Law Council
OF AUSTRALIA

Free and equal: An Australian conversation on human rights

Australian Human Rights Commission

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About the Law Council of Australia

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

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

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

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

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society, its National Human Rights Committee, Indigenous Legal Issues Committee, Business and Human Rights Committee, National Criminal Law Committee, Equal Opportunity Committee, Indigenous Incarceration Working Group, Migration Law Committee and Constitutional Law Committee of its Legal Practice Section in the development of this submission.

Executive Summary

1. The Law Council is pleased to respond to the Australian Human Rights Commission's (**the AHRC's**) Free and equal: An Australian conversation on human rights inquiry (**the Inquiry**). It welcomes the AHRC's comprehensive approach to reviewing Australia's legal and policy framework for respecting, protecting and fulfilling human rights generally.

2. Australia continues to face pressing challenges in rights implementation for diverse vulnerable groups within society, which have formed ongoing topics of Royal Commissions and other national inquiries. These groups include people with disabilities, older people, Indigenous peoples, women experiencing violence, LGBTI+ groups, asylum seekers and children. These ongoing challenges demonstrate that current rights protection regimes are inadequate, and that this is an unfinished national conversation. A policy shift is required from a response which is too frequently crisis-driven, to a more positive, preventative framework of human rights protection.

3. Australia currently holds a seat on the United Nations Human Rights Council and as such should be at the forefront in protecting human rights both at a domestic and international level. However, Australia is currently the only Western democracy lacking a constitutional or statutory charter of rights. This indicates that it is out of step with its international peers.

4. The Law Council's central recommendation in this submission concerns the adoption of a federal human rights act. It sets out the case for such a measure, having regard to acute national concerns regarding systemic breaches of human rights, ranging from the use of chemical restraints upon older Australians, to laws under which people with disability face protracted periods of imprisonment despite never having been convicted of a crime, to the appalling situation of First Nations as 'the most incarcerated people on Earth', to the criminal prosecution of ten year old children. It also explores inadequacies in Australia's current federal system of protection for human rights, which is patchy, remedial and too often easily overridden.

5. The experience of jurisdictions with human rights acts in place, however, indicate that these have led to tangible and practical improvements in the way that people's rights are upheld in practice – from successfully challenging the use of restraints on a sick older woman in distress, to moving a 40 year old man with disability in aged care into more appropriate care, to preventing evictions of individuals at risk, to ceasing to transfer children into adult prisons. These improvements have frequently been negotiated at an early stage with bureaucrats and policymakers, with the key impacts of human rights legislation identified as occurring within the executive and parliament, rather than through a flood of litigation in the courts. Such experiences underline the potential of a federal human rights act in driving a government-wide culture of respect for human rights.

6. The Law Council considers that in addition to a federal human rights act, much can be done to promote and uphold human rights in Australia. This includes:

    - expanded human rights education and awareness programs, with particular emphasis on primary, secondary and tertiary education, and building a strong human rights culture across government and parliament;

- additional funding for legal assistance services to support vulnerable Australians to defend their right in practice, and lifting restrictions on their role in advocating for systemic change,
- strengthened support for the AHRC, through increased resourcing to perform its functions effectively, strengthening its independence through mandating a transparent, arms-length and merits-based selection process, and requiring an Australian Government response to AHRC reporting within specified timeframes;
- measures to ensure that the Parliamentary Joint Committee on Human Rights can play a stronger role in the scrutiny of human rights by federal parliament;
- establishing a comprehensive, consolidated federal anti-discrimination legislation regime, provided that this preserves and strengthens existing protections;
- developing an indicator framework for measuring Australia's progress in realising human rights, having regard to international examples;
- continuing to respect and pursue the calls in the Uluru Statement, including for a Constitutionally-enshrined First Nations Voice to Parliament;
- proactive, targeted national agendas to fulfil Australia's human rights obligations in specific areas. Reforms needed include those regarding: the over-incarceration of Indigenous peoples; juvenile justice reform; the rights of people with disability in the justice system, implementing outstanding Australian Law Reform Commission (**ALRC**) recommendations regarding elder abuse; implementing forthcoming Royal Commission recommendations concerning the rights of people with disability and older persons in aged care; implementing Australia's commitments under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[1] (**OPCAT**); business and human rights, and ensuring long-term, durable solutions for asylum seekers; and
- exploring how the United Nations Declaration on the Rights of Indigenous Peoples[2] (**UNDRIP**) may be effectively implemented in Australia.

7. Finally, the Law Council notes that the core human rights issues facing Australia are evolving as it progresses into the twenty-first century. Continued national leadership and guidance by the AHRC regarding emerging human rights challenges which face governments, business and the community will be vital. These include the intersection of human rights with rapidly adopted developments in artificial intelligence and technology, and with the protection of the environment.

[1] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (**UNDRIP**).

