, pain and price gouging: new research reveals coronavirus is making periods worse for women and girls', *Plan International* (Web Page, 28 May 2020)

<<https://www.plan.org.au/media/media-releases/periods-in-a-pandemic>>; Maani Truu, 'Half of Australian women were impacted by period product shortages during coronavirus', *SBS News* (online, 28 May 2020) at <<https://www.sbs.com.au/news/half-of-australian-women-were-impacted-by-period-product-shortages-during-coronavirus>>.

¹⁴⁶ See MBS Online, *Medicare Benefits Schedule* (22 June 2020)

<<http://www.mbsonline.gov.au/internet/mbsonline/publishing.nsf/Content/Factsheet-TempBB>>

¹⁴⁷ Ruby Prosser Scully, 'Telehealth restrictions 'jeopardise sexual and reproductive health'', *Medical Republic*, (Web Page, 16 July 2020) <<http://medicalrepublic.com.au/telehealth-restrictions-jeopardise-sexual-and-reproductive-health/31649>>

¹⁴⁸ Marie Stopes Australia, *Situational Report: Sexual and Reproductive Health Rights in Australia* (Situational Report, 24 July 2020) 5: <https://resources.mariestopes.org.au/SRHRinAustralia.pdf>

¹⁴⁹ The Hon Greg Hunt MP, 'Continuous care with telehealth stage seven' (Media Release, 10 July 2020)

<<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/continuous-care-with-telehealth-stage-seven>>

and healthcare providers have lobbied the government to renew funding after September to avert a 'public sexual and reproductive health crisis.'¹⁵⁰ Managing Director of Marie Stopes Australia, Jamal Hakim has said that restricting the use telehealth item numbers during 'has even further penalised women, pregnant people and people who need to access vital STI treatments' and Australian Healthcare and Hospitals Association CEO, Alison Verhoeven has said this: *As we face the most significant health and economic challenges experienced in a century we need big-picture thinking and serious policy reform efforts in healthcare that are agile and innovative. There is no practical or clinical reason why MBS telehealth funding should not be applied to sexual and reproductive health.*¹⁵¹ There has been no communication by the government on the issue since late July.

IVF Treatment

The suspension of elective medical treatment (including IVF) by the federal government in March 2020 was lifted on 27 April. Because of the patient backlog and the need to comply with social distancing and infection precautions, clinics and fertility specialists were then in the unenviable position of having to decide how to prioritise the needs of different patients, the majority of whom are desperate and deserving. For example, it was reported that

Associate Professor Peter Illingworth, medical director of IVF Australia, wrote to patients warning that while the fertility provider was "aiming to accommodate everyone who contacts us ... we will not compromise the care IVF Australia can offer you, by taking on too many patients at once".

Those patients whose had already had a cycle postponed due to the COVID-19 epidemic, were "short of time by being aged 40 or above, had a low ovarian egg number or had already completed three full cycles with IVF Australia" would be prioritised, the email said.¹⁵²

Victoria's "second wave" saw a further suspension of elective medical treatment in July / August, adding significant anxiety to patients who thought they could once again embark on their fertility journeys only to have this abruptly halted once again.

Surrogacy

The issue of overseas surrogacy arrangements is also a significant concern. The closure of international borders as a response to the pandemic has meant that many intended parents, surrogates and babies have been left in limbo. For example, as recently as August 2020 it was reported that 'babies are being born to surrogate mothers in one country while the commissioning parents are in another country, unable to see them because the borders have been closed. It has been widely reported that more than a hundred of these cases exist in Ukraine and at least 40 in Georgia.'¹⁵³ It is not an overstatement to say that this is a disaster; both from a rights and interests perspective.

¹⁵⁰ ASHM and Marie Stopes Australia, 'Exemption to Medicare changes will avert sexual and reproductive health crisis' (Media Statement, 17 July 2020).

¹⁵¹ Marie Stopes Australia and Australian Healthcare and Hospitals Association, 'Government Silence on Medicare Items is Impacting Healthcare' (Media Release, 1 September 2020).

¹⁵² Dana McCauley, 'Fertility patients eager to restart IVF treatment when ban lifts' *The Sydney Morning Herald* (online, 26 April 2020) <<https://www.smh.com.au/politics/federal/fertility-patients-eager-to-restart-ivf-treatment-when-ban-lifts-20200425-p54n6w.html>>.

¹⁵³ Michael Cook, 'International Surrogacy Goes Pear-Shaped', *BioEdge* (August 2020) <<https://www.bioedge.org/bioethics/international-surrogacy-goes-pear-shaped/13501>>.

Abortion

A decision by the National Cabinet to freeze elective medical treatment from 25 March¹⁵⁴ was followed by a phased resumption of elective surgeries from 28 April.¹⁵⁵ The freeze did not apply to abortions, which were categorised by the Royal Australian and New Zealand College of Obstetricians and Gynaecologists as *urgent* medical treatment.¹⁵⁶ Nevertheless, some women face significant barriers in accessing abortion in Australia and the COVID-19 pandemic has amplified these barriers and had a disproportionate impact on women and girls who experience intersectional disadvantage and discrimination, including women with a disability, those experiencing family violence, migrant women on temporary visas, women living in rural and regional areas, and Aboriginal and Torres Strait Islander women.

The past two decades have seen the dismantlement of some of the key legal barriers to abortion. Most states and territories have decriminalised abortion, imposed an ‘obligation to refer’ on medical practitioners with a conscientious objection to abortion and introduced safe access zones around abortion clinics.¹⁵⁷ Some legal barriers remain. For example, South Australia is yet to decriminalize abortion and requires women to see two doctors in prescribed facilities,¹⁵⁸ creating a significant barrier to access, particularly for those in regional and remote areas. Despite the dismantlement of legal barriers in most states, abortion remains inaccessible for many women. Persisting barriers to access include inadequate public funding by states and territories (with most abortion services delivered by private providers), lack of information, misleading information provided by putative ‘pregnancy advisory services’ staffed by anti-abortionists, language barriers and the training and attitudes of medical service providers. Doctors with a conscientious objection to abortion continue to deliberately delay and obstruct access to abortion, even in jurisdictions where the law requires them to refer a patient to a medical practitioner who holds no such objection.¹⁵⁹ Fear of ostracism and attacks have led to a reluctance among doctors to provide abortion services and abortion has occupied a stigmatised place within medical practice.¹⁶⁰ Legislative frameworks and stigma around later gestation abortion have required some women to travel interstate to access services, often at great financial cost, and doctors routinely travel interstate to provide these services.

Restrictions on movement, mandatory isolation measures and border closures, combined with the economic stress generated by the pandemic, have compounded pre-existing barriers to abortion access. Patients who would otherwise have to travel to obtain surgical abortions are no longer able to do so. These include women and girls living in parts of Australia where abortions are not accessible, including those living in rural, regional and remote areas. Doctors who travel interstate to provide terminations at

¹⁵⁴ Prime Minister of Australia, ‘Elective Surgery’ (Media Release, 25 March 2020) <<https://www.pm.gov.au/media/elective-surgery>>.

¹⁵⁵ Australian Department of Health, ‘Government eases elective surgery restrictions’, *Australian Government* (Web Page, 22 April 2020) <<https://www.health.gov.au/news/government-eases-elective-surgery-restrictions>>

¹⁵⁶ The Royal Australian and New Zealand College of Obstetricians and Gynaecologists, *COVID-19: Category 1 (Australia) and Urgent (New Zealand) Gynaecological Conditions and Surgical Risks* (25 March 2020; updated 4 April 2020) <<https://ranzocg.edu.au/news/category-1-gynaecological-conditions>>; Note: This is to be contrasted with the United States where several States used the pandemic to classify abortion as ‘nonessential’ healthcare and to block access: Barbara Baird and Erica Millar, ‘Abortion at the edges: Politics, practices, performances’ 80 (2020) *Women’s Studies International Forum*.

¹⁵⁷ See generally Ronli Sifris, Tania Penovic and Caroline Henckels, ‘Advancing Reproductive Rights through Legal Reform: The Example of Abortion Clinic Safe Access Zones’ (2020) 43(3) *University of New South Wales Law Journal*.

¹⁵⁸ *Criminal Law Consolidation Act 1935* (SA) s 82A.

¹⁵⁹ Louise Anne Keogh et al, ‘Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers’ (2019) 11 *BMC Medical Ethics* 20.

¹⁶⁰ Caroline de Costa, ‘Who are the abortion providers and what does the future hold?’ in Louise Swinn (Ed), *Choice Words: A Collection of Writing about Abortion* (Allen and Unwin, Sydney, 2019) 47.

a later gestational stage, and women requiring later terminations, some of whom have complex needs,¹⁶¹ are unable to travel.¹⁶² With the domestic flights industry in decline, Marie Stopes Australia has chartered flights in order to keep some regional clinics open.¹⁶³

The introduction of temporary item numbers under the Medicare Benefits Scheme has provided access to medical abortion for some women. Medical abortion is available up to nine weeks' gestation. Clinical care is provided by nurses and doctors via telephone and medication is delivered by courier, with access to aftercare by telephone.¹⁶⁴ The service accords with the advice of the International Campaign for Women's Right to Safe Abortion that '[e]very country could and should move most abortions out of hospitals and clinics by ensuring women can get abortion pills and self-manage their abortions up to 10-12 weeks at home, with a number to call for advice and back-up care if needed.'¹⁶⁵ Marie Stopes Australia has observed an increase in demand for tele-abortion services of 140% compared to the same period in 2019 and described medical abortion via telehealth as an important mechanism for early gestation abortion access.¹⁶⁶ Telehealth services are difficult to access for some women experiencing family violence, who may not be able to communicate with doctors over the phone or receive medication by courier due to privacy concerns which may be amplified by other aspects of lived experience such as poverty and disability. Research has found that women seeking abortions are at higher risk of intimate partner violence,¹⁶⁷ a risk that is compounded further by the COVID-19 pandemic. But for many women, medical abortion via telehealth has been the only option to access abortion services.¹⁶⁸ The restrictions on subsidised telehealth access (outlined above) have reduced the availability of this option and access will be further undermined if the temporary item numbers are not maintained after their scheduled expiry on 30 September.¹⁶⁹

¹⁶¹ Trish Hayes, Chanel Keane and Suzanne Hurley, 'Counselling "late women" - The experience of women seeking abortion in the eighteen to twenty-four-week gestational period: Critical reflections from three abortion counsellors' (2020) *Women's Studies International Forum* 78; Note: The authors observe at 5 that 'every aspect— medical, legal, physical, emotional, psychological, spiritual and social—is bigger and more complex than we might find in abortion provision under 18 weeks and yet the demand for this service is extraordinarily compelling.'

¹⁶² Barbara Baird and Erica Millar, 'Abortion at the edges: Politics, practices, performances' (2020) *Women's Studies International Forum* 80; Melissa Davey, 'Later Gestation Abortions Hit by Australia's Coronavirus Travel Restrictions', *The Guardian* (online, 31 March 2020) <<https://www.theguardian.com/world/2020/mar/31/later-gestation-abortions-hit-by-australias-coronavirus-travel-restrictions>>.

¹⁶³ Emilie Gramenz, 'Abortion Providers Take Private Flights to Regional Queensland as Coronavirus Triggers Industry Collapse,' ABC News (online, 2 May 2020) <<https://www.abc.net.au/news/2020-05-02/abortion-providers-take-private-flights-during-coronavirus/12181846>>; Marie Stopes Australia, *Situational Report: Sexual and Reproductive Health Rights in Australia* (Situational Report, 24 July 2020) 4 <<https://resources.mariestopes.org.au/SRHRinAustralia.pdf>>.

¹⁶⁴ I. Fix et al, 'At-home telemedicine for medical abortion in Australia: a qualitative study of patient experiences and recommendations' (2020) *BMJ Sex Reproductive Health* 1–6 <doi:10.1136/bmjshr-2020-200612>.

¹⁶⁵ International Campaign for Women's Right to Safe Abortion, *An International Call to Action* (27 March 2020).

¹⁶⁶ Marie Stopes Australia, *Situational Report: Sexual and Reproductive Health Rights in Australia* (Situational Report, 24 July 2020) 5: <<https://resources.mariestopes.org.au/SRHRinAustralia.pdf>>

¹⁶⁷ M. Hall et al, 'Associations between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis' (2014) 11(1) *PLoS Medicine*.

¹⁶⁸ Marie Stopes Australia, *Situational Report: Sexual and Reproductive Health Rights in Australia* (Situational Report, 24 July 2020) 5 <<https://resources.mariestopes.org.au/SRHRinAustralia.pdf>>; ASHM and Marie Stopes Australia, 'Exemption to Medicare changes will avert sexual and reproductive health crisis' (Media Statement, 17 July 2020).

¹⁶⁹ See Ruby Prosser Scully, 'Telehealth Restrictions 'Jeopardise Sexual and Reproductive Health' *Medical Republic*, (Report, 16 July 2020) <<http://medicalrepublic.com.au/telehealth-restrictions-jeopardise-sexual-and-reproductive-health/31649>>; Gina Rushton, 'Telehealth has improved abortion access for women around Australia. We can't let it lapse', *The Guardian* (online, 15 July 2020) <<https://www.theguardian.com/world/commentisfree/2020/jul/15/abortion-drugs-remain-inaccessible-unsafe-and-unaffordable-for-many-australian-women>>.

The increased access to medical abortion has not been extended to women in South Australia, where the requirement of face-to-face consultations with two doctors in prescribed facilities¹⁷⁰ has made tele-abortion unavailable and created a significant barrier to access for women in rural, regional and remote parts of the state. South Australia's government has been called upon to introduce changes to its laws during the pandemic to allow access to medical abortion via telehealth in order to reduce barriers to abortion access and the risk of COVID-19 exposure for doctors and patients.¹⁷¹ Although the Health Minister flagged potential temporary changes to allow tele-abortions in April,¹⁷² no changes have been made.

Intersectional impact

Quantitative analysis from a recent study of the impact on reproductive health of lockdown measures (discussed above) suggested that COVID-19 affected pregnancy plans, with participants delaying childbearing, or deciding to remain childfree.¹⁷³ The study observed a profound impact on pregnant and birthing women as they tried to access healthcare subject to strict COVID-19 regulations.¹⁷⁴

As noted above, the study observed that difficulty accessing suitable contraception was experienced disproportionately by young women and those experiencing financial hardship.¹⁷⁵ The impacts of the pandemic on SRHR have not been evenly distributed. Barriers to reproductive health care which have resulted from the pandemic, such as increased levels of financial hardship and distress, have had a disproportionate impact on women who are marginalised for reasons other than gender.

The International Planned Parenthood Federation has observed that 'Covid-19 is escalating existing inequalities for women and girls and discrimination of already marginalised groups, including refugees, people with disabilities and those in extreme poverty.'¹⁷⁶ The pandemic has served to amplify pre-existing problems of access for women and girls who face intersectional discrimination and longstanding situations of crisis. The following Part will examine three of these crises in the context of SRHR.

¹⁷⁰ *Criminal Law Consolidation Act 1935 (SA)* s 82A.

¹⁷¹ South Australian Abortion Action Coalition, *Briefing Note: Avoidable exposure to COVID-19 risk resulting from current SA abortion law* (Briefing Note, 6 May 2020).

¹⁷² Angela Skujins, 'COVID-19 Could Prompt Temporary Change to SA Abortion Law,' *In Daily* (online, 17 April 2020) <https://indaily.com.au/news/2020/04/17/covid-19-prompts-temporary-change-to-sa-abortion-law/>; Note: Similar changes have been enacted in the United Kingdom in response to COVID-19: Barbara Baird and Erica Millar, 'Abortion at the edges: Politics, practices, performances' 80 (2020) *Women's Studies International Forum*.

¹⁷³ Jacqueline Coombe et al, 'The impact of COVID-19 on the reproductive health of people living in Australia: findings from an online survey' (2020) *MedRxiv* (pre-print) <<https://doi.org/10.1101/2020.08.10.20172163>>.

¹⁷⁴ *Ibid.*, 13.

¹⁷⁵ *Ibid.*

¹⁷⁶ International Planned Parenthood Federation, *IMAP Statement on COVID-19 and Sexual and Reproductive Health and Rights*, (April 2020); See also Barbara Baird and Erica Millar, 'Abortion at the edges: Politics, practices, performances' 80 (2020) *Women's Studies International Forum*.

PART IV: SYSTEMIC CRISES IN AUSTRALIA

This Part addresses the following questions:

Concept/definition of crisis

1. Please provide information on the legal and policy framework used by your State to manage situations of crisis and on how the concept of “crisis” has been defined or framed.
2. Please list the type of situations that would fit the concept of “crisis” in your State and indicate what situations are excluded.
3. What institutional mechanisms are in place for managing a crisis and how are priorities determined?

Experiences of crisis

5. Please list the situations of crisis experienced by your State in the last five years.
6. What was the impact of those crises on women and girls?
[...]
9. Please indicate the main challenges, if any, encountered by women and girls to access justice and obtain reparations for violations of their SRHR, including any procedural barriers, and the types of assistance available to access legal and other remedies.

4.1 Introduction

This part will examine what the WG has described as ‘long-standing situations of crisis resulting from structural discrimination deeply embedded in histories of patriarchy, colonisation, conquest and marginalisation’ and ‘other types of crisis based on lived experiences of women’. Together, we view these categories as ‘systemic crises’. Systemic crises are not dealt with through declarations of emergency or disaster but through a patchwork of existing legislation and policy pertaining to particularly vulnerable and marginalised groups.

We will focus on three of Australia’s systemic crises, namely the discrimination and marginalisation of women with disabilities, Aboriginal and Torres Strait Islander women and refugees and asylum-seekers. We will examine the legislative and policy frameworks related to Indigenous women and refugee women, specifically as it relates to SRHR of women and girls. We will consider the gaps in these frameworks which allows discrimination and marginalisation to continue and the impacts of these longstanding crises on SRHR. Our discussion on women with disabilities will focus more broadly on violence and discrimination they continue to experience and in particular, the discriminatory and intersectional practice of involuntary sterilisation.