Introduction

8. The Law Council welcomes the AHRC's Inquiry, which seeks to promote a national conversation about 'what makes an effective system of human rights protection for 21st century Australia?[3]' It appreciates the AHRC's comprehensive approach to reviewing Australia's legal and policy framework for respecting, protecting and fulfilling human rights generally, as set out in its current Inquiry Issues Paper[4] (**the Issues Paper**).[5]

9. The timing of the AHRC's Inquiry is particularly important having regard to several current matters of national debate and significance, including questions of freedom of expression, freedom of religion and press freedoms. Rather than a piecemeal debate which often raises individual freedoms in isolation, the Law Council welcomes the AHRC's comprehensive approach to reviewing Australia's legal and policy framework for respecting, protecting and fulfilling human rights generally.

10. The Law Council considers that the Inquiry is essential to understanding the role of the rule of law and human rights in underpinning a healthy Australian democracy. These are not elitist legal concepts. Rather, as the Hon Robert French AC, former Chief Justice of the High Court of Australia has remarked:

> *The rule of law provides a kind of societal infrastructure. It creates and maintains the space within which we can enjoy our freedoms, exercise our rights, develop our capacities, find opportunities, take risks and generally pursue life goals. It is that infrastructure, strengthened by efficient and impartial and independent courts and tribunals, which encourages the investment of capital from domestic and offshore sources. It might also be thought, because it supports a society with respect for the human rights and freedoms of its members, to attract human capital in the form of people coming from other places to live and work here and contribute to the common good. It gives shape and definition to Australia as a particular kind of society in the global community of nations.*[6]

11. The Law Council's perspective on the questions outlined in the Issues Paper is underpinned by its *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments*[7] *(***the LCA Policy**), along with several other key Law Council policies cited below. The LCA Policy's key principles and commitments are directed to:

- the domestic implementation of international human rights law in Australia;
- advocacy in relation to human rights in Australia and internationally;
- education and public awareness in relation to human rights; and
- participation in the international human rights system.

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[3] Issues Paper, 3.
[4] AHRC, *Free and Equal: An Australian Conversation on Human Rights* (2019).
[5] The Law Council notes that much of this submission is highly relevant to the later-released AHRC technical discussion paper, *A Model for Human Rights Reform* (2019). It is separately responding to the AHRC technical discussion paper, *Priorities for Federal Discrimination Reform* (2019).
[6] The Hon Robert French AC, 'Rights and Freedoms and the Rule of Law' (Victorian Law Foundation Oration, Melbourne, 9 February 2017).
[7] Law Council, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (2017), available at <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>.

12. Australia has a long history of inquiries and debates about human rights protection at the federal level. A proposal for a federal bill of rights was first put forward in 1896 during the pre-federation Constitutional Conventions by Richard O'Connor, a future justice of the High Court. His proposal was defeated 19 votes to 23.[8]

13. This result set the tone for future human rights law reform proposals in Australia. In 1973, 1984 and 1985, three different Commonwealth Attorneys-General introduced bills to establish a federal human rights law.[9] In each case, the bill either lapsed or was withdrawn. In 1988, the Constitutional Commission recommended the introduction of a new chapter into the Constitution, similar to the 1982 *Canadian Charter of Rights and Freedoms* (**the Canadian Charter**),[10] containing a number of core rights. In 2009, the National Human Rights Consultation[11] (**the National Consultation**), chaired by Frank Brennan, recommended that Australia adopt a federal Human Rights Act modelled on legislation in the ACT and Victoria. Both proposals were rejected – at a referendum, and by Cabinet, respectively.

14. The Law Council, with the assistance of its constituent bodies, has contributed to numerous past human rights consultations at the federal level and has set out its support for a federal Human Rights charter. Its constituent bodies have also been highly active in responding to similar state and territory level inquiries.

15. While proposals for human rights legislation at the federal level have, to date, largely failed to gain traction, there has been an increasing acceptance of human rights protections at the state and territory level. In February 2019, the Queensland Parliament passed the *Human Rights Act 2019* (Qld)[12] (**the Queensland Act**). This follows passage of the ACT's *Human Rights Act 2004* (ACT) (**the ACT Act**) and Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Victorian Charter**). There are calls for others to follow suit: for example, prior to the 2019 state election, the Law Society of New South Wales (**LS NSW)** called on all parties in NSW to enact human rights legislation.[13]

16. United Nations (**UN**) bodies have consistently noted gaps in Australia's human rights protection at the federal level for many years. They have also identified that at critical moments, existing human rights protections have been set aside by the Australian Parliament, such as during the Northern Territory Emergency Intervention (**NTER**), when the *Racial Discrimination Act* 1975(Cth) (**RDA**) was suspended.[14] Most recently, in 2017, the UN Human Rights Committee (**HRC**), in its concluding observations on the sixth periodic report of Australia, recorded its concern over 'gaps in the application of [the International Covenant on Civil and Political Rights[15] (**ICCPR**)]; and recommended Australia 'adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state