4.2 Women and girls with disabilities

Women and girls with disabilities experience significant levels of discrimination and violence in Australia. They are 40% more likely to be subjected to domestic violence¹⁷⁷ and 70% more likely to experience sexual violence than women without disability.¹⁷⁸ 20% of women with disability report a history of unwanted sex (cf 8.2% of women without disability)¹⁷⁹ and more than 25% of reported rapes are perpetrated against women with disability.¹⁸⁰ A study by the Australian Law Reform Commission revealed that 90% of women with an intellectual disability have experienced sexual abuse and 68% has experienced such abuse before the age of 18.¹⁸¹ Frohmader et al observe that violence against women and girls with disability 'continues to fall through legislative, policy and service response 'gaps' as a result of the failure to understand the intersectional nature of the violence that they experience, and the multiple and intersecting forms of discrimination which make them more likely to experience, and be at risk of, violence.'¹⁸²

A range of misconceptions and beliefs have robbed women and girls with disabilities of autonomy and significantly undermined their SRHR. Women with disabilities have been assumed to be incapable of concealing their menstrual blood and regulate emotions presumed to be associated with menstruation and furthermore incapable of managing menstruation and controlling their sexuality and fertility.¹⁸³ As De Beco has observed, '[t]here is at the same time a general belief that disabled women have no sexual life and that they are unsuited to motherhood, the result being that their children are frequently taken away from them in the case of separation or divorce. Disabled women are thus considered as both asexual and hypersexual. The fact that such opposite sexual features are attributed to them is testament to the particular way in which gender and disability intersect.'¹⁸⁴ This intersection is manifested in non-consensual measures, including the non-consensual administration of contraceptives and performance of abortion and sterilisation without consent.

¹⁷⁷ D. Brownridge, 'Partner violence against women with disabilities: Prevalence, risks and explanations' (2006) 12(9) *Violence against Women* 805–22 cited in C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 14.

¹⁷⁸ C. Frohmader, 'Gender Blind, Gender Neutral': The effectiveness of the National Disability Strategy in improving the lives of women and girls with disabilities (Women With Disabilities Australia, 2014) (WWDA), Hobart, Tasmania. ISBN: 978-0-9585268-2-1 cited in C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 14.

¹⁷⁹ L. Dowse et al, *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia* (Background Paper, 2013) cited in C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 14.

¹⁸⁰ M. Heenan and S. Murray, *Study of reported rapes in Victoria 2000–2003. Summary research report*. Melbourne: Statewide Steering Committee to Reduce Sexual Assault (2006) cited in C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 14.

¹⁸¹ Australian Law Reform Commission (ALRC) *Family Violence — A National Legal Response* (Final Report, 2010) <<http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>> cited in C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 14.

¹⁸² C. Frohmader, L. Dowse and A. Didi, *Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective* (Women With Disabilities Australia, 2015) 17.

¹⁸³ Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality Related to Menstruation – Considering the Role of Discrimination Law' (2019) 41(3) *Sydney Law Review* 293, 313

¹⁸⁴ Gauthier de Beco, 'Intersectionality and Disability in International Human Rights Law' (2020) 24(5) *The International Journal of Human Rights* 593, 599.

Involuntary sterilisation

Sterilisations were performed in Australia from the early to mid-twentieth century on eugenic grounds. An editorial published in 1931 in the *Medical Journal of Australia* called for 'the sterilisation of mental defectives and of patients with a mental disease as a condition of discharge from hospital.'¹⁸⁵ Eugenics gave way in the 1950s to a 'welfare model' which purported to pursue women's best interests but was underpinned by tropes of incapacity and vulnerability.¹⁸⁶

The practice is highly gendered and intersectional, and continues to the present day with a preponderance of involuntary or coerced sterilisations performed on women and girls with intellectual disabilities.¹⁸⁷ The primary rationales used to justify involuntary the practice are protection against sexual abuse and pregnancy and control of menstruation.¹⁸⁸ As Tobin and Luke observe, each rationale is underpinned by the assumption an assumption of a 'lack of autonomy and capacity to care for herself or any children that she might conceive.'¹⁸⁹ While the prevention of abuse is used to rationalise involuntary sterilisation, it may in fact increase the risk of abuse due which may otherwise be exposed by an ensuing pregnancy.¹⁹⁰ There have been a number of inquiries into the practice, the most recent of which was conducted by federal government's Senate Community Affairs References Committee. The Committee examined the legal framework governing sterilization in Australia.

Sterilisation which is considered to be necessary to save life or prevent permanent damage is characterised as therapeutic and may be performed without the patient's consent. Non-therapeutic sterilisations are the subject of a bifurcated approval regime. Authorisation for the sterilisation of a child may be obtained from the Family Court of Australia, a court exercising federal judicial power, which has jurisdiction pursuant to the *Family Law Act 1975 (Cth)* to determine child sterilisation cases under its powers to make orders 'relating to the welfare of children.'¹⁹¹ Sterilisation may be authorised when it is in the child's best interests and there are no less invasive alternatives.¹⁹² The Family Court's jurisdiction operates concurrently with State and Territory legislation which, in some jurisdictions also regulates the sterilisation of children (providing an alternative to the Family Court). State and territory tribunals may furthermore authorise the sterilisation of adults subject to their own legislative criteria.¹⁹³

The Senate Committee's report observed its goal to be 'the rigorous defence of the rights of persons with disabilities as equal, valued and productive members of Australian society'¹⁹⁴ but considered that an outright ban on the practice would '[remove] the focus from the needs and interests of the individual,

¹⁸⁵ 'Editorial' (1931) 2 *Medical Journal of Australia* 655 cited in John Tobin and Elliot Luke, 'The Involuntary, Non-Therapeutic Sterilisation of Women and Girls with an Intellectual Disability – Can it Ever be Justified?' (2013) 3 *Victoria University Law and Justice Journal* 27, 29 n 9.

¹⁸⁶ John Tobin and Elliot Luke, 'The Involuntary, Non-Therapeutic Sterilisation of Women and Girls with an Intellectual Disability – Can it Ever be Justified?' (2013) 3 *Victoria University Law and Justice Journal* 27, 29.

¹⁸⁷ Parliament of Australia, Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (Report, July 2013), 5; Susan Brady, John Briton and Sonia Grover, *The Sterilisation of Girls and Young Women in Australia: Issues and Progress*, Australian Human Rights Commission (Report, 2011) 3.

¹⁸⁸ *Ibid*, 35.

¹⁸⁹ *Ibid*, 35.

¹⁹⁰ Willene Holness, 'Informed Consent for Sterilisation of Women and Girls with Disabilities in the Light of the Convention on the Rights of Persons with Disabilities' (2013) 27(4) *Agenda* 35, 38.

¹⁹¹ S 67ZC.

¹⁹² *Marion's Case* (1992) 175 CLR 218, 249, 259-60 (Mason CJ, Dawson, Toohey and Gaudron JJ)

¹⁹³ See generally Parliament of Australia, Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (Report, July 2013), 68-81.

¹⁹⁴ *Ibid* [4.35].

placing it instead on generic notions of what is best for persons with disabilities as an homogenous group'.¹⁹⁵ It recommended that all jurisdictions adopt in law a uniform 'best protection of rights' test, replacing current 'best interests' tests, that makes explicit reference to the protection of the individual's rights; and the maintenance of future options and choices.¹⁹⁶

Human Rights Bodies

While the Senate Committee's recommendations sought to bring the practice of involuntary sterilisation into line with human rights, it overlooked the reality that human rights standards support the abolition of sterilisation performed without free and informed consent; a position which has been repeatedly expressed by human rights bodies.

In 2010, the CEDAW Committee noted its concern about the continued practice of non-therapeutic sterilisations of women and girls with and recommended that national legislation be introduced 'prohibiting, except where there is a serious threat to life or health, the use of sterilisation of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent'.¹⁹⁷ In 2018, the Committee called on Australia to abolish the practices of the non-consensual administration of contraceptives to, the performance of abortion on and the sterilization of women and girls with disabilities, which it characterised as harmful practices, and develop and enforce strict guidelines on the sexual and reproductive health rights of women and girls with disabilities who are unable to consent.¹⁹⁸

Involuntary sterilisation of women with disabilities has been characterised by the UN Special Rapporteur on Torture as torture or ill-treatment¹⁹⁹ and as a serious form of violence against women by the Special rapporteur on Violence against Women, its Causes and Consequences.²⁰⁰ Concerns about involuntary sterilisation have been expressed by the Committee on the Rights of the Child²⁰¹, the Committee against Torture²⁰² and the Committee on Economic, Social and Cultural Rights²⁰³

In Concluding Observations issued shortly after the Senate Committee report, the Committee expressed its deep concern about its recommendations that would allow the practice to continue and urged Australia to adopt uniform national legislation prohibiting the sterilization of boys and girls with disabilities, and

¹⁹⁵ Ibid [4.37].

¹⁹⁶ Ibid [5.126].

¹⁹⁷ Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Australia*, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010) [42]. See also Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [57].

¹⁹⁸ CEDAW Committee, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018), [25], [26(d)].

¹⁹⁹ Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, 5-8.

²⁰⁰ Rashida Manjoo, Special Rapporteur, *Report of the Special Rapporteur on violence against women, its causes and consequences*. United Nations General Assembly, UN Doc No. A/67/227 (2012).

²⁰¹ Committee on the Rights of the Child, *Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [57].

²⁰² Committee Against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, 53rd sess, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) [20].

²⁰³ Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities Eleventh session (1994) [31].

adults with disabilities, in the absence of their prior, fully informed and free consent.²⁰⁴ This position was reiterated most recently in October 2019.²⁰⁵

Royal Commission

Concerns about the high incidence of violence against, and sexual abuse of, women with disabilities have been expressed by the UN Committee on the Rights of Persons with Disability,²⁰⁶ the Special Rapporteur on Violence against Women, its Causes and Consequences.²⁰⁷ Concerns within the community of widespread violence, abuse and neglect of persons with disability has given rise to a Senate Inquiry in 2015²⁰⁸ and the establishment in April 2019 of a Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.²⁰⁹ The Royal Commission is now conducting public hearings and will deliver a final report with recommendations for the improvement of laws, policies, structures and practices by 29 April 2022.

4.3 Indigenous Marginalisation

Aboriginal and Torres Strait Islander peoples are the Indigenous people of Australia and comprise hundreds of groups with their own unique histories, cultural traditions and languages.²¹⁰ Indigenous peoples in Australia have faced ongoing violence, trauma, racism, discrimination, and marginalisation, dating from colonisation, through to modern day.²¹¹ Historically, Indigenous Australians have been subject to genocide, dispossession of land, forced assimilation into 'mainstream' society, and the forced removal of children from Indigenous families ('Stolen Generations') between the 1910s and 1970s.²¹²

In addition to the practice of forced child removal, Indigenous women's intersectional experiences of discrimination and abuse include widespread sexual abuse and rape, and eugenically informed birth

²⁰⁴ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [39], [40].

²⁰⁵ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) [33], [34]

²⁰⁶ UN Committee on the Rights of Persons with Disability, *Concluding Observations Australia*, UN Doc. CRPD/C/AUS/CO/1, (2013) 2-4;

²⁰⁷ UN General Assembly, Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Australia, UN Doc. A/HRC/38/47/Add.1 (17 April 2018).

²⁰⁸ Australian Senate, Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (November 2015).

²⁰⁹ See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'About the Royal Commission', *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Web Page, 2020)

<https://disability.royalcommission.gov.au/about-royal-commission>.

²¹⁰ Australian Institute of Health and Welfare, 'Indigenous Australians', *Australian Institute of Health and Welfare* (Web Page, 2020) <https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>.

²¹¹ On racism, see Gawaian Bodkin-Andrews and Bronwyn Carlson, 'The legacy of racism and Indigenous Australian identity within education' (2016) 19(4) *Race Ethnicity and Education* 784-807

<https://www.tandfonline.com/doi/pdf/10.1080/13613324.2014.969224?needAccess=true>.

²¹² Nathan Sentance, 'Genocide in Australia', *Australian Museum* (Web Page, 26 May 2020)

<https://australian.museum/learn/first-nations/genocide-in-australia/> ('Genocide in Australia'); Thalia Anthony and Harry Blag, 'Enforcing assimilation, dismantling Aboriginal families: a history of police violence in Australia', *The Conversation* (online, 19 June 2020)

<https://theconversation.com/enforcing-assimilation-dismantling-aboriginal-families-a-history-of-police-violence-in-australia-140637>;

Michael O'Loughlin, 'The Stolen Generation', *Australian Museum* (Web Page, 22 June 2020)

https://australian.museum/learn/first-nations/stolen-generation/?gclid=EAlaQobChMlxZ-avjOz6wIViX4rChlZhAcaEAAAYASAAEgJEZvD_BwE.

control.²¹³ Larissa Behrendt has observed that 'Aboriginal women were raped as part of the invasion process. Historically, the rape of Aboriginal women was an acceptable thing and it continues to be tolerated by the non-Aboriginal community.'²¹⁴ While the practice is not well-documented, Indigenous women have been sterilised without consent²¹⁵ and coerced into taking contraceptives not approved for use in Australia.²¹⁶ In light of the removal of children and sterilisation of women, Behrendt has observed that 'Aboriginal women were losing their right to be mothers; the right to be a mother was not an issue for white women who at this time were concerned with right to choose whether or not to be a mother at all by agitating for access to safe contraception and securing safe abortions.'²¹⁷

Indigenous Australians face ongoing barriers to accessing education and employment. Further, Indigenous persons are grossly overrepresented in criminal justice systems across Australian jurisdictions, are subject to police brutality, and in many instances have died in custody.²¹⁸ Aboriginal and Torres Strait Islanders also experience numerous physical and mental health issues which are often directly linked to intergenerational trauma, including: high rates of chronic illness, such as heart disease, diabetes, respiratory diseases and cancer; high incidence of physical and sexual violence against Aboriginal and Torres Strait Islander women and poor psychological health.²¹⁹

Notwithstanding the clear harms resulting from ongoing Indigenous marginalisation, the issue has not been formally categorised as an 'emergency' or 'crisis' at law or policy in Australian jurisdictions. Conversely however, numerous Indigenous advocacy and community organisations, academics and others have identified Indigenous marginalisation (including its various aspects and impacts, as well as Indigenous policy) as a 'crisis'.²²⁰ This crisis overlaps and intersects with other crises, such as bushfires and the COVID-19

²¹³ Aileen Moreton-Robinson, *Talkin' up to the White Women: Indigenous Women and Feminism* (University of Queensland Press, St Lucia, 2000) 171; Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal*. 27, 29-30; Emily Maguire, *This is What a Feminist Looks Like: the Rise and Rise of Australian Feminism* (National Library of Australia, Canberra 2019) 149-150.

²¹³ See i.e. Jackie Huggins, 'Black women and women's liberation', (1987) 13(1) *Hecate* 77; Aileen Moreton-Robinson, *Talkin' up to the White Women: Indigenous Women and Feminism* (University of Queensland Press, St Lucia, 2000) 171.

²¹⁴ Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal*. 27, 30.

²¹⁵ *Ibid*, 29-30.

²¹⁶ Aileen Moreton-Robinson, *Talkin' up to the White Women: Indigenous Women and Feminism* (University of Queensland Press, St Lucia, 2000) 171.

²¹⁷ Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *Australian Feminist Law Journal* 27, 30.

²¹⁸ Nathan Sentance, 'Genocide in Australia', *Australian Museum* (Web Page, 26 May 2020)

<<https://australian.museum/learn/first-nations/genocide-in-australia/>> .

²¹⁹ Australian Institute of Health and Welfare, 'Indigenous Australians', *Australian Government* (Web Page, 2020) <<https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>>; Australian Institute of Health and Welfare, 'Understanding Indigenous welfare and wellbeing', *Australian Government* (Web Page, 11 September 2019) <<https://www.aihw.gov.au/reports/australias-welfare/understanding-indigenous-welfare-and-wellbeing>>.

²²⁰ Larissa Behrendt, Miriam Jorgensen, and Alison Vivian, UTS Jumbunna, 'Self-Determination: Background Concepts' (Report, 15 December 2017), 31 <<https://www2.health.vic.gov.au/about/publications/ResearchAndReports/self-determination-background-concepts>>; National Aboriginal Community Controlled Health Organisation (NAACHO), 'Aboriginal Health History', NAACHO (Web Page, 2020) <<https://www.naccho.org.au/about/aboriginal-health-history/>>; Amnesty International, 'Australia: The Crisis of Indigenous Youth Detained in Australia - Joint Written Statement to HRC36', *Amnesty International Australia*, (Web Page, 21 August 2017) <<https://www.amnesty.org/en/documents/asa12/6960/2017/en/>>; Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>; Ian Anderson, 'The Crisis of Australia's Indigenous Policy' (2015) 74(3) *Meanjin* 54-59; Kerry McCallum, 'Indigenous Violence as a 'Mediated Public Crisis' (Conference Paper, ANZCA 2007 Conference Proceedings, 5-6 July 2007) <<https://webarchive.nla.gov.au/awa/20110708020528/http://pandora.nla.gov.au/pan/31914/20110708->

pandemic.²²¹ Indigenous marginalisation has, and continues to, impact women and girl's sexual and reproductive health rights in myriad ways. The following section will examine the law and policy frameworks around Indigenous marginalisation at a Commonwealth level, and within the Northern Territory, which has the highest proportion of Indigenous people²²² and a concerning track record managing the crisis.

Legal and Policy Framework

Commonwealth Law

There is currently no dedicated or comprehensive legal framework to manage the crisis of Indigenous marginalisation at a Commonwealth level. The systemic crisis does not prompt emergency powers, or any immediate action. Instead, there is patchwork of legislation relevant to some of aspects of Indigenous marginalisation. For example, the *Racial Discrimination Act 1975* (Cth) makes it unlawful to do any 'any act involving a distinction, exclusion, restriction or preference' against a person on the basis of race, colour, descent, national origin or ethnic origin, or immigrant status.²²³ Further, notwithstanding the fact that Australia is a party to the numerous international human rights treaties, there is limited incorporation of human rights in Commonwealth law, and no national bill of rights or similar document.²²⁴ As a result, the legal system 'offers minimal protection' to the 'most vulnerable and marginalised in [Australian] society, such as Indigenous peoples'.²²⁵ Instead, government action with respect to Indigenous marginalisation occurs at a policy level.

[1127/www.anzca.net/download-document/169-indigenous-violence-as-a-mediated-public-crisis.pdf](https://www.anzca.net/download-document/169-indigenous-violence-as-a-mediated-public-crisis.pdf)>; Sophie Cousins, 'Suicide in Indigenous Australians: a "catastrophic crisis"' (2017) 389(10066) *The Lancet* 242; Ali MC, 'Crisis of Aboriginal women in prison in Australia', *Al Jazeera* (online, 3 December 2019) <<https://www.aljazeera.com/indepth/features/crisis-aboriginal-women-prison-australia-191105183142685.html>>; Lorena Allam, 'Suicide crisis in remote Indigenous communities 'Australia's shame', Senate inquiry finds', *The Guardian* (online, 5 December 2018) <<https://www.theguardian.com/australia-news/2018/dec/05/suicide-crisis-in-remote-indigenous-communities-australias-shame-senate-inquiry-finds>>

²²¹ See i.e. F. Markham, D. Smith and F. Morphy (eds), 'Indigenous Australians and the COVID-19 Crisis: Perspectives on Public Policy' (Topical Issue No. 1/2020, ANU Centre for Aboriginal Economic Policy Research, 2020) <https://caepi.cass.anu.edu.au/sites/default/files/docs/2020/4/CAEPR_TI_no1_2020_Markham_Smith_Morphy.pdf>; Human Rights Law Centre, 'Over 200 organisations outline human rights concerns at outset of COVID crisis', *Human Rights Law Centre* (Web Page, 9 April 2020) <<https://www.hrlc.org.au/news/2020/4/9/upr-human-rights-concerns-covid-crisis>>; B. Williamson, F. Markham and J.K. Weir, 'Aboriginal Peoples and the Response to the 2019-2020 Bushfires' (Working Paper No. 134/2020, ANU Centre for Aboriginal Economic Policy Research, 2020) <<https://www.aidr.org.au/media/7718/aboriginal-people-and-the-response-to-the-2019-20-bushfires.pdf>>; Calla Willquist, 'Unprecedented' Australian bushfires directly affected one in eight Indigenous people', *The Guardian* (online, 18 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/18/unprecedented-australian-bushfires-directly-affected-one-in-eight-indigenous-people>>.

²²² See generally Australian Bureau of Statistics, Media Release, *2016 Census shows growing Aboriginal and Torres Strait Islander population* (27 June 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/MediaReleasesByCatalogue/02D50FAA9987D6B7CA25814800087E03?OpenDocument>>.

²²³ *Racial Discrimination Act 1975* (Cth) s 9.

²²⁴ Australian Human Rights Commission, 'Chapter 2 – An Aboriginal and Torres Strait Islander human rights protection framework for the 21st century: Social Justice Report 2008' in Australian Human Rights Commission, *Social Justice Report* (2008) <https://humanrights.gov.au/our-work/chapter-2-aboriginal-and-torres-strait-islander-human-rights-protection-framework-21st#Ch2_1_1>.

²²⁵ *Ibid.*

Commonwealth Policy

General Policies

(a) Closing the Gap

In 2008, the Commonwealth Government established the 'Closing the Gap' program, a policy that sought to reduce disadvantage for Aboriginal and Torres Strait Islander people in several key areas.²²⁶ The national policy called on Australian governments and Aboriginal and Torres Strait Islander peoples to 'work together to achieve equality in health status and life expectancy' for Indigenous Australians by 2030. The policy was formally commenced through the signing of the 'Indigenous Health Equality Statement of Intent'.²²⁷

The Council of Australian Governments (COAG) established measurable targets. These were:

- Close the gap in life expectancy by 2031;
- Halve the gap in child mortality by 2018;
- Ensure 95 percent of Aboriginal and Torres Strait Islander four-years-olds are enrolled in early childhood education by 2025;
- Halve the gap in reading, writing and numeracy by 2018;
- Halve the gap in year 12 attainment by 2020;
- Halve the gap in employment by 2018; and
- Close the gap in school attendance by 2018 (this target was added in May 2014).²²⁸

The Prime Minister reports yearly as to the progress achieving these targets. The yearly reviews however indicated little progress over time. 10 years on from commencement, a scathing review of the policy was published by the Closing the Gap Steering Committee which found that the policy was 'incompletely and incoherently implemented'.²²⁹ The Committee criticised the planning delays and failure to fund several initiatives, including the *National Aboriginal and Torres Strait Island Health Plan 2015*, the *National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017-2013*.²³⁰ It further condemned the absence of mechanisms to address the underlying determinants of health, such as national plan to address housing and health infrastructure, or building a primary health service 'according to need' and establish preventative, rather than merely responsive health mechanisms.²³¹ The Committee in their report stated that without a commitment to vital 'architecture' to address inequality, 'the closing the gap targets will measure nothing but the collective failure of Australian governments to work together to stay the course'.²³²

²²⁶ Australian Indigenous Health *Info.net*, 'Closing the Gap', Edith Cowan University (Web Page, 2020)

<[²²⁷ *Closing the Gap: Statement of Intent* \(20 March 2008\) <\[https://antar.org.au/sites/default/files/statement_intent_2008.pdf\]\(https://antar.org.au/sites/default/files/statement_intent_2008.pdf\)>](https://healthinfonet.ecu.edu.au/learn/health-system/closing-the-gap/#:~:text=Closing%20the%20Gap%20is%20a.%5B1%5D%5B2%5D.>.</p></div><div data-bbox=)

²²⁸ Australian Government, *Closing the Gap on Indigenous Disadvantage: The Challenge for Australia* (2008) 5 <[file:///Users/andreaJones/Downloads/closing_the_gap%20\(1\).pdf](file:///Users/andreaJones/Downloads/closing_the_gap%20(1).pdf)>.

²²⁹ Closing the Gap Steering Committee, *A Ten-year Review: The Closing the Gap Strategy and Recommendations for Reset* (2018) 4 <https://humanrights.gov.au/sites/default/files/document/publication/CTG%202018_FINAL-WEB.pdf> .

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

In 2016, ahead of the expiry of four of the seven targets in 2018, the Commonwealth Government commenced development of the 'Closing the Gap Refresh', a new agenda for the implementation of the Closing the Gap policy. The refresh recognised the importance of establishing a 'genuine formal partnership' with Aboriginal and Torres Strait Islander peoples 'in order to effect real change'.²³³ Subsequently, a partnership between Australian Governments and the 'Coalition of Aboriginal and Torres Strait Island Peak Organisations' (Coalition of Peaks) was officially formalised in 2018 through the 'Partnership Agreement on Closing the Gap 2019-2029'.²³⁴

In July 2020, the National Agreement on Closing the Gap (the National Agreement) came into force.²³⁵ The National Agreement was developed by the partnership, and established 16 new targets, including the following:

1. Close the Gap in life expectancy within a generation, by 2031;
- 2. Increase the proportion of Aboriginal and Torres Strait Islander babies with a healthy birthweight to 91 per cent, by 2031;**
3. Increase the proportion of Aboriginal and Torres Strait Islander children enrolled in Year Before Fulltime Schooling (YBFS) early childhood education to 95 per cent by 2025;
4. Increase the proportion of Aboriginal and Torres Strait Islander children assessed as developmentally on track in all five domains of the Australian Early Development Census (AEDC) to 55 per cent, by 2031;
5. Increase the proportion of Aboriginal and Torres Strait Islander people (age 20-24) attaining year 12 or equivalent qualification to 96 per cent, by 2031;
6. Increase the proportion of Aboriginal and Torres Strait Islander people aged 25-34 years who have completed a tertiary qualification (Certificate III and above) to 70 per cent, by 2031;
7. Increase the proportion of Aboriginal and Torres Strait Islander youth (15–24 years) who are in employment, education or training to 67 per cent, by 2031;
8. Increase the proportion of Aboriginal and Torres Strait Islander people aged 25–64 who are employed to 62 per cent, by 2031;
9. Increase the proportion of Aboriginal and Torres Strait Islander people living in appropriately sized (not overcrowded) housing to 88 per cent, by 2031;

²³³ Council of Australian Governments, *COAG Statement on the Closing the Gap Refresh* (12 December 2018) <<https://www.coag.gov.au/sites/default/files/communique/coag-statement-closing-the-gap-refresh.pdf>>.

²³⁴ Council of Australian Governments, *Partnership Agreement on Closing the Gap 2019-2029* (22 March 2019) <https://www.coag.gov.au/sites/default/files/agreements/partnership-agreement-on-closing-the-gap_0.pdf>.

²³⁵ Australian Government, 'History of Closing the Gap', *Australian Government* (Web Page, 2020) <<https://www.closingthegap.gov.au/history>>.

10. **Reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent, by 2031;**
11. **Reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by at least 15 per cent, by 2031;**
12. **Reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45 per cent, by 2031;**
13. **A significant and sustained reduction in violence and abuse against Aboriginal and Torres Strait Islander women and children towards zero;**
14. Significant and sustained reduction in suicide of Aboriginal and Torres Strait Islander people towards zero;
15.
 - a. A 15 per cent increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests, by 2030;
 - b. A 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea, by 2030; and
16. A sustained increase in number and strength of Aboriginal and Torres Strait Islander languages being spoken, by 2031.²³⁶

The most recent Closing the Gap report, tabled by Prime Minister Scott Morrison, emphasised the positive policy shift away from targets set by governments, to those determined by Aboriginal and Torres Strait Islander peoples themselves.²³⁷ Nevertheless, 12 years on from the commencement of Closing the Gap, *only two* targets are considered to be 'on track': the target to have 95% of Indigenous 4 year-old enrolled in early childhood education by 2025, and the target to half the gap in high school qualification attainment for Indigenous Australians aged 20-24.²³⁸

Policies specific to SRHR

(a) Blood Borne Viruses and Sexually Transmissible Infections

The Commonwealth Government has a number of policies in place to address the prevalence of blood borne viruses (BBV) and sexually transmissible infections (STI) in Indigenous communities. These are:²³⁹

²³⁶ Australian Government, 'Closing the Gap Targets and Outcomes', *Australian Government* (Web Page, 2020)

<<https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>>.

²³⁷ Scott Morrison, Prime Minister, *Closing the Gap Report: 2020* (2020) 3-4

<<https://ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf>>.

²³⁸ Ibid 11.

²³⁹ Australian Department of Health, *National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (Fifth) 2018–2022* (2018) 4 <[https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1//\\$File/ATSI-Fifth-Nat-Strategy-2018-22.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1//$File/ATSI-Fifth-Nat-Strategy-2018-22.pdf)>.

- The Fifth National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (BBV and STI Strategy);
- The Third National Hepatitis B Strategy 2018–2022;
- The Fourth National STI Strategy 2018–2022;
- The Fifth National Hepatitis C Strategy 2018–2022; and
- The Eighth National HIV Strategy 2018–2022.

The current strategies build on preceding strategies, which commenced in 2010.²⁴⁰ Each strategy contains guiding principles, goals, targets and priority areas for the management of their primary health concern of focus.²⁴¹ These areas include education and prevention, testing, treatment and management, access and coordination of care, supporting workforce, improving data and surveillance and addressing stigma and discrimination.²⁴² The Commonwealth suite of policies to address BBVs and STIs is intended to complement policies implemented by states and territories in their given jurisdictions.²⁴³ The strategies adopt a partnership approach, working with the Aboriginal Community Controlled Health (ACCH) sector, including Aboriginal Community Controlled Health Services (ACCHS) and ACCH sector support organisations and community organisations at the national, state and territory level.²⁴⁴ Supporting the above strategies is also the *Enhanced Response to Addressing Sexually Transmissible Infections (and Blood Borne Viruses) in Indigenous Populations* (2017), which is currently focused on addressing the concerning syphilis outbreak in remote northern and central Australia (see below).²⁴⁵

The outcomes of the most recent strategies have yet to be published. However, assessments of the preceding policies indicate some progress in the area of BBVs and STIs with notifications of chlamydia, gonorrhoea, hepatitis B and genital warts decreasing between 2012 and 2016.²⁴⁶ Importantly however, cases of Indigenous Australians presenting with syphilis, hepatitis C and HIV have continued to increase.²⁴⁷

²⁴⁰ See Kirby Institute, *National Blood-borne Virus and Sexually Transmissible Infections Surveillance and Monitoring Report 2011* (2011) <https://kirby.unsw.edu.au/sites/default/files/kirby/report/SERP_National-BBV%26STI-Surveillance%26Monitoring-Report-2011.pdf>.

²⁴¹ Ibid.

²⁴² Ibid 16.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Australian Department of Health, *Enhanced response to addressing sexually transmissible infections (and blood borne viruses) in Indigenous populations* (November 2017) <[https://www1.health.gov.au/internet/main/publishing.nsf/Content/71E8A32E7518E532CA25801A0009A217/\\$File/Action-Plan-May18.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/71E8A32E7518E532CA25801A0009A217/$File/Action-Plan-May18.pdf)>.

²⁴⁶ Australian Department of Health, *National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (Fifth) 2018–2022* (2018) 18-19 <[https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/\\$File/ATSI-Fifth-Nat-Strategy-2018-22.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1/$File/ATSI-Fifth-Nat-Strategy-2018-22.pdf)> .

²⁴⁷ Ibid.

Other measures include vaccine programs for STIs. For example, since the introduction of the human papilloma virus (HPV) vaccine in 2007, Australia has seen a 96% reduction of genital warts in women.²⁴⁸ The introduction of the vaccine in schools, and the implementation of a renewed screening program for HPV means that the risk of related diseases including cervical cancer have decreased.²⁴⁹

(b) Maternal Health

There are few policies exclusively dedicated to improving Aboriginal and Torres Strait Islander maternal health. Instead, some existing frameworks incorporate aspects directed at improving maternal health outcomes for Indigenous women.

In 2019, for example, the Council of Australian Governments released *Woman-centred care Strategic directions for Australian maternity services*, an overarching national strategy to improve maternity care in Australia. The strategy calls for the adoption of several critical approaches relevant to Indigenous women, including:

- Development, provision and maintenance of access to information about available maternity services;
- Development and implementation of culturally-safe and appropriate evidence-based models of care in partnership with Aboriginal and Torres Strait Islander people and communities;
- Development and support of a maternity workforce that reflects cultural diversity;
- The co-design and delivery of services around the needs and desires of women and communities;
- Provision of individualised information and appropriate care, based on high-quality evidence, during the perinatal period;
- Provision of respectful, holistic healthcare in line with women's choices, experiences and desired outcomes, informed by woman-reported data;
- Provision of mental health support to reduce morbidity and mortality relating to poor perinatal health; and
- Reduction of stillbirths and maternal and neonatal morbidity and mortality, in partnership with women.²⁵⁰

Further, the national *Pregnancy Guidelines 2019*, a resource developed by the Commonwealth Government to guide medical practitioners in delivery of maternal health services dedicates a chapter to 'pregnancy care for Aboriginal and Torres Strait Islander women'. The chapter discusses important issues relating to the delivery of maternal healthcare for Indigenous women, including the need to understand context, the importance of cultural safety, taking an individualised approach to care, providing adequate and relevant information to Indigenous mothers, and where possible, involving Aboriginal and Torres Strait Islander health professionals to facilitate understanding and coordinate care.²⁵¹ The chapter also goes on to discuss issues relevant to Indigenous patients, including the importance of birthing on country, and the prevalence

²⁴⁸ Deborah J Bateson et al. 'The Gutmacher-Lancet Commission on sexual and reproductive health and rights: how does Australia measure up?' (2019) *Medical Journal of Australia* 210:6 250-252.

²⁴⁹ Ibid.

²⁵⁰ Council of Australian Governments Health Council, *Woman-centred care: Strategic directions for Australian maternity services* (August 2019) <<https://www.health.gov.au/sites/default/files/documents/2019/11/woman-centred-care-strategic-directions-for-australian-maternity-services.pdf>>.

²⁵¹ Australian Department of Health, *Clinical Practice Guidelines: Pregnancy Care* (2019) 30-36 <<https://www.health.gov.au/resources/pregnancy-care-guidelines>>.

of adolescent pregnancy in Indigenous communities. Finally, the chapter highlights programs from state and territory jurisdictions that have seen some improvement of outcomes and suggests possible strategies to achieve the same at a national level. Importantly however, Pregnancy Guidelines are just that – guidelines – so there is no determinative or binding force behind the policy document.

Other programs not specifically directed towards Indigenous women, but that may benefit some Indigenous women include the ‘Pregnancy, Birth and Baby’ hotline, which provides information, guidance and support to women, including those in rural or remote areas for the first 5 years of a baby’s life; and the maintenance of national maternal and perinatal data by the Australian Institute of Health and Welfare.²⁵²

The Commonwealth Government has also established the *Australian Nurse-Family Partnership Program*, a nurse-led home visitation program to support pregnant Aboriginal and Torres Strait Islander mothers, or mothers whose partner are Aboriginal or Torres Strait Islanders.²⁵³ The program is delivered by 11 Aboriginal Controlled Community Health organisations and sees home nurses and Nurse and Family Partnership Workers (FPWs) regularly visit expectant mothers during the early stages of pregnancy, through to the child’s second birthday.²⁵⁴ The program seeks to support healthy pregnancies and promote confident parenting in culturally safe ways.²⁵⁵

(c) Birthing and Stillbirths

In 2018, the Commonwealth Government established the ‘Select Committee on Stillbirth Research and Education’ to investigate the prevalence of stillbirths in Australia. The Committee tabled its report in December that year and highlighted the high incidence of stillbirths for Aboriginal and Torres Strait Islander women (see below).²⁵⁶ The Committee included 16 recommendations for the government. Notably, none of the recommendations were expressly directed at addressing the disproportionate impact of stillbirths on Indigenous women and families. Instead, some of the recommendations generally promoted increased provision of culturally appropriate information, service and support.

In 2020, the Commonwealth Government also opened for public comment on the draft *National Stillbirth Action and Implementation Plan*.²⁵⁷ The plan aims to reduce the number of stillbirths in Australia by 20% over 5 years.²⁵⁸ The plan also recognises that Aboriginal and Torres Strait Islander peoples continue to face a higher risk of stillbirths.²⁵⁹

²⁵² Australian Department of Health, ‘Maternity Services and Stillbirth Prevention’, *Australian Government* (Web Page, 26 June 2020) <<https://www.health.gov.au/internet/main/publishing.nsf/Content/pacdb-pdb-maternity>>.

²⁵³ Australian Nurse Family Partnership Program, ‘About the ANFPP’, *Australian Nurse and Family Partnership Program* (Web Page, 2020) <<https://www.anfpp.com.au/about>>.

²⁵⁴ Australia Nurse-Family Partnership Program, ‘How it works’, *Australian Nurse-Family Partnership Program* (Web Page, 2020) <<https://www.anfpp.com.au/how-it-works>>.

²⁵⁵ *Ibid.*

²⁵⁶ Senate Select Committee on Stillbirth Research and Education, *Final Report* (2018) xv-xviii <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Stillbirth_Research_and_Education/Stillbirth/~media/Committees/stillbirth_ctte/report.pdf>.