[8] Justice Michael Kirby AC CMG, 'A Bill of Rights for Australia' (Speech, the Young Presidents' Association Queensland Chapter, 4 October 1994).
[9] Lionel Murphy, Gareth Evans and Lionel Bowen.
[10] *Canada Act 1982* (UK) c 11, sch B pt I (***Canadian Charter of Rights and Freedoms***).
[11] Commonwealth of Australia, *National Human Rights Consultation Report* (8 October 2009) (**the National Consultation**), 378.
[12] Some of the Queensland Act's provisions commenced operation from 1 July 2019, with the remaining provisions due to operate on 1 January 2020.
[13] LS NSW, *2019 State Election Policy Platform* (December 2018) <https://www.lawsociety.com.au/2019-state-election-platform>.
[14] Human Rights Committee (**HRC**), *Consideration of Reports submitted by States Parties under Article 40 of the Covenant*: *Concluding Observations of the Human Rights Committee: Australia,* 95th sess, UN Doc CCPR/C/AUS/CO/5 (2 April 2009).
[15] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

and territory jurisdictions'.[16] The UN Committee on Economic, Social and Cultural Rights similarly recommended in 2017 that Australia consider introducing a federal charter of rights, noting the limitations of the Parliamentary Joint Committee on Human Rights.[17] The Human Rights Council Working Group on Australia's Second Universal Periodic Review in 2016 also included several recommendations made by States to this effect.[18]

Need for a more preventative approach

17. The Law Council considers that a federal human rights charter would underpin a more preventative approach to human rights protection for Australians.

18. In response to the systemic and sometimes harrowing breaches of the human rights of diverse groups of Australians, several of which are canvassed briefly below, governments have tended to establish Royal Commissions in recent years. While each of these Royal Commissions has been welcome and necessary, the Law Council notes that as a general policy response, Royal Commissions are crisis-driven and highly resource-intensive. They reflect on human rights abuses rather than preventing them and protecting people through human rights laws. For example, it has been reported that:

    - the Royal Commission into Aged Care will cost the Australian Government $104 million over four years;[19]
    - the Royal Commission into Institutional Responses to Child Sexual Abuse cost about $500 million;[20]
    - the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**the Disability Royal Commission**) will cost $527 million;[21] and
    - the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission**) jointly cost the Northern Territory and Federal Governments $54 million.[22]

19. Moreover, Royal Commissions' recommendations are not always implemented by governments in practice.[23] There are both historic and current examples of

[16] HRC, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [5]-[6].
[17] UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, 47th meeting, UN Doc E/C.12/AUS/CO/5 (11 July 2017), [5]-[6].
[18] *Report of the Working Group on the Universal Periodic Review – Australia*, UN Doc A/RES/54/254 (13 January 2016), [136.70]-[136.73] (Indonesia, Iceland, Turkey and Canada).
[19] Sarah Scopelianos, 'The Royal Commission into Aged Care Quality and Safety explained', *ABC* (online), 11 February 2019.
[20] Michelle Grattan, 'Royal Commission on the abuse of disabled people to be announced soon', *The Conversation* (online), 27 February 2019.
[21] Rosemary Bolger, 'It's not flash being disabled': PM launches $527 million disability Royal Commission', *SBS News* (online), 5 April 2019.
[22] Tom Maddocks, 'Royal commission into child detention and protection costs NT Government more than $40 million', *ABC* (online), 28 November 2017.
[23] Peter Wilkins & John Phillimore, 'Royal commission recommendations: processes to ensure they are implemented', *The Mandarin* (online), 6 February 2019.

critically important Royal Commissions' findings being ignored,[24] as well as the findings of other inquiries into endemic national issues.[25]

20. While Royal Commissions will always be an essential policy tool to respond to urgent and complex situations, the Law Council considers that an alternative, more preventative approach is warranted. This would establish a strong ethos of respect for the fundamental rights of all Australians – whether old, young, diverse, strong or vulnerable – which is proactive, alert and responsive to possible human rights breaches. While not a panacea to all ills, such an ethos - established across the public and private sectors, across police, prisons, aged care, disability services, childcare, schools and hospitals - may serve to curb the systemic need for rolling Royal Commissions in Australia.

21. The Law Council considers that renewed leadership – by governments, business and community leaders - is necessary to foster this culture of human rights for all Australians. The failure to implement the flagship recommendation of the 2009 National Consultation - that Australia adopt a federal human rights act – must be addressed as a cornerstone of this approach. For example, a human rights act would have the role of requiring authorities to assess their actions according to human rights standards However, as noted below, there are many other actions which should be also adopted in this regard.

Issues Paper - Key questions

What human rights matter to you?

Core treaties

22. With the support of its people, Australia has entered into a series of international treaties for the protection and promotion of human rights. Every treaty to which Australia is party is binding on it and must be performed by it in good faith.[26] The human rights treaties which Australia has entered into set out in clear terms Australia's international human rights obligations. Australia is bound to comply with their provisions and to implement them domestically. These treaties should inform any discussion of human rights in the national context.

23. The Law Council recognises that Australia is subject to obligations under seven '*core*' international human rights treaties to which it is a party. These are:

- the Convention on the Elimination of All Forms of Racial Discrimination **(CERD)**; [27]
- the ICCPR;
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**);[28]

[24] 'The Royal Commission into Aboriginal Deaths in Custody: timeline of events and aftermath', SBS NITV, 15 April 2017; Faith Gordon and Kate Fitz-Gibbon, 'One year on from Royal Commission findings on Northern Territory child detention: what has changed?', *The Conversation* (online) 27 November 2018.
[25] See, eg, Australian Law Reform Commission (**ALRC)**, *Pathways to Justice – An inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (December 2017) (**Pathways to Justice Report**).
[26] Article 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980).
[27] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[28] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

- Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**);[29]
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);[30]
- Convention on the Rights of the Child *(***CRC**);[31] and
- Convention on the Rights of Persons with Disabilities (**CRPD**).[32]

24. Australia is also a party to:

- the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty;[33]
- the Optional Protocol to the Convention on the Elimination on all Forms of Discrimination against Women;[34]
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;[35]
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;[36]
- the Optional Protocol to the Convention on the Rights of Persons with Disabilities;[37] and
- OPCAT.

25. In addition, Australia is party to other important multilateral treaties with strong relevance to human rights, including in the areas of international refugee law,[38] trafficking,[39] international humanitarian law,[40] international criminal law[41] and international labour law.[42] The Law Council recognises all of these treaties as imposing legally binding obligations upon Australia which contribute to the protection and promotion of human rights.

UNDRIP

26. On 3 April 2009, the Australian Government formally announced Australia's support for UNDRIP, which had been proclaimed by the General Assembly in 2007 as 'a standard of achievement to be pursued in a spirit of partnership and mutual

[29] Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[30] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[31] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[32] Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).
[33] Opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).
[34] Opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000).
[35] Opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002.
[36] Opened for signature 25 May 2000, 2171 UNT 227 (entered into force 18 January 2002).
[37] Opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).
[38] These include the *Convention relating to the Status of Refugees* (1951), *Convention relating to the Status of Stateless Persons* (1954), *Convention on the Reduction of Statelessness* (1961) and the *Protocol relating to the Status of Refugees* (1967).
[39] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
[40] These include the Geneva Conventions (1949) and the additional protocols to the Geneva Conventions (1977).
[41] These include the *Slavery Convention* (1926), the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (1956) and the *Rome Statute of the International Criminal Court* (2002).
[42] These include the *Forced Labour Convention* (1930), *Freedom of Association and Protection of the Right to Organise Convention* (1948), *Right to Organise and Collective Bargaining Convention* (1949), *Discrimination (Employment and Occupation) Convention* (1958), *Worst Forms of Child Labour Convention* (1999).

respect'.[43] It is a comprehensive standard on human rights for Indigenous Peoples and informs the way governments engage with and protect the rights of Indigenous people.[44] While the Declaration is not a treaty and does not itself create legally binding obligations, many, if not all of its provisions, have been recognised as reflecting customary international law.[45] Furthermore, UNDRIP echoes many of the rights articulated in other legally binding human rights treaties but with a focus on Indigenous peoples. As the AHRC has noted, UNDRIP is based on fundamental rights of self-determination, participation in decision-making, respect for and protection of culture, and equality and non-discrimination.[46] Lenzerini remarks that UNDRIP has:

> *… been generally acknowledged as the instrument of reference to define State obligations existing in the field of indigenous peoples' rights, if not worldwide certainly very extensively. In addition to the fact that the UNDRIP is explicitly mentioned in the text of important international treaties concluded after its adoption, this is clearly shown by the use made of the Declaration by international human rights monitoring bodies, as well as by domestic courts and other State organs*.[47]

27. The Law Council strongly endorses the importance of UNDRIP. While it recognises UNDRIP in full, it particularly emphasises the significance of article 3, which underpins many of UNDRIP's provisions. Article 3 provides that:

> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

28. The right to self-determination is also reflected in both the ICCPR[48] and ICESCR[49]. While there is no universally accepted definition of the right to self-determination, it is agreed that at a minimum, it entails the entitlement of peoples to have control over their destiny and to be treated respectfully.[50] This includes peoples being free to pursue their economic, social and cultural development.[51] As observed by the Law Council's Indigenous Legal Issues Committee (**ILIC**), successive Australian Governments have consistently misunderstood the nature of self-determination. Self-determination is an 'ongoing process of choice' to ensure that Indigenous

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[43] Ibid, Preamble.
[44] Attorney-General's Department, 'Right to Self-Determination', undated, https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoselfdetermination.aspx.
[45] International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP around the world: achievements and future perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.
[46] AHRC, 'About Aboriginal and Torres Strait Islander Social Justice' https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/about-aboriginal-and-torres-strait/
[47] Federico Lenzerini, 'Implementation of the UNDRIP around the world: achievements and future perspectives' (2019) 23 *International Journal of Human Rights* 51,
[48] *ICCPR* art 1.
[49] *ICESCR* art 1.
[50] Attorney-General's Department, 'Right to Self-Determination', undated, https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoselfdetermination.aspx
[51] Ibid.