²⁵⁷ Australian Department of Health, *Aboriginal and Torres Strait Islander Health Partnership Forums Australian Government Department of Health Update* (July 2020) 8 <<https://www.health.gov.au/sites/default/files/documents/2020/07/aboriginal-and-torres-strait-islander-health-partnership-forums-update-july-2020.pdf>>.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

Policies that intersect with other crises

(a) Responses to COVID-19

The Australian Government has established the 'Aboriginal and Torres Strait Islander Advisory Group on COVID-19' to provide culturally appropriate advice and guide the Department of Health with regard to protecting Indigenous individuals and communities during COVID-19.²⁶⁰ The taskforce includes the National Aboriginal Community Controlled Health organisation and its affiliates, Aboriginal Health Services, the Australian Indigenous Doctors Association and the National Indigenous Australians Agency.²⁶¹ The Advisory Group exists in order to ensure that the Australian Government's COVID-19 response 'considers Aboriginal and Torres Strait Islander perspective and needs'.²⁶² So far, the group has developed a management plan for Indigenous communities and translated key health advice into 52 languages.²⁶³

The Australian Government has also provided funding to NAACHO and sector support organisations to set up 100 General Practice respiratory clinics across Australia, including in rural and regional areas.²⁶⁴ The GPs will be operated by Aboriginal and Torres Strait Islander Community Controlled Health services and are intended to 'improve culturally safe access to GP clinics and COVID-19 testing for Indigenous Australians'.²⁶⁵

Other initiatives include 'COVID-19 epidemiology' training for Aboriginal and Torres Strait Islander health practitioners; travel restrictions designed to protect remote Indigenous communities from infection; and culturally appropriate mental health support for COVID-19 in conjunction with Gayaa Dhuwi Australia, a new national mental health and suicide prevention body governed by Indigenous experts, to support wellbeing in Indigenous communities.²⁶⁶

(b) Responses to the Bushfire Crisis

The Commonwealth government has also provided funding to NAACHO to support Aboriginal and Torres Strait Islander peoples impacted by the 2019-20 bushfires through the provision of culturally appropriate mental health services. As of July 2020, 13 Aboriginal Community Controlled Health Services have received funding to provide emergency distress and trauma counselling, social support and provide community grants to 'strengthen social connectedness and resilience' in Indigenous communities.²⁶⁷

²⁶⁰ Australian Government, 'Aboriginal and Torres Strait Islander Advisory Group on COVID-19', *Australian Government* (Web Page, 2020) <<https://www.health.gov.au/committees-and-groups/aboriginal-and-torres-strait-islander-advisory-group-on-covid-19>>.

²⁶¹ Australian Department of Health, 'Aboriginal and Torres Strait Islander Health Partnership Forums: Australian Government Department of Health Update' (Report, Australian Government, July 2020) <<https://www.health.gov.au/sites/default/files/documents/2020/07/aboriginal-and-torres-strait-islander-health-partnership-forums-update-july-2020.pdf>>.

²⁶² Ibid.

²⁶³ Ibid; See also Australian Department of Health, *Management Plan for Aboriginal and Torres Strait Islander Populations* (July 2020) <<https://www.health.gov.au/sites/default/files/documents/2020/07/management-plan-for-aboriginal-and-torres-strait-islander-populations.pdf>>.

²⁶⁴ Australian Department of Health, 'Aboriginal and Torres Strait Islander Health Partnership Forums: Australian Government Department of Health Update' (Report, Australian Government, July 2020) <<https://www.health.gov.au/sites/default/files/documents/2020/07/aboriginal-and-torres-strait-islander-health-partnership-forums-update-july-2020.pdf>>.

²⁶⁵ Ibid.

²⁶⁶ Ibid 4-7. See also Gayaa Dhuwi (Proud Spirit) Australia (Web Page, 2020) <<https://www.gayaadhuwi.org.au/>>.

²⁶⁷ Ibid 6.

Impacts on SRHR

Sexual Health Education

Aboriginal and Torres Strait Islander peoples face considerable barriers to effective and culturally appropriate education regarding sexual and reproductive health. Firstly, Indigenous Australian generally experience greater disadvantage than their non-Indigenous counterparts. This can have flow on effects including limited access to culturally appropriate sexual education in some schools, as well as lower general school attendance rates for students.²⁶⁸ Cultural barriers can also impact access to adequate sexual and reproductive health education. For example, for a number of Indigenous communities, there is a separation of 'men's business' and 'women's business' which can impact on access to critical sexual health information.²⁶⁹ Research also indicates that young Indigenous persons also experience 'shame' around discussing sensitive issues such as sexual and reproductive health.²⁷⁰

Menstrual Health

Indigenous women in Australia face considerable barriers to adequate menstrual health. A 2019 study found that Indigenous women, both young and mature encountered educational, access and privacy issues relating to menstruation.²⁷¹ Indigenous participants identified a 'lack of comprehensive puberty education' and information on menstruation and menstrual hygiene. In addition, they reported an absence of culturally-sensitive information on puberty for both girls and boys. Participants went on to highlight the high financial cost of sanitary items (often much higher in remote communities), and lack of female friendly infrastructure (such as working toilets and accessible disposal facilities) as further access barriers for Aboriginal and Torres Strait Islander women. Privacy issues resulted from overcrowded housing, living across multiple residences, and lack of space to keep personal items. This was especially the case for certain groups, such as young mothers, Indigenous students living in boarding schools and those who were homeless. Further Indigenous women described shame, stigma and secrecy surrounding menstruation as compounding the challenges they faced during menstruation.

Research into water, sanitation and hygiene in remote Indigenous communities has found that a lack of infrastructure led to girls missing school for several days each month. An indigenous organisation representative spoke of girls missing school during menstruation:

Mothers and grandmothers have said that girls are missing school when they have their periods...because they don't want to change [pads] at school ...often there's no soap ...there's often no rubbish bins or there's one rubbish bin outside the toilet which is really embarrassing to use. In terms of the infrastructure that I can put in place to help girls, it's rubbish bins, it's soap, it's running water and toilets that flush, and privacy.²⁷²

²⁶⁸ Sarah Larkins et al, 'Attitudes and behaviours of young Indigenous people in Townsville concerning relationships, sex and contraception: the "U Mob Yarn Up" project' (2007) 186(1) *Medical Journal of Australia* 513, 513.

²⁶⁹ Australasian Society for HIV Medicine (ASHM), 'Djiyadi - Can we talk?' (Report, 2011) 8,11, 29 <<https://www.ashm.org.au/products/product/1976963384>>.

²⁷⁰ Sarah Larkins et al, 'Attitudes and behaviours of young Indigenous people in Townsville concerning relationships, sex and contraception: the "U Mob Yarn Up" project' (2007) 186(1) *Medical Journal of Australia* 513, 513.

²⁷¹ Emily Krusz et al, 'Menstrual health and hygiene among Indigenous Australian girls and women: barriers and opportunities' (2019) 19 *BMC Women's Health* 146, 4-5 <<https://bmcwomenshealth.biomedcentral.com/track/pdf/10.1186/s12905-019-0846-7>>.

²⁷² Nina Hall et al, 'Water, Sanitation and Hygiene in Remote Indigenous Australia: A Scan of Priorities' (Discussion Paper, University of Queensland Global Change Institute, July 2017) 38 <https://gci.uq.edu.au/filetbing/get/13903/UQ_WASH%20scan%20in%20Indig%20Communities-FCNAL-LR-2.pdf>.

Access to Contraceptives

Indigenous women and girls often experience barriers to accessing effective contraceptives. These include a lack of adequately trained and resourced workforce to implement culturally appropriate sexual health education programs; access to sexual 'health hardware' such as condoms; and issues surrounding the reduced effectiveness of contraceptives when alcohol and drugs are involved.²⁷³ In addition, Indigenous women living in rural and remote Australia typically have limited access to health services, and choice in providers.²⁷⁴ Further, while long-acting contraception has been identified as effective at reducing rates of unintended pregnancies among women experiencing socio-economic disadvantage, take-up of such contraceptives has been slow in Australia in comparison to Europe and elsewhere.²⁷⁵

Blood Borne Viruses and Sexually Transmitted Infections

Aboriginal and Torres Strait Islander peoples are disproportionately impacted by BBVs and STIs.²⁷⁶ Indigenous persons have substantially higher rates of BBVs such as Human Immunodeficiency Virus (HIV) and STIs such as chlamydia, gonorrhoea, hepatitis B and C, and syphilis.²⁷⁷ For example, cases of gonorrhoea are seven times more common in Indigenous persons than non-Indigenous persons overall.²⁷⁸ In addition, cases of chlamydia are three times more common in Indigenous persons in metropolitan areas, and five times more common in remote areas.²⁷⁹ Approximately 80% of Indigenous persons that are diagnosed with an STI are diagnosed in outer regional and remote areas of Australia, notwithstanding that only a quart of the Aboriginal and Torres Strait Islander population lives there.²⁸⁰

The Australian Government has identified the ongoing syphilis outbreak in Aboriginal and Torres Strait Islander communities in northern and central Australia as of particular concern.²⁸¹ The syphilis outbreak is predominantly impacting 15-29 year-old Indigenous persons and has 'considerable public health implications', including increased risk of congenital syphilis (passed on from mothers with syphilis to newborns).²⁸²

²⁷³ Natalie A Strobel and James Ward, 'Education programs for Indigenous Australians about sexually transmitted infections and bloodborne viruses', *Australian Government* (Report, May 2012) <<https://www.aihw.gov.au/getmedia/00250e14-7b83-4da8-994e-723a25d96ab7/ctgc-rs14.pdf.aspx?inline=true>>.

²⁷⁴ Sarah Larkin and Priscilla Page, 'Access to contraception for remote Aboriginal and Torres Strait Islander women: necessary but not sufficient' (2016) 205(1) *Medical Journal of Australia* 18, 18-19.

²⁷⁵ Ibid.

²⁷⁶ Australian Department of Health, *National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (Fifth) 2018–2022* (2018) 4 <<https://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1//File/ATSI-Fifth-Nat-Strategy-2018-22.pdf>>.

²⁷⁷ Ibid; See also Kirby Institute, *Bloodborne viral and sexually transmissible infections in Aboriginal and Torres Strait Islander people: Annual surveillance report 2018* (2018) <https://kirby.unsw.edu.au/sites/default/files/kirby/report/KI_Aboriginal-Surveillance-Report-2018.pdf>.

²⁷⁸ Morgan Liotta, 'Sexual health education for Aboriginal and Torres Strait Islander peoples', *Royal Australian College of General Practitioners* (Article, 18 March 2018) <<https://www.racgp.org.au/newsgp/racgp/sexual-health-education-for-aboriginal-and-torres>>.

²⁷⁹ Ibid.

²⁸⁰ James S. Ward et al, 'Setting the record straight: sexually transmissible infections and sexual abuse in Aboriginal and Torres Strait Islander communities' (2020) 212(5) *Medical Journal of Australia* 205, 205.

²⁸¹ Australian Department of Health, Australian Department of Health, *National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (Fifth) 2018–2022* (2018) 6 <<https://www.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1//File/ATSI-Fifth-Nat-Strategy-2018-22.pdf>>.

²⁸² Australian Department of Health, Enhanced response to addressing sexually transmissible infections (and blood borne viruses) in Indigenous populations (November 2017) 3 <<https://www.health.gov.au/internet/main/publishing.nsf/Content/71E8A32E7518E532CA25801A0009A217/File/Action-Plan-May18.pdf>>.

There are number of factors that have been identified as contributing to the disproportionate impact of BBVs and STIs in Indigenous communities, including intergenerational trauma; racism; historical discriminatory practices that created disadvantage that has been passed between generations; lower health literacy; lack of culturally respectful health education; other cultural issues; and lower levels of employment and income .²⁸³ Further, the ongoing discrimination towards Indigenous Australian, and the stigma surrounding BBV and STI increase the risks and burden of these illness for Aboriginal and Torres Strait Islander peoples.²⁸⁴

Adolescent Pregnancy

Adolescent pregnancy rates are higher among young Indigenous women than their non-Indigenous counterparts.²⁸⁵ These rates are particularly high for Indigenous women living in remote to very remote areas.²⁸⁶ In part this has been attributed to lower rates of contraceptive use among Indigenous youth.²⁸⁷ A 2015 research study into sexual and reproductive health in young people in Australia and New Zealand found that adolescent mothers that are not adequately supported risk negative personal impacts, including lower education attainment, lower self-esteem, and increased risk of intimate partner violence, depression and substance abuse.²⁸⁸ In addition, children born to adolescent mothers also face a higher risk of intergenerational teenage parenthood and socio-economic disadvantage.²⁸⁹ Young mothers also may face barriers to accessing prenatal support, and as a result may access reproductive healthcare later.²⁹⁰

Prenatal, Perinatal and Neonatal Healthcare

Aboriginal and Torres Strait Islander women in Australia face numerous barriers to adequate and appropriate prenatal, perinatal and neonatal healthcare. Indigenous women have reported receiving prenatal care that included conflicting or insufficient information from different healthcare professionals.²⁹¹ Such experiences are particularly likely for women who are birthing far from home.²⁹² Further, women living in rural areas experience difficulties accessing services as a result of geographic isolation.²⁹³

²⁸³ Australian Department of Health, *National Aboriginal and Torres Strait Islander Blood Borne Viruses and Sexually Transmissible Infections Strategy (Fifth) 2018–2022* (2018) 6 <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-bbvs-1//File/ATSI-Fifth-Nat-Strategy-2018-22.pdf>>; James S. Ward et al, 'Setting the record straight: sexually transmissible infections and sexual abuse in Aboriginal and Torres Strait Islander communities' (2020) 212(5) *Medical Journal of Australia* 205, 206.

²⁸⁴ Ibid.

²⁸⁵ Jan Savage, Aboriginal adolescent sexual and reproductive health programs: a review of their effectiveness and cultural acceptability (2018) 11 <<https://www.health.nsw.gov.au/research/Documents/11-aboriginal-adolescent-sexual-and-reproductive-health-prog.pdf>>; Sarah Larkins et al, 'Attitudes and behaviours of young Indigenous people in Townsville concerning relationships, sex and contraception: the "U Mob Yarn Up" project' (2007) 186(1) *Medical Journal of Australia* 513, 516.

²⁸⁶ National Aboriginal Community Controlled Health Organisation (NAACHO), 'Teenage mothers in Australia 2015', NAACHO (Report, May 2018) <<https://nacchocommunique.com/2018/05/02/naccho-aboriginal-health-and-teenage-pregnancy-maternalmhmatters-download-aihw-report-indigenous-teenage-mothers-almost-twice-as-likely-to-smoke-during-pregnancy-as-non-indigenous-mothers-sis/>>.

²⁸⁷ Ibid.

²⁸⁸ Royal College of Australasian Physicians, *Sexual and Reproductive Health Care for Young People* (2015) 21 <https://www.racp.edu.au/docs/default-source/policy-and-advocacy/achshm/sexual-and-reproductive-health-care-for-young-people-position-statement.pdf?sfvrsn=f0d0331a_2>.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Australian Women's Health Network, *Women and Sexual and Reproductive Health: Second Edition* (2019) 21 <https://awhn.org.au/wp-content/uploads/2019/04/AWHN_WomenSRHP_2019_02.pdf>.

²⁹² Ibid.

²⁹³ Ibid.

Birth and Still Births

Australia's National Maternity Services Plan (NMSP) notes that while Australia is 'one of the safest countries in which to give birth or be born...this is not the case for Aboriginal and Torres Strait Islander peoples'.²⁹⁴ Indeed, there is a disproportionate incidence of 'adverse perinatal outcomes' for Indigenous mothers and their babies, as compared to non-Indigenous mothers and babies.²⁹⁵ This includes higher rates of maternal mortality (13.8 per 100,000 women), pre-term births (140 per 1000 births), low birth weight (118 per 1000 births) and perinatal deaths (14 per 1000 births).²⁹⁶ There are numerous factors that contribute to adverse outcomes during pregnancy, including the following:²⁹⁷

- **Socio-economic factors:** many Indigenous women experience lower education levels, higher unemployment, lower education levels, inadequate housing and sanitation, as well as increased contact with the criminal justice system;
- **Health factors:** Indigenous women are vulnerable to numerous chronic health concerns including diabetes, heart disease, infections, injuries and poor mental health. Many Indigenous women also experience psychosocial stressors from trauma, violence, illness, financial pressures, incarceration, poor nutrition and harmful levels of alcohol intake and smoking.
- **Racism and Inequality:** racism has been described as a 'double burden' for Aboriginal and Torres Strait Islander women. Institutionalised racism, the enduring impacts of colonisation and social exclusion impact on women's' ability to access to timely and effective health care services.²⁹⁸

Cultural safety is also a key concern for Aboriginal and Torres Strait Islander mothers. These mothers experience a lack of cultural safety because health practices in Australia generally 'reflect western medical values and perceptions of health, risk and safety'.²⁹⁹ As a result, Indigenous women are often unable to access healthcare that appropriately accounts for power relations and cultural differences.³⁰⁰ Academics have emphasised that 'achieving culturally competent maternity services is key to improve maternity care and good health for mothers and babies'.³⁰¹

Indigenous women living in remote areas are also often denied the ability to give birth 'on country'. This refers to the practice of an Aboriginal mother giving birth to her child on the lands of her ancestors 'ensuring a spiritual connection to the land for her baby'.³⁰² The lack of adequate health services in remote areas, as well as the limited number of Aboriginal midwives instead see many Indigenous women travelling

²⁹⁴ Sue Kildea et al, 'Improving maternity services for Indigenous women in Australia: moving from policy to practice' (2016) 205(8) *Medical Journal of Australia* 375, 375.

²⁹⁵ Australian Department of Health, 'Pregnancy Care Guidelines: Pregnancy care for Aboriginal and Torres Strait Islander women', *Australian Government* (Web Page, 16 May 2019) <<https://www.health.gov.au/resources/pregnancy-care-guidelines/part-a-optimising-pregnancy-care/pregnancy-care-for-aboriginal-and-torres-strait-islander-women>>.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ Sue Kildea et al, 'Improving maternity services for Indigenous women in Australia: moving from policy to practice' (2016) 205(8) *Medical Journal of Australia* 375, 375.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid* 376.

³⁰² Natalia Dragon, 'Birthing on Country: Improving Aboriginal & Torres Strait Islander infant and maternal health', *Australian Nursing and Midwifery Journal* (Article, 10 February 2019) <<https://anmj.org.au/birthing-on-country-improving-indigenous-health/>>.

to metropolitan areas to receive reproductive care and support.³⁰³ This, however, has important cultural implications:

*'When a woman gives birth off country, away from ancestral homelands, the belief is that it breaks the child's spiritual place in the community raising emotional, social and spiritual issues for the mother and child.'*³⁰⁴

The need to travel to more metropolitan areas also results in increased clinical and medical risks such as not attending prenatal care appointments and presenting late in labour.³⁰⁵ Further, pregnant women that are away from community and their other children are susceptible to anxiety, stress and depression and often experience concerns that their other children may be vulnerable to child protection services in their absence.³⁰⁶

Aboriginal and Torres Strait Islander women also experience stillbirths at double the rate of non-Indigenous women in Australia (approximately 13 per 1000 births).³⁰⁷ There are various factors which contribute to this, including obesity, maternal smoking, diabetes, hypertension, syphilis infection, perinatal infections, foetal growth restrictions, which disproportionately impact Indigenous women, particularly those in rural and remote areas.³⁰⁸

Violence, Rape and Sexual Assault

Aboriginal women and children disproportionately experience domestic and family violence in Australia.³⁰⁹ For example, Aboriginal women are 35 times more likely to be hospitalised resulting from domestic and family violence.³¹⁰ Indigenous women are also 10 times more likely to be killed from violent assault than their non-Indigenous counterparts. These numbers are even higher in rural and remote communities, with reports indicating that Indigenous women are up to 80 times more likely to experience such violence.³¹¹ Further, it is estimated that 90% of all violence against Indigenous women is not reported to police.³¹²

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ S. Ireland et al, 'Niyith Niyith Watmum (the quiet story): exploring the experiences of Aboriginal women who give birth in their remote community' (2011) 27 *Midwifery* 634-641; N. Ramsey, 'Indigenous birthing in remote locations: Grandmothers, Law and government medicine' in O. Best and B. Fredericks B (eds) *Yatdjuligin, Aboriginal and Torres Strait Islander Nursing and Midwifery Care* (Cambridge University Press, 2014)102-119.