communities are able to meet their social, cultural and economic needs. It is not about creating a separate Indigenous 'state'.'[52] Davis states that:

> *… The right to self-determination, expressed as the right to determine their own economic, social, cultural and political destinies, came to represent the fundamental principle underpinning Indigenous peoples' advocacy. Almost universally, Indigenous peoples had been institutionalised to the extent that every aspect of their lives was controlled by the state… the idea that indigenous people should have some control over the decisions that are made about their lives.*[53]

29. Other pivotal articles include article 19, requiring States to obtain the free, prior and informed consent of Indigenous peoples before adopting legislative or administrative measures that may affect them. Integral to this concept is article 18, upholding Indigenous peoples' rights to participate in decision-making through their chosen representatives, and to maintain their own decision-making institutions.

30. The Law Council contends that ensuring effective access by many Indigenous peoples in Australia to their rights must be a matter of the utmost priority, having regard to the concerns discussed above. As such, ensuring Australia's adherence to UNDRIP must be at the heart of its approach to realising human rights. It is important to avoid 'siloing' UNDRIP rights, and instead integrate them in context with other rights and treaties. For example, it understands that the Disability Royal Commission is viewing UNDRIP in context with the CRPD which is a positive approach.

31. However, there has been little broader action taken to implement UNDRIP, such as through an audit of current federal legislation. The Law Council is committed to promoting its implementation and awareness of its provisions amongst members of the legal profession and the community generally.[54] Its current interest in this area is further discussed below (Targeted National Actions).

Approach to human rights

Universal, indivisible, interdependent and interrelated

32. The Law Council endorses an approach, consistent with international law and practice, which confirms that all human rights are universal, indivisible and interdependent and interrelated.[55]

33. This is affirmed by article 5 of the *Vienna Declaration and Programme of Action*, adopted in 1993 by 171 states (including Australia) that:

> *All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.*

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[52] AHRC, 'Right to self-determination' (30 April 2013) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>.
[53] Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.
[54] Law Council, *Policy Statement: Indigenous Australians and the Legal Profession* (2010), 3 <https://www.lawcouncil.asn.au/docs/971f3e13-cc39-e711-93fb-005056be13b5/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>.
[55] LCA Policy, 2.

While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[56]

Respect, protect and fulfil human rights

34. The Law Council, consistent with international law and practice, also recognises three levels of obligations upon Australia to *respect,* to *protect* and to *fulfil* human rights. The obligation to *respect* requires Australia to refrain from interfering directly or indirectly with, or curtailing the enjoyment of, human rights. The obligation to *protect* requires Australia to protect individuals and groups against human rights abuses. The obligation to *fulfil* obliges Australia to adopt positive measures to facilitate the enjoyment of human rights.[57]

Nature of rights – absolute, limited, derogable

35. Under international human rights law, certain human rights are absolute, and no limitation on them is permissible. These include the prohibition on genocide, the right to be freed from torture, cruel, inhuman or degrading treatment, the right to be free from slavery and servitude, the prohibition on prolonged arbitrary detention, the prohibition on imprisonment for inability to fulfil a contractual obligation, the prohibition on the retrospective operation of criminal laws, the right to recognition as a person before the law, and the right to be free from systemic racial discrimination.[58]

36. For other rights, limitations (or restrictions) may be imposed provided certain standards are met. Some rights have express limitation clauses setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause.

37. In general, the approach taken under international human rights law is that limitations on rights should be: prescribed by law; pursue a legitimate aim; and be necessary to pursue that aim, which requires an assessment of their proportionality.[59] Key factors relevant to whether a limitation is proportionate include whether the measure provides sufficient flexibility to treat different cases differently, or imposes a blanket policy without regards to the merits of the individual case. Proportionality must be considered in the particular circumstances of a case.[60]

38. In general, the Law Council endorses the approach of the Parliamentary Joint Committee on Human Rights (**PJCHR**) with respect to its assessment of permissible limitations on human rights in legislation. It considers three questions:

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[56] UN General Assembly, *Vienna Declaration and Programme of Action,* A/CONF.157/23 (12 July1993), 5.
[57] LCA Policy, 4.
[58] For example, the rights in articles 6(3), 7, 8(1) and (2), and elements of 2(1), 9(1), 11, 15, 16, 18 and 26 of the ICCPR are absolute. Other rights are capable of being subject to narrowly prescribed restrictions.
[59] See, eg, Parliamentary Joint Committee on Human Rights (**PJCHR**), Parliament of Australia, *Human Rights Scrutiny Report* (Report No 2 of 2018, 13 February 2018) iv; HRC, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion,* 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8]; HRC, *General comment No 34: Article 19 of the ICCPR on Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [21]-[36]; HRC, *General comment No 27: Article 12 of the ICCPR on Freedom of Movement*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11].
[60]PJCHR, *Guide to Human Rights* (June 2015).