³⁰⁶ Sue Kildea et al, 'Improving maternity services for Indigenous women in Australia: moving from policy to practice' (2016) 205(8) *Medical Journal of Australia* 375, 376.

³⁰⁷ Senate Select Committee on Stillbirth Research and Education, Final Report (2018) 5, 13 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Stillbirth_Research_and_Education/Stillbirth/~media/Committees/stillbirth_ctte/report.pdf>.

³⁰⁸ Ibid 14-15.

³⁰⁹ Shawana Andrews, 'At Risk Aboriginal Women and Children Forgotten in Crisis', *Melbourne University (The Pursuit)* (Blog, 21 April 2020) <<https://pursuit.unimelb.edu.au/articles/at-risk-aboriginal-women-and-children-forgotten-in-crisis>>.

³¹⁰ Australian Government, *National Plan to Reduce Violence against Women and their Children 2010-2022* (2010) 1, 20 <https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf>.

³¹¹ Angela Spinney and Kyllie Cripps, 'FactCheck Q&A: are Indigenous women 34-80 times more likely than average to experience violence?', *The Conversation* (online, 4 July 2016) <<https://theconversation.com/factcheck-qanda-are-indigenous-women-34-80-times-more-likely-than-average-to-experience-violence-61809>>.

³¹² Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 10 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.

Scholars have emphasised that the ‘causes’ or contributing factors to the disproportionate rates of violence against Indigenous women must be understood in the unique context of Aboriginal and Torres Strait Islanders experience in Australia, and the history of colonisation. To illustrate:

‘collective dispossession; the loss of land and traditional culture; the fragmentation of kinship systems and Aboriginal law; poverty and unemployment; structural racism; drug and alcohol misuse; institutionalisation; and the decline of traditional Aboriginal men’s role and status [means that] while “powerless” in relation to mainstream society, Indigenous men may seek compensation by exerting power over women and children’.³¹³

In addition, alcohol and substance abuse has also been identified as ‘precipitating violence’.³¹⁴ Other reports indicate that the remoteness of some communities means that women have limited access to protection from police. In other instances, Indigenous women may face abuse at the hands of police.³¹⁵

Indigenous women who had experience domestic violence are more likely to report high to very high levels of psychological distress, develop a mental health condition, experience homelessness at some time in their life, and were less likely to trust police in their local area or get support outside their household in a time of crisis.³¹⁶

Incarceration

Indigenous women and girls in Australia face disproportionate contact with the criminal justice system in all Australian jurisdictions. While Indigenous women make up only 2% of the female population in Australia, they account for approximately 34% of female prison populations.³¹⁷ This percentage is even higher in some jurisdictions such as Western Australia, where Indigenous women accounted for 86% of the female prison population in 2016.³¹⁸ Indigenous women are also the fastest growing prison population in the country.³¹⁹ According to the Australian Law Reform Commission, the incarceration rate for Aboriginal women in Australia has risen by a staggering 148% since 1991.³²⁰

Indigenous women typically enter the criminal justice system at a younger age than non-Indigenous women and are twice as likely to return to prison post-release.³²¹ Female Indigenous offenders are often charged

³¹³ Australian National Research Association for Women’s Safety, *Landscapes: State of Knowledge* (2015) 3; See Harry Blagg, *Working with adolescents to prevent domestic violence* (1999) 10 <[https://webarchive.nla.gov.au/awa/20050721204829/http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/\(E24C1D4325451B61DE7F4F2B1E155715\)~no8_fullreport.pdf/\\$file/no8_fullreport.pdf](https://webarchive.nla.gov.au/awa/20050721204829/http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/(E24C1D4325451B61DE7F4F2B1E155715)~no8_fullreport.pdf/$file/no8_fullreport.pdf)>.

³¹⁴ Ibid.

³¹⁵ Rape & Domestic Violence Service Australia, ‘Aboriginal and Torres Strait Islander communities’ (online) <<https://www.rape-dvservices.org.au/resources/aboriginal-and-torres-strait-islander-communities>>.

³¹⁶ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014-15* (Catalogue No. 4714.0, 19 February 2019) <[https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Aboriginal%20and%20Torres%20Strait%20Islander%20women's%20experiences%20of%20family%20and%20domestic%20violence%20\(Feature%20Article\)~10100](https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Feature%20Article~Aboriginal%20and%20Torres%20Strait%20Islander%20women's%20experiences%20of%20family%20and%20domestic%20violence%20(Feature%20Article)~10100)>.

³¹⁷ Australian Human Rights Commission, ‘Imprisonment rates of Indigenous women a national shame’, *Australian Human Rights Commission* (Web Page, 2 May 2018) <<https://humanrights.gov.au/about/news/imprisonment-rates-indigenous-women-national-shame>>.

³¹⁸ Ibid 10.

³¹⁹ Ali MC, ‘Crisis of Aboriginal women in prison in Australia’, *Al Jazeera* (online, 3 December 2019) <<https://www.aljazeera.com/indepth/features/crisis-aboriginal-women-prison-australia-191105183142685.html>>.

³²⁰ Pauline Wright, ‘Opinion piece: What will it take for governments to recognise Australia’s justice gap is a national tragedy?’, *Australian Law Reform Commission* (Web Page, 16 June 2020) <<https://www.lawcouncil.asn.au/media/news/opinion-piece-what-will-it-take-for-governments-to-recognise-australias-justice-gap-is-a-national-tragedy>>.

³²¹ Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment* (2017) 10

and prosecuted for minor offences, such as public order offences, driving and vehicle infringements and shop-lifting offences.³²² This means that Aboriginal and Torres Strait Islander women often 'cycle through the prison system' with shorter sentences and multiple incarcerations.³²³

In 2018, the Aboriginal and Torres Strait Islander Social Justice Commissioner (of the Australian Human Rights Commission) labelled the overrepresentation of Indigenous women in Australian prisons a 'national disgrace'.³²⁴

Legal outcomes for Indigenous persons are impacted by numerous factors.

Firstly, socio-economic inequalities such as class, economic disadvantage, limited access to health services, housing insecurity contribute to the higher levels of incarceration for Indigenous women.³²⁵ Poverty and homelessness have been found to be intrinsically tied to the criminal justice system, as it often leads to the commission of minor and victimless offences that can escalate through unpaid fine regimes, penalty notice systems. In addition, poverty, lack of stable housing and homelessness also increase the likelihood of reoffending post-release.³²⁶

The situation is particularly concerning in jurisdictions such as Western Australia and the Northern Territory, which impose 'mandatory sentencing' for certain summary offences.³²⁷ Mandatory sentencing laws 'require that judicial officer deliver a minimum or fixed penalty' upon conviction of certain offences.³²⁸ The National Association of Community Legal Centres (NACLC) has criticised mandatory sentencing regimes for being 'arbitrary' and 'preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender'.³²⁹ The North Australian Aboriginal Justice Agency (NAAJA) has further condemned the laws for focusing on the 'punitive and retributive aspects of sentencing' under the premise that it provides effective deterrence – which studies indicate it does not.³³⁰

Racism and Intergenerational trauma also have significant impacts on the rates of incarceration of Indigenous women. Numerous organisations such as the National Aboriginal and Torres Strait Islander Legal Service NATSILS) and the Victorian Equal Opportunity and Human Rights Commission have

<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.

³²² Ibid 12.

³²³ Sacha Kendall et al, 'Aboriginal mothers are incarcerated at alarming rates – and their mental and physical health suffers', *The Conversation* (online, 22 May 2019) <<https://theconversation.com/aboriginal-mothers-are-incarcerated-at-alarming-rates-and-their-mental-and-physical-health-suffers-116827>> ('*Aboriginal Mothers in Prison*').

³²⁴ Australian Human Rights Commission, 'Imprisonment rates of Indigenous women a national shame', *Australian Human Rights Commission* (Web Page, 2 May 2018) <<https://humanrights.gov.au/about/news/imprisonment-rates-indigenous-women-national-shame>>.

³²⁵ Zuleyka Zavallos, 'Racial and Gender Justice for Aboriginal Women in Prison', *The Power to Persuade* (Blog, 18 July 2019) <<http://www.powertopersuade.org.au/blog/racial-and-gender-justice-for-aboriginal-women-in-prison/18/7/2019>>.

³²⁶ Ibid.

³²⁷ Ibid.

³²⁸ Australian Law Reform Commission, '8. Mandatory Sentencing' in *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) 273 <https://www.alrc.gov.au/wp-content/uploads/2019/08/fr133_08_mandatory_sentencing.pdf>.

³²⁹ Ibid; National Association of Community Legal Centres, Submission No. 94 to Submission to Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (September 2017) 9 <https://www.alrc.gov.au/wp-content/uploads/2019/08/94_nacalc.pdf>.

³³⁰ North Australian Aboriginal Justice Agency, Submission No. 113 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (October 2017) 26 <https://www.alrc.gov.au/wp-content/uploads/2019/08/113_north_australian_aboriginal_justice_agency_naaja.pdf>.

highlighted that 'the intergenerational effects of historic treatment of Aboriginal and Torres Strait Islander people plays a role in [their] over-representation...in prison'.³³¹

In addition, the Australian Law Reform Commission identified violence and sexual assault as a key contributor to high rates of incarceration of Indigenous women, with family violence being described as 'cyclical and intergenerational'.³³² Studies have also indicated a correlation between the two, finding Indigenous women who have been incarcerated have often experienced sexual violence and poverty.³³³ Reports indicate that between 70% and 90% of Indigenous inmates had been subject to sexual abuse in jurisdictions such as New South Wales and Western Australia respectively.³³⁴ Further, Aboriginal and Torres Strait Islander women and girls have also commonly reported histories of substance abuse, in many cases in response to trauma, abuse, homelessness, and the child protection system.³³⁵

Another contributing factor is the high rates of mental illness and psychological disability for Aboriginal and Torres Strait Islanders. This includes issues such as Post Traumatic Stress Disorder (PTSD), cognitive impairment, depression, anxiety and others.³³⁶ In some cases, incarceration disrupts the receipt of critical care to manage these conditions, which presents clear risks to stability and mental wellbeing.³³⁷

Various studies and reports have found the Indigenous female offenders require support, prevention and diversion rather than incarceration and other punitive responses. This is because these women and girls often have 'significant histories of trauma', and the process of incarceration disconnects them from their children, families, community and country.³³⁸

An estimated 80% of Indigenous women in Australian prisons are mothers.³³⁹ Prosecuting and incarcerating Aboriginal and Torres Strait Islander women therefore also impacts more broadly on Indigenous children and communities.³⁴⁰ A 2019 study into Indigenous women's' experiences of incarceration found Aboriginal mothers experienced significant distress due to the trauma and separation from their children (compounded by intergenerational trauma from the legacy of the Stolen Generations), the stress of the prison environment, and the high rates of mental health disorders. These concerns were exacerbated by the difficulty in maintaining regular contact with their families, in part due to a lack of money to utilise the prison phones.³⁴¹ Indigenous mothers in prison reported ongoing fears that their

³³¹ Ibid; Australian Law Reform Commission, 'Criminal Justice services, programs and responses' in *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>.

³³² Ibid.

³³³ Zuleyka Zavallos, 'Racial and Gender Justice for Aboriginal Women in Prison', *The Power to Persuade* (Blog, 18 July 2019) <<http://www.powertopersuade.org.au/blog/racial-and-gender-justice-for-aboriginal-women-in-prison/18/7/2019>>; Australian Law Reform Commission, 'Drivers of incarceration for Aboriginal and Torres Strait Islander women' in *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>.

³³⁴ Ibid; Price Waterhouse Coopers, *Indigenous incarceration: Unlock the facts* (May 2017) 23 <<https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>>.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Sacha Kendall et al, 'Aboriginal mothers are incarcerated at alarming rates – and their mental and physical health suffers', *The Conversation* (online, 22 May 2019) <<https://theconversation.com/aboriginal-mothers-are-incarcerated-at-alarming-rates-and-their-mental-and-physical-health-suffers-116827>>.

³³⁸ Ibid; Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 13 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.

³³⁹ Ibid 5.

³⁴⁰ Ibid.

³⁴¹ Ibid.

children would not be returned to them.³⁴² These women also experienced high rates of reproductive health issues such as endometriosis, ovarian cysts and cervical cancer. These concerns were linked to poor physical, social and emotional wellbeing.³⁴³

The conditions within prisons that house Indigenous women are also concerning. The Human Rights Law Centre has raised the issue of 'systems of prisons [that] replicate the dynamics of power and control in violent relationships' that can ultimately re-traumatise women.³⁴⁴ For example, strip searches can cause a similar sense of vulnerability as is experienced by women who have been subject to violence or sexual abuse.³⁴⁵ There have also been reports that Indigenous women also face barriers to accessing sanitary items in prison.³⁴⁶ Prisoners have reported having to wait up to 12 hours for requested sanitary items.³⁴⁷ Some have even alleged that the denial of sanitary items is a 'power play' for police officers in charge of holding cells.³⁴⁸

Access to justice and reparations for Indigenous women and girls

Below we examine barriers to access to justice and ability to obtain reparations for some of the violations of SRHR examined above.

Access to Legal and Support Services

As examined above, Indigenous women experience much higher rates of contact with the criminal justice system than non-Indigenous women in Australia. Indigenous women however face a number of barriers to accessing justice. As identified by the National Family Violence Prevention Legal Services (NFVPLS) in 2018, Aboriginal and Torres Strait Islander women face 'complex and compounding barriers to accessing support' including:

- Lack of understanding of their legal rights and options to access support;
- Mistrust of mainstream medical, legal and other support services;
- Lack of cultural competency in support services;
- Experiences of discrimination across support services;
- Cultural pressures not to seek support from policy and fears around removal of children;
- Poverty and social isolation.³⁴⁹

In addition, the Australian Human Rights Commission has found that dedicated legal services for Aboriginal and Torres Strait Islanders tend to be focused on and directed towards supporting Indigenous men, who are also grossly overrepresented across Australian prisons.³⁵⁰

³⁴² Ibid.

³⁴³ Sacha Kendall et al, 'Aboriginal mothers are incarcerated at alarming rates – and their mental and physical health suffers', *The Conversation* (online, 22 May 2019) <<https://theconversation.com/aboriginal-mothers-are-incarcerated-at-alarming-rates-and-their-mental-and-physical-health-suffers-116827>>.

³⁴⁴ Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 17 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.

³⁴⁵ Ibid.

³⁴⁶ Kate Betts, 'Women detainees had to 'ask repeatedly' for sanitary items', *The Sydney Morning Herald* (online, 15 February 2018) <<https://www.smh.com.au/lifestyle/health-and-wellness/women-detainees-had-to-ask-repeatedly-for-sanitary-items-20180214-p4z0ca.html>>.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs

Other organisations have also highlighted issues such as language and communication barriers,³⁵¹ geographical barriers (particularly for rural and remote communities), the intimidating nature of courts and the difficulties understanding legal processes and courtroom dynamics that also impact upon Indigenous women's ability to access justice.³⁵²

Sexual Violence Support

According to a systematic review of the literature surrounding Australia's response to Indigenous women's sexual assault, little is known about service responses implemented nationally to provide counselling, medical and support services for Indigenous survivors of sexual assault.³⁵³ According to research, when a mainstream sexual assault service in a regional centre with a high Indigenous population was invited to establish a new service in an Indigenous community, staff reflected that the attendance of Indigenous women was relatively low.³⁵⁴ Furthermore, there is a lack of research surrounding what works in responding to Indigenous sexual assault.³⁵⁵ However, according to a regional sexual health service which conducted interviews on 47 members of a discrete Aboriginal community, several barriers to justice access were identified by the participants. Procedural barriers in accessing sexual health services and repatriations include a historical distrust of government organisations, fear of breach of confidentiality and male dominance within the community and organisations.³⁵⁶ Other barriers to accessing justice include personal barriers of shame, fear, denial and lack of knowledge of what process might ensue once sexual assault was disclosed, and family barriers such as denial, blaming and bullying.³⁵⁷

Reconciliation

Notwithstanding Australia's violent colonial history and the systemic marginalisation of, and discrimination against Indigenous peoples, including women and girls, no formal national truth and reconciliation commission has been established to date. As a result, Indigenous women have not received reparations for the harms to their sexual and reproductive health rights during colonisation, nor their flow on impacts such as intergenerational trauma.

Many have however called for 'truth-telling' to facilitate an honest and full understanding of colonisation, dispossession and trauma experienced by Aboriginal and Torres Strait Islanders.³⁵⁸ This includes recommendations from the Referendum Council (a consultative body advising the Australian Government

Committee, *Access to Justice* (20 October 2009)

<https://humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.

³⁵¹ Scott Ludlam and Chiara Lawry, 'Closing the Justice Gap for Indigenous Australians' (2010) 7(17) *Indigenous Law Bulletin* 12 <<http://classic.austlii.edu.au/au/journals/IndigLawB/2010/11.html>>.

³⁵² Judicial Council on Cultural Diversity, 'Barriers to Access to Justice for Aboriginal and Torres Strait Islander Women', Judicial Council on Cultural Diversity (Fact Sheet, 2018) <<https://jccd.org.au/wp-content/uploads/2018/06/Aboriginal-Torres-Strait-Islander-Women-FACTSHEET.pdf>>; See also, Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016) <https://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf>.