- whether and how the limitation is aimed at achieving a legitimate objective;
- whether and how there is a rational connection between the limitation and the objective; and
- whether and how the limitation is proportionate to that objective.61

39. Rights are also either derogable or non-derogable. For derogable rights, governments can temporarily suspend their application in the exceptional circumstance of a 'state of emergency' and subject to certain conditions, including official notification.[62] However, certain rights are non-derogable and cannot be suspended.[63]

Progressive realisation of economic, social and cultural rights

40. In relation to economic, social and cultural human rights, the Law Council emphasises Australia's obligation to take measures to the maximum of its available resources with a view to achieving progressively the full realisation of these rights, without prejudice to obligations that are immediately applicable according to international law.[64]

What are the barriers to the protection of human rights in Australia?

Examples of acute areas of concern

41. The Law Council considers that the barriers to the protection of human rights can only be appreciated by reference to context regarding key areas of concern.

42. While there is much to celebrate about Australian democracy in practice, the Law Council is concerned that breaches of human rights in Australia, particularly of those held by vulnerable or marginalised groups, remain 'disturbingly routine'.[65] While a comprehensive overview is beyond the scope of this submission, acute examples include those discussed in the paragraphs which follow. Together, these signal that there is a gap between the promise and the implementation of human rights in Australia. Several of the examples discussed include consideration of the potential, in that area, for human rights legislation to assist in closing these 'implementation gaps' by translating international human rights obligations into national law and practice.

Aboriginal and Torres Strait Islander peoples

43. The multiple and severe disadvantage endured by Aboriginal and Torres Strait Islander peoples is a product of a history of dispossession and a legacy of

[61] PJCHR, Practice Note 1.
[62] *ICCPR* article 4.
[63] *ICCPR* article 4(2): right to life (art 6); freedom from torture or cruel, inhuman and degrading treatment or punishment; and freedom from medical or scientific experimentation without consent (art 7); freedom from slavery and servitude (arts 8(1) and (2); freedom from imprisonment for inability to fulfil a contractual obligation (art 11); prohibition against retrospective operation of criminal laws (art 15); right to recognition before the law (art 16); freedom of thought, conscience and religion (art 18).
[64] *ICESCR* art 2(1).
[65] George Williams and Daniel Reynolds, 'Out on a limb: Australia's troubling exceptionalism on human rights' (2017) 38 *Law Society Journal* 40, 40.

systemic discrimination in Australia.[66] Williams and Reynolds remark that historically:

> *The number of ways in which Indigenous people have been denied their basic rights in this country is striking: they have been excluded from voting, prevented from marrying, separated from their children, told where to live and robbed of their wages, to name just a few.*[67]

44. Today, this disadvantage manifests in poor health outcomes (including lower life expectancy, high rates of mental health conditions, cognitive impairment and physical disability);[68] lower socio-economic outcomes and high unemployment rates;[69] high rates of family violence;[70] high contact with child protection;[71] lower educational attainment and limited literacy;[72] and extensive experience of discrimination and racism.[73]

45. A critical area in which inequality is evident in Australia is in the dramatic disparity in the number of Aboriginal and Torres Strait Islander incarcerations.[74] In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples described Australia's Indigenous incarceration rate as a 'major human rights concern' and criticised Australia's policies, such as the paperless arrest laws in the Northern Territory, for having a disproportionate effect on Indigenous people.[75]

46. While approximately two per cent of the adult Australian population are Aboriginal or Torres Strait Islander peoples, Indigenous prisoners comprise 28 per cent of the total Australian prison population.[76] The ALRC *Pathways to Justice* report noted Indigenous over-representation in the criminal justice system is a 'persistent and growing problem[77]', with the incarceration rate having increased by 41 per cent between 2006 and 2016.[78] In NSW, the Indigenous incarceration rate increased by 63 per cent between 1993 and 2016.[79] The national Indigenous incarceration rate in 2016 was 13 times the non-Indigenous incarceration rate.[80] Based on the best

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[66] See, eg, Darren Dick on behalf of Tom Calma, 'Social determinants and the health of Indigenous peoples in Australia – a human rights based approach' (Workshop paper presented at the International Symposium on the Social Determinants of Indigenous Health, Adelaide, 29-30 April 2007).
[67] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017), 25-26.
[68] See, eg, Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Life Expectancy Increases* (Catalogue Number 3302.0.55.003, November 2013); First People's Disability Network Australia, *10-point plan for implementing NDIS in Aboriginal Communities* <http://fpdn.org.au/10-point-plan-ndis>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *The Hidden Harm Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012) 32 [2.93]; Creative Spirits, *Health and Hearing* (2016).
[69] See, eg, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators* (2016), 3.11. 3.12.
[70] See, eg, Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (2018).
[71] See, eg, Secretariat of National Aboriginal and Islander Child Care, University of Melbourne, Griffith University and Save the Children Australia, *Family Matters Report 2017*: *Snapshot* (2017).
[72] See, eg, Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2019) [2.2.2].
[73] Ibid [2.2]; see also Annual Reports by the AHRC.
[74] See, eg, Change the Record Coalition, *A generation of government failure – time for change* (2016).
[75] UN Office of the High Commissioner for Human Rights (**OHCHR**), 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Corpuz on her Visit to Australia' (2017).
[76] Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue Number 4517.0,2018).
[77] ALRC, *Pathways to Justice Report* (28 March 2018), 21.
[78] Ibid, 21-23.
[79] Don Weatherburn and Jessie Holmes, NSW Bureau of Crime Statistics and Research 'Indigenous Imprisonment in NSW: A closer look at the trend' (Issues Paper no 126, 2017) 1.
[80] Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue Number 4517.0, 2016).

available international data, Indigenous Australians are the most incarcerated people on Earth.[81]

47. The inequality is even more pronounced when comparing the rates between Indigenous and non-Indigenous women and children. In 2016, Indigenous women made up two per cent of Australia's adult female population, but accounted for 34 per cent of the female prison population.[82] Over the decade to 2017, total number of women in prison in Australia increased by 77 per cent.[83]

48. The disparity in incarceration rates of Aboriginal and Torres Strait Islander women further affects their children. Studies suggest that 80 per cent of female Aboriginal and Torres Strait Islander prisoners are mothers, with 20 per cent of Aboriginal and Torres Strait Islander children nationally experiencing parental incarceration.[84] The ALRC has highlighted that the imprisonment of Indigenous women has a 'disproportionate but largely hidden adverse outcome for their children' and can contribute to 'gaps in parenting, income, child care, role models and leadership in their communities, entrenching future disadvantage'.[85]

49. Aboriginal and Torres Strait Islander children are likewise overrepresented in the youth justice system. Aboriginal and Torres Strait Islander children make up five per cent of children aged 10-17 in Australia. However, they account for 49 per cent of children aged 10-17 under youth justice supervision.[86] Indigenous children comprised over half (56 per cent) of the total number of children in detention and are 23 times more likely than non-Indigenous children to be in detention.[87]

50. At the same time, particular laws and policies including those with respect to bail, parole, fines default, driving offences, mandatory sentencing, public order offences and expanded police powers have all been recognised as driving up Indigenous incarceration rates.[88] As discussed below, Aboriginal legal services are chronically under-resourced to cope with the demand created. Disproportionate and discriminatory systemic responses are also contributors. As noted by the ALRC:

> *There is evidence that the law is applied unequally—for example, Aboriginal and Torres Strait Islander young people are less likely to be cautioned and more likely to be charged than non-Indigenous young people.*[89]

51. A key issue is that government responses to address 'community safety' largely focus on law and order policy responses and fail to address the underlying reasons why individuals come into contact with the justice system in the first place.[90] As noted by Change the Record,

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[81] Thalia Anthony, 'Factsheet Q&A: Are Indigenous Australians the most incarcerated people on Earth?' *The Conversation* (online) 6 June 2017.
[82] ALRC, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper' (Discussion Paper 84, July 2017) 26.
[83] Sophie Russell and Eileen Baldry, 'Three Charts On – Australia's Booming Prison Population', *The Conversation* (online), 14 June 2017.
[84] ALRC, *Pathways to Justice Report* (28 March 2018), 11.100.
[85] Ibid, 11.102.
[86] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-2018* (2019) v.
[87] Ibid, 9.
[88] ALRC, *Pathways to Justice Report* (28 March 2018).
[89] Ibid, 33. See also *Wotton v State of Queensland (No 5)* [2016] FCA 1457; Royal Commission into the Detention and Protection of Children in the Northern Territory, *Final Report* (2018), 171-179.
[90] Change the Record Coalition, *Blueprint for Change* (2015).

> *The criminal justice system is often an ineffective or inappropriate way to respond to people who have a disability or are experiencing poverty, mental illness, drug or alcohol addiction, homelessness or unemployment. We need a social policy and public health response to such issues, not a criminal justice one. Services like adequate health care, disability supports, employment and training, drug treatment and affordable housing cost far less than prisons, and have a substantially better record of success.*[91]

52. The Law Council's concerns regarding Indigenous over-incarceration as a national crisis warranting national attention cannot be overstated. In particular, the failure by governments to respond to the ALRC's *Pathways to Justice* report is incomprehensible. The Law Council considers that any Australian debate concerning human rights must start with the over-incarceration of its First Nations people, which undermines the very proposition of Australians as 'free and equal' from the outset. It raises questions as to whether a society in which the rate of over-incarceration has risen so exponentially can be said to have a properly functioning system of justice.

53. Urgent and comprehensive law, policy and program reforms are needed to address this issue. Human rights laws can also inform better outcomes. For example, the ACT Act contains several provisions relevant to non-custodial measures and diversion from the criminal justice system.[92] The ACT Act has been cited by an ACT Magistrate to support an application to refer an offender to circle sentencing,[93] which aims to engage the Indigenous community in the sentencing process, and reduce the number of people coming into contact with the criminal justice system. Other examples, such as the halting of the transfer of Victorian children to adult prisons and improvements to ACT juvenile detention practices are discussed below.