³⁵³ Janya McCalman, 'Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature' (2014) *SAGE Open* 1-13 <<https://journals.sagepub.com/doi/pdf/10.1177/2158244013518931>>.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.* 10.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ Reconciliation Australia, 'Truth-telling Central to Reconciliation Process', *Reconciliation Australia* (Web Page, 10 May 2018) <<https://www.reconciliation.org.au/truth-telling-central-to-reconciliation-process/>>.

on Aboriginal and Torres Strait Islander views on constitutional recognition), and advocacy body Reconciliation Australia.³⁵⁹

There has been some 'progress' on reconciliation.³⁶⁰ In 1991, the Commonwealth legislated for the creation of the 'Council of Aboriginal Reconciliation', a body intended set up a ten-year reconciliation process, titled the 'decade of reconciliation' that included the education of non-Indigenous Australians about Aboriginal and Torres Strait Islander culture and disadvantage and the establishment of local reconciliation groups in all jurisdictions to encourage a social movement to support justice and Indigenous human rights.³⁶¹

The decade prompted important legal developments for Indigenous justice, including landmark land rights cases such as *Mabo* and *Wik*, these establishment of the Native Title Act 1993 which created a 'process through which native title can be recognised and protected'.³⁶²

Several policy developments also followed, including the establishment of National Reconciliation week, to promote education on reconciliation and support for Indigenous justice, Royal Commission inquiries into Aboriginal Deaths in Custody (RCIADC, 1987-1991) and the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' (NISATSIC, 1997).³⁶³ The inquiries were particularly relevant to the SRHR of Indigenous women as they recognised both the prevalence of Indigenous women dying in police custody, and the impacts of the separation of mothers and children as part of the Stolen Generations.

Important political acknowledgements also include the 1992 'Redfern Speech' made by then Prime Minister Paul Keating which was the first time an Australian Prime Minister publicly recognised the impact of colonisation on Aboriginal and Torres Strait Islander peoples, and the 2007 'National Apology to the Stolen Generations' made by then Prime Minister Kevin Rudd.³⁶⁴

Most recently, in 2017 the historic 'Uluru Statement from the Heart' provided consensus from over 1200 Aboriginal and Torres Strait Islander community representatives on constitutional recognition.³⁶⁵ The Statement calls three elements central to reconciliation: an Indigenous 'Voice to Parliament', enshrined in the Australian Constitution, to facilitate consultation with Indigenous communities on matters that impact upon them; the establishment of a 'Makarrata Commission', in essence a tribunal to assist Indigenous Australians to negotiate with the Commonwealth government and facilitate reconciliation (similar to those created in Canada, New Zealand and South Africa); and a 'Declaration of Recognition', a symbolic statement to recognise Australia's history, and promote unity.³⁶⁶

³⁵⁹ Ibid.

³⁶⁰ Reconciliation Australia, *The State of Reconciliation in Australia: Our History, Our Story, Our Future* (2016) 3 <https://www.reconciliation.org.au/wp-content/uploads/2017/11/The-State-of-Reconciliation-report_FULL_WR.pdf>.

³⁶¹ ANTaR, 'Reconciliation', ANTaR (Web Page, 2020) <<https://antar.org.au/campaigns/reconciliation>>.

³⁶² Ibid; Attorney-General's Department, 'Native Title', Australian Government (Web Page, 2020) <<https://www.ag.gov.au/legal-system/native-title>>; See also *Native Title Act 1993* (Cth).

³⁶³ Reconciliation Australia, *The State of Reconciliation in Australia: Our History, Our Story, Our Future* (2016) 18 <https://www.reconciliation.org.au/wp-content/uploads/2017/11/The-State-of-Reconciliation-report_FULL_WR.pdf>.

³⁶⁴ ANTaR, 'Reconciliation', ANTaR (Web Page, 2020) <<https://antar.org.au/campaigns/reconciliation>>.

³⁶⁵ *Uluru Statement from the Heart* (2017) <<https://fromtheheart.com.au/uluru-statement/the-statement/>>.

³⁶⁶ Ibid; See also University of Melbourne, *Uluru Statement from the Heart: Information Booklet* (2017) <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/2764738/Uluru-Statement-from-the-Heart-Information-Booklet.pdf>.

4.4 Offshore Detention of Refugees and Asylum-Seekers

The United Nations has found that Australia's offshore processing of refugees and asylum seekers on Nauru and on Manus Island (PNG) breaches international human rights law. The UN has emphasised that all centres and detainees, both onshore and offshore, 'fall under the responsibility of the Government of Australia', and by extension, the Australian Government is 'ultimately accountable for any human rights violations that occur in such facilities'.³⁶⁷ Furthermore, all persons in offshore processing centres, including those managed by private contractors of Australia's choice, enjoy the same protection from torture and ill treatment under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).³⁶⁸

The UN Special Rapporteur, François Crépeau, has described Australia's offshore processing system as a situation 'purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorised maritime arrivals'.³⁶⁹ In his investigation, the Rapporteur found that the 'combination of harsh conditions in Nauru or on Manus Island, the protracted period of closed detention and the uncertainty about the future' leads to serious physical and mental harm.³⁷⁰ In particular, the Rapporteur highlighted that there had been numerous counts of rape and sexual abuse of female asylum seekers and refugees by security guards, service providers, other refugees and asylum seekers, as well as Nauruans. In addition, there is no availability of a proper and independent investigation mechanism in place, making the lives of women living in these centres 'unbearable'.³⁷¹

The Special Rapporteur stated that Australia clearly and undeniably was responsible for the physical and psychological damage suffered by asylum seekers and refugees in offshore detention, especially given that these individuals and families had already endured incredible hardship in transit to Australian territory, and the fact that Australian authorities had been alerted about the issues with offshore detention on numerous occasions.³⁷² He concluded that 'regarding human rights issues, the system cannot be salvaged'.³⁷³

Legal and Policy Framework

Commonwealth Law

Australia is a State party to the 1951 *Convention relating to the Status of Refugees* (Refugee Convention) and its 1967 Protocol. Domestically, migration matters fall under the jurisdiction of the Commonwealth.³⁷⁴ The main legislation on migration is the *Migration Act 1958* (Cth), which governs all forms of migration,

³⁶⁷ François Crépeau, Special Rapporteur, Human Rights Committee, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 14 [72].

³⁶⁸ *Ibid*; *Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

³⁶⁹ *Ibid* 15 [78]-[79].

³⁷⁰ *Ibid*, 14 [73].

³⁷¹ *Ibid* 15 [78]-[79].

³⁷² *Ibid*.

³⁷³ *Ibid*.

³⁷⁴ *Australian Constitution* ss 51(xix), 51(xxvii).

visa application and humanitarian assistance.³⁷⁵ The *Migration Act* is administered by the Department of Immigration and Border Protection.

The *Migration Act* translates some of the provisions of the Refugee Convention into Australian law, including the definition of a refugee and the principle of non-refoulement.³⁷⁶ However, many provisions do not. Section 189 of the *Migration Act* gives authorised officers power to detain ‘unlawful non-citizens’, including refugees and asylum seekers, if they are in Australia’s ‘migration zone’ - land, sea, or any structure connected to either.³⁷⁷ This law forms the basis of Australia’s refugee policy, which will be explored in further detail below.

Medevac

In March 2019, the Commonwealth Parliament passed the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (Medevac) which added to the *Migration Act 1958* (Cth) provisions that provided for the transfer of asylum-seekers in regional processing facilities to Australia to obtain ‘medical or psychiatric assessment or treatment’.³⁷⁸ Two Australian doctors had to recommend the transfer and state that the medical care was not possible to obtain in the regional processing country.³⁷⁹ Under Medevac, the Minister of Home Affairs had to approve a transfer unless deemed adverse to security.³⁸⁰

Since Medevac entered into force, Nauru enacted regulations which prohibited tele-medicine, thereby making assessments of health needs by Australian doctors necessary to assess the need for a transfer more difficult.³⁸¹ Nevertheless, Medevac did operate, and has been described by UNHCR as ‘a timely, effective and often life-saving safeguard’.³⁸² Under the scheme, 135 asylum-seekers from regional processing facilities in Nauru and Manus Island were transferred to Australia for medical treatment.³⁸³ As a result, women and girls in regional processing centres who require SRH treatment in Australia will have little chance of accessing such treatment. Regrettably, the whole scheme was repealed by Australia in December 2019.³⁸⁴ While UNHCR expressed disappointment over this course of action³⁸⁵, the Federal

³⁷⁵ The University of Melbourne, ‘Refugee & Asylum Seeker Law Research Guide: Australia’ (online) <https://unimelb.libguides.com/refugee_law/australia>.

³⁷⁶ Australian Law Reform Commission, *Refugee Law in Australia* (Report, 19 December 2011) <<https://www.alrc.gov.au/publication/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-11722-refugee-law-2/refugee-law-in-australia-2/>>.

³⁷⁷ *Migration Act 1958* (Cth) ss 5, 189.

³⁷⁸ *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) s 4.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

³⁸¹ Health Practitioners (Telemedicine Prohibition) Regulations 2019 (Nauru) <http://ronlaw.gov.nr/nauru_ipms/files/subordinate_legislation/582ffb0d78903d0ed38f0cdf4055c832.pdf>.

³⁸² UN High Commissioner for Refugees Regional Representation in Canberra, ‘UNHCR Statement on the Repeal of “Medevac” Legislation’ (Statement, 5 December 2019) <<https://www.unhcr.org/en-au/news/press/2019/12/5de8cee27/unhcr-statement-on-the-repeal-of-medevac-legislation.html>>.

³⁸³ ‘Medevac’ law: Australia denies medical evacuations for refugees’, *The Guardian*, (News article, 4 December 2019) <<https://www.bbc.com/news/world-australia-50653195>>.

³⁸⁴ See generally Alex Reilly, ‘Explainer: the medevac repeal and what it means for asylum seekers on Manus Island and Nauru’, *The Conversation* (4 December 2019) <<https://theconversation.com/explainer-the-medevac-repeal-and-what-it-means-for-asylum-seekers-on-manus-island-and-nauru-128118>>

³⁸⁵ UNHCR Statement in Australia’s repeal of Medevac Legislation (5 December 2019) <<https://www.unhcr.org/en-au/news/press/2019/12/5de8e3574/unhcr-statement-australias-repeal-medevac-legislation.html>>.

Government justified the repeal by stating that the scheme posed a 'risk' to Australia's border and constituted a 'loophole' for activist campaigns for transfer of asylum-seekers.³⁸⁶

Commonwealth Policy

Refugee and Humanitarian Program

Australia's current policy is known as the 'Refugee and Humanitarian Program'.³⁸⁷ It comprises of both an 'onshore protection program' and an 'offshore resettlement program'.³⁸⁸ The former is available only to those seeking asylum upon arrival on a valid visa, such as a student visa.³⁸⁹ Asylum-seekers who enter Australia by sea without a valid visa are transferred to regional processing facilities in Papua New Guinea (Manus Island) or Nauru under the offshore resettlement program.³⁹⁰ Under this program, resettlement to Australia is not a prospect and refugees and asylum-seekers face mandatory and detention with limited prospects of remaining in PNG or Nauru or being resettled to other countries.³⁹¹ Since 2012, it has been reported that over 3,000 asylum seekers have been detained in these offshore facilities.³⁹²

The Australian Government has outsourced the management of the offshore detention centres to private enterprises.³⁹³ The distant location of the regional processing centres and outsourcing of operation and management have resulted in secrecy and lack of transparency concerning the treatment of refugees and asylum-seekers in these centres.³⁹⁴ Ultimately, this lack of accountability has led to extensive harm and neglect of those detained.³⁹⁵

The United Nations has found that Australia's offshore processing of refugees and asylum seekers on Nauru and on Manus Island (PNG) breaches international human rights law. The UN has emphasised that all centres and detainees, both onshore and offshore, 'fall under the responsibility of the Government of Australia', and by extension, the Australian Government is 'ultimately accountable for any human rights violations that occur in such facilities'.³⁹⁶ Furthermore, all persons in offshore processing centres, including those managed by private contractors of Australia's choice, enjoy the same protection from torture and ill treatment under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).³⁹⁷

³⁸⁶ "Medevac' law: Australia denies medical evacuations for refugees', *BBC News* (4 December 2019)

<<https://www.bbc.com/news/world-australia-50653195>>

³⁸⁷ Australian Government Department of Home Affairs, 'About the Refugee and Humanitarian program' (Web page)

<<https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/about-the-program>>.

³⁸⁸ Kaldor Centre for International Refugee Law University of New South Wales, 'Australia's Refugee Policy: An Overview' (Factsheet, July 2020)

<https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australian%20Refugee%20Policy_Apr2019.pdf>.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Ibid.; Amy Nethery and Rosa Halman, 'Secrecy and human rights abuse in Australia's offshore immigration detention centres' (2016) 20(7) *International Journal of Human Rights* 1018, 1018.

³⁹² Elaine Pearson, 'Seven Years of Suffering for Australia's Asylum Seekers, Refugees', *Human Rights Watch* (online, 16 July 2020) <<https://www.hrw.org/news/2020/07/16/seven-years-suffering-australias-asylum-seekers-refugees>>.

³⁹³ Ibid 1025.

³⁹⁴ Ibid 1018.

³⁹⁵ Ibid 1025.

³⁹⁶ François Crépeau, Special Rapporteur, Human Rights Committee, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 35th sess, Agenda Item 3, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 14 [72].

³⁹⁷ Ibid; *Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

The UN Special Rapporteur, François Crépeau, has described Australia's offshore processing system as a situation 'purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorised maritime arrivals'.³⁹⁸ In his investigation, the Rapporteur found that the 'combination of harsh conditions in Nauru or on Manus Island, the protracted period of closed detention and the uncertainty about the future' leads to serious physical and mental harm.³⁹⁹ In particular, the Rapporteur highlighted that there had been numerous counts of rape and sexual abuse of female asylum seekers and refugees by security guards, service providers, other refugees and asylum seekers, as well as Nauruans. In addition, there is no availability of a proper and independent investigation mechanism in place, making the lives of women living in these centres 'unbearable'.⁴⁰⁰

The Special Rapporteur stated that Australia clearly and undeniably was responsible for the physical and psychological damage suffered by asylum seekers and refugees in offshore detention, especially given that these individuals and families had already endured incredible hardship in transit to Australian territory, and the fact that Australian authorities had been alerted about the issues with offshore detention on numerous occasions.⁴⁰¹ He concluded that 'regarding human rights issues, the system cannot be salvaged'.⁴⁰²

Impacts on SRHR

Rape, Sexual Assault and Sexual Harassment

Reports indicate that women detained in offshore processing centres have been denied their sexual and reproductive health rights in various ways.

For example, a 2014 independent review revealed that Transfield Services, the corporation who manages the offshore detention centre on Nauru, had received numerous allegations of abuse of detainees, including 45 allegations of sexual assault and child abuse.⁴⁰³ Women had been subjected to coercion by way of sexual exploitation, sexual assault and harassment, rape and threats of rape, as well as physical abuse.⁴⁰⁴ In addition, the report indicated the numerous children in detention had also experienced coercion in these forms.⁴⁰⁵ The review further recognised that this may not have been a full account of abuses experienced as some incidents may have not be reported for family and cultural reasons.⁴⁰⁶

Further, in August 2016, media outlet *The Guardian* published over 2000 incident reports from the detention centre on Nauru alone.⁴⁰⁷ These reports were referred to as the 'Nauru files' and contained

³⁹⁸ Ibid 15 [78]-[79].

³⁹⁹ Ibid, 14 [73].

⁴⁰⁰ Ibid 15 [78]-[79].

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ The Senate Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (August 2015) 123

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report>.

⁴⁰⁴ Phillip Moss, *Final Report: Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (2014) 23-36 <<https://www.homeaffairs.gov.au/reports-and-pubs/files/review-conditions-circumstances-nauru.pdf>>.

⁴⁰⁵ Ibid 36-42.

⁴⁰⁶ Ibid 41.

⁴⁰⁷The Senate Legal and Constitutional Affairs References Committee (SLCARC), 'Chapter Two: Allegations of Abuse and Self – harm' in SLCARC, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre* (Report, Parliament of Australia, 2017)

de-identified details of incidents occurring at the offshore processing centre between 2013-2015.⁴⁰⁸ The de-classified documents reveal numerous allegations of harassment, sexual assault and abuse.⁴⁰⁹ Incidents included, for example, one young detainee who reported that guards had told her she was 'on a list' of women the guards were waiting on to be released and revealed that women in the detention centre were frequently subject to 'offers' to take their virginity.⁴¹⁰ On another occasion an asylum seeker who had been sexually assaulted was told by a Wilson Security guard that women in Australia are 'raped all the time' and perpetrators don't get punished.⁴¹¹ The Nauru files also uncovered numerous allegations of sexual and physical assaults against children. These included sexually assaulting a child, choking a child, spitting on a child, making a child lift up their shirt to show their stomach, pulling a child's hair along with many other allegations of physical abuse.⁴¹²

As of 2019, 24 women were flown to Australia for an abortion, many pregnancies that were the result of rape.⁴¹³ Reports from the detention centre claim that security guards would offer the women longer showers if they could watch them in the shower and offered them cigarettes and marijuana in exchange for sexual acts.⁴¹⁴ The tents in which the women slept did not have locks, leaving them vulnerable to the abuse from the guards.⁴¹⁵ Refugee advocacy and support group, the Asylum Seeker Resource Centre asserts they have evidence of women being sexually abused, raped and harassed by security officers who are contracted by the Australian government.⁴¹⁶

Abortion

In 2016, a refugee from an undisclosed African nation known as 'Plaintiff S-99' was raped on Nauru while unconscious and suffering a seizure, an act which resulted in pregnancy.⁴¹⁷ S-99 sought to have an abortion, which was, and continues to be, illegal in the state of Nauru. S-99 had complex medical needs – she had a neurological condition, poor mental health and had suffered both physical and psychological complications from a cultural practice she was subjected to as a young girl.⁴¹⁸

Subsequently, the Minister for Immigration and Border Protection arranged for S-99 to be flown to Port Moresby, Papua New Guinea (PNG) for the abortion procedure. It should be noted that abortion, except in the instance that it will save a mother's life, was, and continues to be illegal in PNG.⁴¹⁹ S-99's lawyer

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report/c02.

⁴⁰⁸ Ibid; Nick Evershed, Ri Liu, Paul Farrell, and Helen Davidson, 'The Nauru Files', *The Guardian* (online, 10 August 2016) <<https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>>.

⁴⁰⁹ Ibid.

⁴¹⁰ See Nauru files, 'Incident Report 14/418' <<https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca140418.pdf>>.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Asylum Seeker Resource Centre, *Australia's Man-made Crisis on Nauru: Six Years On* (2018) 18.

⁴¹⁴ Ibid 10.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Anna Henderson and Dan Conifer, 'Refugee Raped on Nauru flown to Papua New Guinea for Abortion', *ABC News* (online, 6 May 2016) <<https://www.abc.net.au/news/2016-05-06/refugee-raped-on-nauru-flown-to-png/7392600>>.

⁴¹⁸ Tania Penovic, 'Dutton's Duty: The Minister's Responsibility to Provide a Safe and Lawful Abortion', *Castan Centre for Human Rights Law* (Blog, 11 May 2016) <<https://castancentre.com/2016/05/11/duttons-duty-the-ministers-responsibility-to-provide-a-safe-and-lawful-abortion/>>.

⁴¹⁹ Bianca Hall, 'Australia sent refugees to PNG for abortions knowing it was illegal, court hears', *Sydney Morning Herald* (online, 29 April 2016) <<https://www.smh.com.au/politics/federal/australia-sent-refugees-png-for-abortions-knowing-it-was-illegal-court-hears-20160429-go12om.html>>.

opposed the action and brought the matter before the Federal Court. He argued that S-99 should instead be flown to Australia, where she could receive safe and legal healthcare.⁴²⁰ In that case, Justice Bromberg held that the Minister has a duty of care to the applicant, and as such, it was the Minister's responsibility to ensure that S-99 had access to a safe and lawful abortion.⁴²¹ Justice Bromberg explained that a reasonable person in the Minister's position would not have placed the applicant on Papua New Guinea to access an abortion due to the safety risks and unlawfulness.⁴²² As such, he issued an injunction to prevent the minister from procuring an abortion on Papua New Guinea but did not require him to bring the applicant to Australia.⁴²³

In 2016, Nauru's Minister for Border Protection, David Adeang introduced a bill into Nauru Parliament that would allow refugee and asylum seeker women to legally procure an abortion – notwithstanding that the practice would continue to be prohibited under the *Crimes Act* for all others in the country.⁴²⁴ In effect, the bill would prevent refugee and asylum seeker women from being flown to Australia or Papua New Guinea to receive an abortion. The proposed bill was described as 'a distortion of Nauruan society for the purpose of accommodating Australia's cruel immigration policy' by a leading Australian human rights lawyer who had represented refugee and asylum seeker women on Nauru.⁴²⁵ The bill was also met with opposition from the Nauruan Parliament, who argued that the legislation would not receive support from the Nauruan public.⁴²⁶ The bill was ultimately withdrawn.⁴²⁷

While at present refugees and asylum seeker women in offshore detention centres can apply to receive an abortion in Australia, reluctance by the Australian Government to provide adequate sexual and reproductive rights to these women continues. In 2017, three pregnant asylum seekers were denied permission to be transferred to Australia in order to receive an abortion.⁴²⁸ In 2019, the Minister for Home Affairs claimed that women seeking abortions in Australia, after being raped in offshore detention centres, are 'trying it on'.⁴²⁹ He has claimed that such women may not in fact require medical attention and are instead seeking to circumvent the current system to gain permission to remain in Australia.⁴³⁰

⁴²⁰ See *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483, [11] <<https://www.judgments.fedcourt.gov.au/judgments/judgments/fca/single/2016/2016fca0483>>.

⁴²¹ *Ibid* [1]-[3].

⁴²² *Ibid*.

⁴²³ *Ibid*.

⁴²⁴ Michael Walsh, 'Nauru scraps proposed abortion laws for refugees and asylum seekers', *ABC News* (online, 11 November 2016) <<https://www.abc.net.au/news/2016-11-11/nauru-scraps-abortion-laws-for-refugees-asylum-seekers/8018504>>.

⁴²⁵ *Ibid*.

⁴²⁶ *Ibid*.

⁴²⁷ *Ibid*.

⁴²⁸ Ben Doherty, 'Three pregnant refugees and nearly 50 others denied medical transfers from Nauru', *The Guardian* (online, 21 August 2017) <<https://www.theguardian.com/australia-news/2017/aug/21/three-pregnant-refugees-and-nearly-50-others-denied-medical-transfers-from-nauru>>.

⁴²⁹ Helena Davidson, 'Peter Dutton condemned for 'vile and offensive' Nauru rape claims', *The Guardian* (online, 21 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/21/peter-dutton-condemned-for-vile-and-offensive-nauru-claims>>;

Helena Davidson, 'Peter Dutton says women using rape and abortion claims as ploy to get to Australia', *The Guardian* (online, 20 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/20/peter-dutton-says-women-using-and-abortion-claims-as-ploy-to-get-to-australia>>.

⁴³⁰ *Ibid*.

Perinatal and Neonatal Care

Prior to 2015, there were no systems in place for pregnant asylum seekers to give birth on Nauru, which whilst having services and equipment, lacked obstetric and paediatric staff.⁴³¹ Instead, pregnant women were flown to Australia prior to reaching 28 weeks' gestation, where they would be 'cared for in-line with Australian community standards'.⁴³² After both mother and baby were clinically assessed as fit to travel, they were transported back to detention on Nauru.⁴³³ This system was critically flawed. The return to Nauru caused considerable distress to mothers, who suffered an 'intense fear of being returned offshore and an abject lack of knowledge as to the time frame they [would] be in Australia'.⁴³⁴

In 2015 however, Minister for Immigration and Border Protection Peter Dutton announced that Australia would adopt a firm stance against transferring pregnant refugees to Australia.⁴³⁵ Women would instead be transferred to Papua New Guinea, or give birth on Nauru, notwithstanding the inadequate facilities.⁴³⁶ The Minister emphasised that the government was supporting the construction and development of facilities for reproductive health care within the detention centre on Nauru.⁴³⁷ In September that year, the first baby was born on Nauru, after the mother, a Rohingya refugee, refused to be transferred to Papua New Guinea.⁴³⁸ The mother had complex health problems and had a family member who had been killed in PNG.⁴³⁹ Refugee advocacy and rights group the Refugee Action Coalition warned that this set 'risky precedent' as the hospital on Nauru has limited resources, staff and no obstetric specialists.⁴⁴⁰

The Australian Government remains reluctant to arrange for refugees and asylum seekers to be flown to Australia in order to receive perinatal and neonatal healthcare. This is notwithstanding considerable medical advice and lobbying from healthcare professionals, lawyers and advocacy and rights groups. There have been some instances where transfers have been successful, but generally only in the most serious circumstances. For example, in 2017, a 37 year-old Kuwaiti refugee who was 36 weeks' pregnant and

⁴³¹ Australian Department of Immigration and Border Protection, Submission No. 30 to Select Committee, *Inquiry into on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (May 2015) 41 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions>.

⁴³²Parliament of Australia, *Final Report: Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru* (2015) 83

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/~media/Committees/nauru_ctte/Final_Report/report.pdf>.

⁴³³ Ibid.

⁴³⁴ Ibid; Darwin Asylum Seeker Support and Advocacy Network, Submission No. 61 to Select Committee, *Inquiry into on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru* (May 2015) 13

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions>.

⁴³⁵ 'Australia 'will not move pregnant asylum seekers from Nauru'', *BBC News* (online, 15 October 2015) <<https://www.bbc.com/news/world-australia-34535903>>.

⁴³⁶ Stephanie Anderson and Dan Conifer, 'Husband of pregnant asylum seeker pleads for her transfer to Australia; Peter Dutton rules it out', *ABC News* (online, 15 October 2015) <<https://www.abc.net.au/news/2015-10-15/peter-dutton-rules-out-transferring-pregnant-asylum-seekers/6856708>>.

⁴³⁷ Ibid.

⁴³⁸ Neelima Choahan, 'Birth of first refugee baby on Nauru sets 'risky precedent'', *Sydney Morning Herald* (online, 21 September 2015) <<https://www.smh.com.au/national/birth-of-first-refugee-baby-in-nauru-detention-centre-sets-risky-precedent-20150921-gjrhke.html>>; Refugee Action Coalition, 'First refugee baby born on Nauru but there's no future', *Refugee Action Coalition Sydney* (Web Page, 21 September 2015) <<http://www.refugeeaction.org.au/?p=4309>>.

⁴³⁹ Ibid; Stephanie Anderson and Dan Conifer, 'Husband of pregnant asylum seeker pleads for her transfer to Australia; Peter Dutton rules it out', *ABC News* (online, 15 October 2015) <<https://www.abc.net.au/news/2015-10-15/peter-dutton-rules-out-transferring-pregnant-asylum-seekers/6856708>>.

⁴⁴⁰ Ibid.

suffering from pre-eclampsia and a large fibroid or benign tumour on the wall of her uterus, whose baby was also in breech position was approved for medical transfer after over a month of lobbying from advocates and support groups.⁴⁴¹ The woman has previously had a miscarriage on Nauru.⁴⁴²

Access to Sanitary Items

Women in offshore detention centres are also denied access to sanitary items, and where such items are provided, the way this done is neither discreet, nor appropriate to maintain the dignity of detainees. Reports indicate that female asylum seekers were sometimes denied access to sanitary pads for 'security reasons', sanitary items are often distributed by male guards, and detainees have been referred to by name, not number during distribution.⁴⁴³ Female asylum seekers have described the shame felt when they are made to approach male guards to request sanitary products, with various male guards worsening the situation by feigning ignorance and asking questions like 'what do you need that for?'.⁴⁴⁴ Sanitary items are reportedly distributed according to monthly allowances based on 'an average of what a woman [is] expected to need', and requests for additional sanitary items are often denied, and women are shamed for even requesting more.⁴⁴⁵

Alanna Maycock, a nurse who visited Nauru in 2014, recounted the following:

One mother we met had been menstruating for around two months. She said she had reported this several times but had not been referred to a gynaecologist for review of her symptoms. She was using material from tent her tent to hold the bleeding because she didn't have free access to sanitary products. And one night the bleeding was so bad and she was extremely dirty, she decided to make the journey to the toilet. As she got near to the toilet where the male guards were sitting a blood clot fell from her to the ground. This women ran to the toilet as a trail of blood followed her.⁴⁴⁶

Access to justice and reparations for offshore refugee and asylum-seeking women and girls

Below we examine barriers for women and girls in offshore detention to access to justice and obtain reparations for violations of SRHR, for example in the context of the impacts on SRHR examined above.

⁴⁴¹ Ben Doherty, 'Pregnant refugee to be flown from Nauru to Australia to give birth', *The Guardian* (online, 3 February 2017) <<https://www.theguardian.com/australia-news/2017/feb/03/pregnant-refugee-to-be-flown-from-nauru-to-australia-to-give-birth>>.

⁴⁴² Ibid.

⁴⁴³ Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality related to Menstruation - Considering the Role of Discrimination Law' (2019) 41(3) *Sydney Law Review* 293; Nicole Hasham, 'Sanitary products handed out by male guards, asylum seekers given ill-fitting clothing on Nauru, Senate inquiry hears', *The Sydney Morning Herald* (online, 20 July 2015)

<<https://www.smh.com.au/politics/federal/sanitary-products-handed-out-by-male-guards-asylum-seekers-given-illfitting-clothing-on-nauru-senate-inquiry-hears-20150720-gigf1o.html>>; Georgina Connery, 'Menstrual cups mooted as Nauru's asylum seekers suffer sanitary product restrictions', *The Canberra Times* (online, 17 October 2015) <<https://www.canberratimes.com.au/story/6059917/menstrual-cups-mooted-as-naurus-asylum-seekers-suffer-sanitary-product-restrictions/>>.

⁴⁴⁴ Yvette Zurek, 'The experiences of women in Australian immigration detention centres' (May 2004) *Forced Migration Review* 20 <<https://www.fmreview.org/sustainable-livelihoods/zurek>>.

⁴⁴⁵ Ibid.

⁴⁴⁶ Alanna Maycock, Speech notes from Australian Medical Association Forum on the Health Care of Asylum Seekers and the Harms caused by Immigration Detention, Sydney 21 February 2016 <https://ama.com.au/sites/default/files/Ms_Alanna_Maycock_Speech.pdf>.

Limited avenues for redress

Women and girls in offshore processing facilities have only limited avenues for redress concerning violations of their rights, including SRHR.

Domestic complaints

(a) Duty of care

As discussed above, Justice Bromberg ordered the Government to facilitate a safe and legal abortion for the Plaintiff in Nauru who became pregnant following a rape while in detention. The case established that the Government owed a duty of care to women on Nauru in need of an abortion.

As noted above, the Medevac scheme which in certain circumstances allowed for the transfer of refugees and asylum-seekers in regional processing centres to Australia for medical care was repealed in December 2019. This course of action removed another avenue through which women and girls in regional processing centres may have sought to access SRH treatment and services not available in Nauru and PNG.

Before the scheme was repealed, 52 cases were lodged in the Federal Court by asylum-seekers and refugees seeking medical transfers on the basis that refusal to transfer amounted to negligence.⁴⁴⁷ Women with pregnancy complications in Nauru have been reported to be amongst the claimants.⁴⁴⁸ The Full Federal Court ruled that it did have jurisdiction to hear negligence claims relating to medical transfers brought by the asylum-seekers.⁴⁴⁹ However, before the High Court, the Government won special leave to appeal against the Federal Court ruling.⁴⁵⁰ Maurice Blackburn, a social justice law firm acting for some of the asylum-seekers, has claimed that the Department is purposefully delaying justice.⁴⁵¹ Principal lawyer at Maurice Blackburn, Jennifer Kanis, noted that access to the Federal Court is the last resort to access medical treatment outside Nauru and PNG since Medevac's repeal.⁴⁵² She also noted that the Government may be ordered to pay compensation if the found to have owed the asylum-seekers a duty of care.⁴⁵³ The High Court hearing is scheduled for September 2020.⁴⁵⁴

As this ongoing litigation illustrates, the potential to obtain a remedy is a long and uncertain process, often in the context of urgent and complex medical circumstances, such as pregnancy complications.

⁴⁴⁷ Dana McCauley, 'Government facing multimillion dollar refugee compensation claims', *The Sydney Morning Herald* (online, 3 September 2019) <<https://www.smh.com.au/politics/federal/government-facing-multimillion-dollar-refugee-compensation-claims-20190903-p52nem.html#comments>>.

⁴⁴⁸ Ibid.

⁴⁴⁹ *FRM17 v Minister for Home Affairs* [2019] FCAFC 148.

⁴⁵⁰ Tom Stayner, 'Federal Government wins right to appeal ruling over medical transfer of refugees', SBS News (online, 20 March 2020) <<https://www.sbs.com.au/news/federal-government-wins-right-to-appeal-ruling-over-medical-transfer-of-refugees>>.

⁴⁵¹ Maurice Blackburn, 'Lawyers accuse Commonwealth of delaying justice for asylum seekers ahead of latest court challenge' (Media statement, 20 March 2020) <<https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2020/lawyers-accuse-commonwealth-of-delaying-justice-for-asylum-seekers/>>.

⁴⁵² Ibid.

⁴⁵³ Dana McCauley, 'Government facing multimillion dollar refugee compensation claims', *The Sydney Morning Herald* (online, 3 September 2019) <<https://www.smh.com.au/politics/federal/government-facing-multimillion-dollar-refugee-compensation-claims-20190903-p52nem.html#comments>>.

⁴⁵⁴ High Court of Australia, 'Cases M27-30/2020' (Web page) <https://www.hcourt.gov.au/cases/case_m27-2020>.

Complaints under Nauruan law

Over the years, there have been various complaints voiced by refugee and asylum-seeking women on Nauru of rape and sexual assault. In a 2017 report to the CEDAW Committee in respect of its pre-sessional review of Nauru, Human Rights Watch (HRW) reported that refugees and asylum-seekers interviewed stated that their complaints to Nauruan police is disregarded and that the police have on occasion discouraged victims from filing reports.⁴⁵⁵ Where reports had been filed, HRW reported that police had refused to investigate even in instances where the victim could identify the perpetrator.⁴⁵⁶ Similarly, in a 2016 review of the Nauru Child Protection system, it was found that officers are reluctant to carry out investigations into allegations of child abuse due to Nauruan cultural norms which go 'against interfering with private home matters'.⁴⁵⁷

The environment detailed in these reports indicates significant barriers to access to justice and reparations for women and girls in Nauru, including refugees and asylum-seekers. These women and girls are under these laws and facing these challenges to their rights and security as a result of Australia's offshore processing system.

International complaints

Various UN expert bodies have frequently condemned Australia over its offshore detention system in response to reports of appalling conditions of detention and breach of international human rights obligations. For example, in 2018 the UN High Commissioner for Refugees (UNHCR) called for the release of persons detained in offshore processing facilities due to reports of widespread mental health conditions and distress, including suicide.⁴⁵⁸

A number of submissions have also been made to the Office of the Prosecutor of the International Criminal Court (ICC) calling for an investigation of international crimes in respect of Australia's treatment of refugees and asylum-seekers.⁴⁵⁹ For example, in 2015 Mr Andrew Wilkie MP requested prosecution for crimes against humanity.⁴⁶⁰ In 2016, a group of Australian lawyers similarly requested action by the ICC concerning crimes against humanity.⁴⁶¹ Another such communication to the ICC were made by lawyers in 2017.⁴⁶² However, in response to Mr Wilkie MP's communication to the ICC, the Office of the Prosecutor in 2020 decided that there was 'no basis to proceed at this time' as the alleged conduct was not deemed to fall within its jurisdiction or contain grounds for further investigation for a potential

⁴⁵⁵ Human Rights Watch, 'Human Rights Watch Submission on Nauru to the United Nations Committee on the Elimination of Discrimination Against Women' (24 January 2017) <https://www.hrw.org/sites/default/files/supporting_resources/human_rights_watch_submission_on_nauru_to_the_committee_on_the_elimination_of_discrimination_against_women.pdf>.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ministry of Home Affairs and UNICEF Pacific, *Review of the Child Protection System in Nauru* (report, 2015) 17 <<https://www.unicef.org/pacificislands/media/881/file/CP-Nauru.pdf>>.

⁴⁵⁸ UN High Commissioner for Refugees, 'Australia urged to evacuate offshore detainees amid widespread, acute mental distress' (Media release, 12 October 2018) <<https://news.un.org/en/story/2018/10/1022972>>.

⁴⁵⁹ Senate Legal and Constitutional Affairs References Committee, 'Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre' (Report, April 2017) 151 <[https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/nauruandmanusrpcs/~media/Committees/legcon_ctte/NauruandManusRPCs/report.pdf](https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/nauruandmanusrpcs/~/media/Committees/legcon_ctte/NauruandManusRPCs/report.pdf)>.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid 152.

⁴⁶² Ibid.

prosecution.⁴⁶³ The Office of the Prosecutor did recognise, however, that the 'conditions of detention appear to have constituted cruel, inhuman, or degrading treatment ("CIDT"), and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law'.⁴⁶⁴

Barriers to Justice

(a) Lack of access to adequate legal advice and representation

Even when there are possible avenues to seek redress, lack of access to adequate legal advice and representation is another barrier for women and girls in offshore detention in Nauru.⁴⁶⁵ The Law Council of Australia has reported that legal advice is limited to preparation of a protection claim.⁴⁶⁶ Of concern is the lack of legal advice and representation in relation to other claims, such as complaints of domestic violence in detention.⁴⁶⁷

(b) Lack of transparency

A key barrier in addition to the limited avenues available for complaints and the lack of legal advice and representation noted above is the lack of transparency around the treatment of refugees and asylum-seekers in offshore detention. The leaked Nauru Files is a clear example of this. The law that restricted medical staff to speak out about abuse in offshore detention facilities (now removed) is another example of the secrecy surrounding offshore detention facilities. The lack of transparency, as well as accountability and scrutiny of conditions of detention in Nauru and Manus Island were key findings in the Senate Inquiry into allegations of abuse, self-harm and neglect that followed the Nauru Files.⁴⁶⁸

Limitations on the use of mobile phones, the internet and communication with journalists and lawyers constitute significant barriers for refugees and asylum-seekers seeking to access justice and seek redress for rights violations, including violations of SRHR. There have been frequent reports of these limitations in relation to both PNG and Nauru.⁴⁶⁹ For example, in a Joint Letter to the Government of Nauru, leading human rights organisations, including Human Rights Watch and the Refugee Council of Australia, expressed concerns over the status of free speech in Nauru.⁴⁷⁰ Amongst other concerns, the organisations pointed to an amendment in Nauru's Criminal Code which may make refugees liable for a criminal offence if they speak out against conditions of detention due to a vaguely and broadly worded new offence.⁴⁷¹

⁴⁶³ International Criminal Court Office of the Prosecutor, Letter to Ms Kate Allingham Office of Andrew Wilkie MP (Letter, 12 February 2020) <[https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_\(1\).pdf](https://uploads.guim.co.uk/2020/02/14/200213-Andrew-Wilkie-Response-from-International-Criminal-Court-Australian-Government-treatment-of-asylum-seekers_(1).pdf)>.

⁴⁶⁴ Ibid 2.

⁴⁶⁵ Law Council of Australia, 'Q&A on Access to Legal Advice on Nauru' (online) <http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/OA_on_Legal_advice_for_Asylum_Seekers_on_Nauru.pdf>.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ The Senate Legal and Constitutional Affairs References Committee, Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre (Report, April 2017) 87-103 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/~media/Committees/legcon_ctte/NauruandManusRPCs/report.pdf>.

⁴⁶⁹ See e.g. Rae et al, 'Self-represented witnessing: the use of social media by asylum seekers in Australia's offshore immigration detention centres' (2018) Vol 40(4) *Media, Culture & Society* 479-495; 'Joint Letter to the government of Nauru on internet blocking and free expression' (Joint Letter, 26 May 2015) <<https://www.hrw.org/news/2015/05/26/joint-letter-government-nauru-internet-blocking-and-free-expression>>.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

PART V: CRISES ABROAD

This part addresses the following question:

Experiences of Crisis

8. If your State has humanitarian aid programmes, please indicate whether sexual and reproductive health and rights are explicitly covered in the humanitarian aid strategy [...].

5.1 Overview

Humanitarian crises present a profound challenge to the realization of SRHR and undermine key underlying determinants of sexual and reproductive health. Women and girls in situations of humanitarian crisis are vulnerable to sexual abuse and exploitation which may be perpetrated by those charged with protecting and promoting their rights.⁴⁷² A report by the United Kingdom Parliament's International Development Committee observed that '[e]vidence we have received suggests that sexual exploitation and abuse is endemic across the international aid sector, predominantly humanitarian provision, and a wide range of organisations have been implicated.'⁴⁷³ While men and boys are also exploited and abused in such situations, the victims and survivors are predominantly women and girls.⁴⁷⁴ Steps are being taken within the UN to address sexual exploitation and abuse in the context of humanitarian aid and peacekeeping are yet to address the full magnitude of the problem, which has been obscured by under-reporting.⁴⁷⁵

The gendered impact of humanitarian crises has been recognised by Australia, which aims to dedicate at least 80 percent of development aid to promote gender equality.³⁶⁴ This is achieved through a 'twin-track' approach by funding specific activities that advances gender equality and women's empowerment in the areas specified in the Gender Equality Strategy (see below), or by mainstreaming gender equality through its aid programs.

The Gender Equality and Women's Empowerment Strategy (February 2016) seeks to place gender equality and women's empowerment at the core of Australia's international relations more broadly, including aid, foreign policy and economic relationships. The Strategy is guided by three mutually reinforcing priorities:³⁶⁵

1. 'Enhancing women's voices in decision-making, leadership and peace-building'
2. 'Promoting women's economic empowerment'
3. 'Ending violence against women and girls'

⁴⁷² See e.g. United Nations General Assembly, *Combating sexual exploitation and abuse Report of the Secretary-General* UN Doc: A/71/97 (23 June 2016).

⁴⁷³ House of Commons, International Development Committee, *Sexual exploitation and abuse in the aid sector*, Eight Report of session 2018-19, HC 840, 31 July 2018, [28] 19 <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-development-committee/inquiries/parliament-2017/sexual-exploitation-in-aid-sector/>>.

⁴⁷⁴ *Ibid* 4.7.17-18, 20.

⁴⁷⁵ *Ibid* 33-40.

With respect to priority (3), to prevent gender-based violence, the Strategy pledges to place a ‘strong focus on protection and promoting sexual and reproductive health and rights (SRHR) in humanitarian emergencies and responses’.³⁶⁶

Outside the focus on the above priorities, the Strategy also clarifies that programs will enhance gender equality and women’s empowerment. Notably, the Strategy underlines that health programs will contain a focus on promoting universal access to sexual and reproductive health and rights.³⁶⁷

Women and girls are identified by the Government as one of the groups disproportionately affected by the pandemic and the Government recognises in its COVID-19 response (discussed below) the need to prioritise groups most affected and focus on inter alia, women’s reproductive health.³⁶⁸

According to DFAT, the estimated budget for gender equality and women’s empowerment in 2019-20 is 55 million Australian dollars through the so-called Gender Equality Fund.³⁶⁹ This does not; however, replace programs that fund specific investments. Further, COVID-19 has resulted in redirection of aid funds to COVID-19 response (discussed under ‘COVID-19 response’ below).

5.2 Humanitarian action

Humanitarian Strategy

Australia’s humanitarian aid program rests on the framework provided in the *Humanitarian Strategy* (May 2016).⁴⁷⁶ The Strategy is premised on 10 guiding principles, which includes the integration of gender equality in ‘all aspects of humanitarian action...and ensure the specific needs of vulnerable groups are addressed’.⁴⁷⁷ Under the Strategy, Australia’s response is also informed by thematic priorities, which includes ‘gender equality and women’s empowerment’.⁴⁷⁸ SRH is briefly mentioned in the context of this priority, namely that Australia will:

*‘Promote international good practice and ensure partners implement and report against the Inter-Agency Standing Committee Gender Marker and use the Minimum Initial Services Package (MISP) for Sexual and Reproductive Health at the onset of a humanitarian emergency’.*⁴⁷⁹

This aligns with the *Gender Equality and Women’s Empowerment Strategy* mentioned above which designates SRHR in humanitarian emergencies and responses as one of the focus areas under the priority to prevent gender-based violence in all aspects of Australia’s international relations.

⁴⁷⁶ Australian Government Department of Foreign Affairs and Trade, *Humanitarian Strategy* (May 2016) <<https://www.dfat.gov.au/sites/default/files/dfat-humanitarian-strategy.pdf>>.

⁴⁷⁷ Ibid 6.

⁴⁷⁸ Ibid 22.

⁴⁷⁹ Ibid 23.

Protection in Humanitarian Action

The ‘core outcome’ of the *Protection in Humanitarian Action Framework for the Australian aid program (2013)* is to enhance the safety of those affected by crises overseas, including both natural and Anthropocene crises.⁴⁸⁰

The Framework underlines protection as a cornerstone of any humanitarian action and designates prevention and response to gender-based violence as one of the key commitments within the protection framework.

In that context, the Framework specifically refers to heightened risk of gender-based violence during crises, including (for example) domestic violence, rape and trafficking.⁴⁸¹ Crises often generate underlying causes for such risks, such as displacement and loss of livelihoods, as well as family and community structures.⁴⁸²

According to the Protection Framework, one way in which Australia is responding to gender-based violence is through funding SRH services during crises (see below).⁴⁸³ A 2019 independent evaluation of the Protection Framework in the context of Australia’s humanitarian action in the Pacific found that while there were lack of awareness of the Protection Framework amongst Department of Foreign Affairs and Trade (DFAT) staff, it has been operationalised to some extent, particularly in respect of SRH issues.⁴⁸⁴ Progress toward thematic priorities was reported as having been ‘most significant’ in respect prevent sexual and gender-based violence (SGBV) through SRH services and so-called ‘dignity-kits’ implemented with the International Planned Parenthood Foundation (IPPF) and the UN Population Fund (UNFPA).⁴⁸⁵

However, the 2019 evaluation also found that interviewees reported ‘difficulty with internal prioritisation within DFAT to ensure the consistent inclusion of sexual and reproductive health (SRH) packages in initial response packages’.⁴⁸⁶ Further, the evaluation noted that services in relation to the prevention of SGBV were focused on urban areas where most services are located.⁴⁸⁷

Examples of SRHR initiatives

[SPRINT Initiative](#)

Sexual and Reproductive Health in Crisis and Post Crisis Situations (SPRINT) is an initiative funded by Australia since 2007 and implemented by the International Planned Parenthood Foundation (IPPF). The

⁴⁸⁰ Australian Government Department of Foreign Affairs and Trade, *Protection in Humanitarian Action Framework for the Australian aid program (2013)* | <<https://www.dfat.gov.au/sites/default/files/framework-protection-humanitarian-action.pdf>>.

⁴⁸¹ Ibid 17.

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Australian Government Department of Foreign Affairs and Trade and Australian Aid, *Evaluation of Protection in Australia’s disaster responses in the Pacific: Independently-led evaluation undertaken by IOD PARC (February 2019)* 12

<<https://www.dfat.gov.au/sites/default/files/evaluation-of-protection-in-australias-disaster-responses-in-the-pacific.pdf>>.

⁴⁸⁵ Ibid 14.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

program promotes the UNFPA 'Minimum Initial Service Package' (MISP) to help safeguard SRHR during crises.⁴⁸⁸

According to DFAT data, Australia has committed 35 million Australian dollars to this initiative since 2007.⁴⁸⁹

DFAT reports that the initiative has in this time reached more than one million people in response to over 78 humanitarian crises.⁴⁹⁰ Aid provided under SPRINT includes support for activities that supports:

- Provision of safe environments (e.g. to access family planning, birth facilities, HIV prevention and sexual violence prevention);
- Support to governments (e.g. to integrate SRH into disaster management); and
- Capacity-building (e.g. of organisation at the local, national and regional levels to implement MISP in crises)⁴⁹¹

Regional Prepositioning Initiative

Australia funds a regional initiative by UNFPA Asia Pacific Regional Office to preposition emergency supplies to enhance disaster preparedness.⁴⁹² This initiative has funded Reproductive Health Medical Missions to promote SRHR in the region.

(a) Care before, during and after birth

Under the initiative, antenatal and post-natal care, as well as support during birth in humanitarian crises across the region have been provided. For example, in the Philippines, 23 UNFPA Reproductive Health Medical Missions enabled this support to 3,500 women.⁴⁹³ These missions allow for the provision of services and supplies necessary for safe care before, during and after birth. Following floods in Myanmar in 2017, clinical kits to support safe delivery and care were provided to healthcare centres and enabled 3,310 women and girls to access supplies and services.⁴⁹⁴

(b) Provision of dignity kits

Dignity kits contain basic supplies for women and girls of reproductive age, such as sanitary items, clean clothes, security whistles and flashlights for security. According to the UNFPA, these kits have been crucial for women, and girls of reproductive age during emergencies.⁴⁹⁵

⁴⁸⁸ United Nations Population Fund, *Minimum Initial Service Package (MISP)* < https://www.unfpa.org/sites/default/files/resource-pdf/MISP_Objectives.pdf>.

⁴⁸⁹ Australian Government Department of Foreign Affairs and Trade, 'Humanitarian policy and partnerships: Sexual and Reproductive Health Program in Crisis and Post Crisis Settings (SPRINT)' (Web page) <<https://www.dfat.gov.au/aid/topics/investment-priorities/building-resilience/humanitarian-policy-and-partnerships/Pages/sexual-reproductive-health-program-crisis-and-post-crisis-setting>>.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² UNFPA and Australian Aid, 'Pre-positioning life-saving supplies to improve disaster preparedness' <<https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Pre-positioning%20life%20saving%20supplies%20to%20improve%20disaster%20preparedness.pdf>>.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

Through the initiative, kits have been distributed across the region. For example, in the Philippines, 11,460 dignity kits were provided in the context of the displacement and destruction as a result of armed conflict in Mindanao in 2017.⁴⁹⁶ In Myanmar, both dignity kits and clinical kits for safe delivery were provided to partners and the government in 2018 that reached almost 1,200 women and girls.⁴⁹⁷

In Bangladesh, UNFPA reports that 4,172 kits will be provided during the pandemic, including in addition to the above items, hand sanitisers and mosquito repellent to protect against COVID-19 and dengue fever.⁴⁹⁸

Following the collapse of a hydropower dam in Lao People's Democratic Republic, the initiative enabled provision of 2,700 kits despite the lack of repositioning of supplies to the country.⁴⁹⁹ Supplies were flown from the regional warehouse hub in Brisbane within 48 hours through the Australian Defence Force.⁵⁰⁰

(c) Other support

Other services and supplies provided to women and girls across the region during emergencies include provision of rape treatment, treatment of STIs and vacuum extraction. Such support was made available to 2,500 women and girls in Tonga after two cyclones in 2018.⁵⁰¹

Between 2015 and 2018, the Initiative has also supported capacity-building, including training on disaster preparedness and logistics, as well as training on prevention of gender-based violence during emergencies.

Pacific Women

Pacific Women is a regional development program delivered over 10 years (2012-2022) to support activities that promote gender equality and empowerment in and across 14 Pacific Island Countries.⁵⁰² Over the course of the program, Australia has committed 320 million Australian dollars. Relevant program areas for SRH include: 'Reduced violence against women and expanded support services' and 'Improved gender outcomes in education and health'. Under the latter, the program aims to:

'Engage with and provide technical support to health programs to ensure family planning, violence services and maternal and adolescent reproductive health receive adequate support'.⁵⁰³

In the context of COVID-19, the program has produced a thematic brief on the gendered impacts of COVID-19 which includes a focus on the disruption of access to SRH services during the pandemic and other crises (discussed in more detail below).⁵⁰⁴

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ UNFPA Asia-Pacific, 'Australia and UNFPA strengthen COVID-19 response in Bangladesh' (News article, 16 June 2020) <<https://asiapacific.unfpa.org/en/news/australia-and-unfpa-strengthen-covid-19-response-bangladesh>>.

⁴⁹⁹ UNFPA and Australian Aid, 'Pre-positioning life-saving supplies to improve disaster preparedness' <<https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Pre-positioning%20life%20saving%20supplies%20to%20improve%20disaster%20preparedness.pdf>>.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² <https://pacificwomen.org/>.

⁵⁰³ Pacific Women, *Delivery Strategy: Pacific Women Shaping Pacific Development 2012-2022*, 32 <https://pacificwomen.org/wp-content/uploads/2017/09/Pacific-Women-Delivery-Strategy-2012-2022_final.pdf>.

⁵⁰⁴ Pacific Women, *Thematic Brief: Gender and COVID-19 in the Pacific: Emerging gendered impacts and recommendations for response (2020)* <https://pacificwomen.org/wp-content/uploads/2020/05/Thematic-Brief_Gender-and-COVID19_Pacific-Women-May-2020.pdf>.

5.3 COVID-19 response

Australia has developed a new aid policy in response to the pandemic. *Partnerships for Recover: Australia's COVID-19 Development Response* (May 2020) focuses on health security; stability; and economic recovery in the Indo-Pacific region.⁵⁰⁵ The policy also notes that its implementation, 'will be underpinned by a strong emphasis on protecting the most vulnerable, especially women and girls'.⁵⁰⁶

In the area of health security, the policy notes that Australia is working with partners to address gender-based violence and to 'deliver essential sexual and reproductive health services disrupted due to the pandemic'.⁵⁰⁷

As noted above, as part of its Pacific Women program, Australia has funded the production of a thematic brief on the gendered impacts of COVID-19 in the Pacific.⁵⁰⁸ Disruption to the access to SRH services is one of the key issues highlighted in the technical brief. It notes the importance of prioritising SRH services and supplies alongside the health responses to COVID-19.⁵⁰⁹ Amongst its recommendations in this area is the need to continue to ensure care and delivery of SRH services and raise awareness of availability of such services and supplies.⁵¹⁰ Further, given the raise in sexual violence during crises, the technical brief underlines the need to prioritise care for survivors of sexual violence, including access to emergency contraception and psychosocial care.⁵¹¹

The operationalisation of the new policy is funded through the redirection of 280 million Australian dollars from the existing aid budget.⁵¹² The redirection of aid funds from other programs rather than additional funding of this policy despite the importance of its objectives has generated criticism.⁵¹³ In comparison, the CEO of the Australian Council for International Development pointed out the additional funds added to the aid budget to respond to the 2004 Indian Ocean tsunami disaster.⁵¹⁴

As a result of the COVID-19 response, the work to develop a new international development policy has been put on hold due to the focus of the Australian Government on COVID-19 response.⁵¹⁵

⁵⁰⁵ Australian Government, Department of Foreign Affairs and Trade, *Partnership for recovery: Australia's COVID-19 Development Response* (May 2020) <<https://www.dfat.gov.au/sites/default/files/partnerships-for-recovery-australias-covid-19-development-response.pdf>>.

⁵⁰⁶ Ibid 7.

⁵⁰⁷ Ibid 9.

⁵⁰⁸ Pacific Women, *Thematic Brief: Gender and COVID-19 in the Pacific: Emerging gendered impacts and recommendations for response* (2020) <https://pacificwomen.org/wp-content/uploads/2020/05/Thematic-Brief_Gender-and-COVID19_Pacific-Women-May-2020.pdf>

⁵⁰⁹ Ibid 4.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Australian Government, *Partnerships for recovery: Australia's COVID-19 development response* (Joint media release, 29 May 2020) <<https://reliefweb.int/report/fiji/partnerships-recovery-australia-s-covid-19-development-response>>.

⁵¹³ See Lisa Cornish, 'DFAT announces new aid policy in response to COVID-19. But is anything different?', *DEVEX* (News article, 28 May 2020) <<https://www.devex.com/news/dfat-announces-new-aid-policy-in-response-to-covid-19-but-is-anything-different-97349>>.

⁵¹⁴ Ibid.

⁵¹⁵ Australian Government Department of Foreign Affairs and Trade, 'Aid: New international development policy' (Web page) <<https://www.dfat.gov.au/aid/new-international-development-policy>>.