Children in juvenile detention

54. Abuse and mistreatment of children in juvenile detention has occurred across multiple Australian jurisdictions.[94] Several inquiries have revealed evidence of 'inappropriate' and 'unlawful' practices occurring in juvenile detention, such as instances of abuse and mistreatment, extended periods of solitary confinement and isolation, and unacceptable use of restraints and force, such as the use of mechanical and other types of restraints, such as hog-ties.[95] These include the NT Royal Commission, which reported that 'shocking and systemic failures occurred

[91] Ibid, 9.
[92] See, eg, ACT Act, ss 8(3), 11, 18, 20 and 22.
[93] Adam Fletcher and André Dao, Report for Australian Government Attorney-General's Department, *Alternatives to Imprisonment for Vulnerable Offenders: International Standards and Best Practice* (July 2012), 99.
[94] Including at Reiby Juvenile Justice Centre in NSW, Bimberi Youth Detention Centre in the ACT, Cleveland Youth Detention Centre in Queensland, and Barwon Prison in Victoria: see Amnesty International, 'Not Just Don Dale: New Canberra child abuse allegations confirm need for national overhaul of 'injustice' system' (Media Release, 4 July 2017).
[95] See, eg, Northern Territory, *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Interim Report, 2017) 37; Commission for Children and Young People Victoria, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (2017) 39; Queensland Government, *Reasons for inclusion or redaction of categories of information in the report* (2017) 2.

over many years [which] were known and ignored at the highest levels'.[96] It found that:

> *Children in detention were denied basic human needs, and the system failed to comply with basic human rights standards and safeguards, including the Convention on the Rights of the Child.*[97]

55. While acknowledging that there have been government efforts to respond to such concerns, the Law Council is concerned that these are piecemeal and that more is required. Under the CRC, Australia has an obligation only to arrest, detain or imprison a child as a measure of last resort.[98] In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Corpuz, expressed concerns over the alarming rate of Indigenous children in prison and highlighted Australia's failure to use detention as a last resort. She noted the inappropriateness of punitive detention over rehabilitative conditions and further commented that incarcerated Indigenous children 'are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime'.[99]

56. A contributor to this cycle is the minimum age of criminal responsibility (**MACR**), which across Australian jurisdictions is currently just 10 years. There is also a rebuttable presumption[100] that children aged between 10 and 14 years are incapable of committing a criminal act. The MACR is well below international standards, and the United Nations Committee on the Rights of the Child (**CRC Committee**) has twice previously recommended that Australia should raise the MACR 'to an internationally acceptable level'.[101] It has revised its previous position on MACR from requiring an age of '12 as the absolute minimum' to finding that this is 'still low' and encouraging states to increase it to 'at least 14'.[102]

Older persons

57. Elder abuse is affecting a growing number of older Australians.[103] Elder abuse encompasses 'any act occurring within a relationship where there is an implication of trust, which results in harm to an older person'.[104] Abuse includes intentional or unintentional physical, psychological, financial, sexual and social harm to an older person.[105] The ALRC found psychological or emotional abuse to be the most common form of elder abuse in Australia.[106] Meanwhile, national concerns regarding the neglect and abuse of older persons in aged care have led to the establishment of the Royal Commission into Aged Care, which has received

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[96] NT Royal Commission, 'Royal Commission and Board of Inquiry into protection and detention systems of the Northern Territory has revealed systemic and shocking failures' (Media Release, 17 November 2017).
[97] NT Royal Commission, *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Findings and Recommendations, 2017) 4.
[98] CRC, art 37(b).
[99] OHCHR, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Corpuz on her Visit to Australia* (2017).
[100] Known as *doli incapax.*
[101] CRC Committee, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268; CRC, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.
[102] CRC Committee, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019).
[103] Alexandra Back, 'Demand for legal aid in cases of elder abuse exceeds expectations', *Canberra Times* (online), 3 January 2017.
[104] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people*, 4.
[105] Ibid.
[106] ALRC, 'Elder Abuse – A National Legal Response Report' (ALRC Report 131, 14 June 2017*)*, 19.

evidence of serious failings in assuring older people their dignity and rights in aged care settings.[107] Summarising the findings of its interim report of 31 October 2019, the Royal Commission characterised the aged care system in Australia as 'a shocking tale of neglect'.[108] It found that:

> *… the aged care system fails to meet the needs of its older, vulnerable, citizens. It does not deliver uniformly safe and quality care, is unkind and uncaring towards older people and, in too many instances, it neglects them.*[109]

58. Amongst other failings, the Royal Commission revealed:

> *… instances where the use of restrictive practices have been inhumane, abusive and unjustified. A lack of permission in the use of restraint and prolonged use of powerful chemical restraints is common in Australia.*[110]

59. Age discrimination is a serious issue experienced by many older persons in Australia. The AHRC reported that age discrimination is pervasive in Australia and the 'impacts of age discrimination can be severe', such as social isolation, mental health conditions, lowered self-esteem and confidence, unemployment and financial disadvantage.[111] With respect to age discrimination in the workplace, the AHRC reported that 'age discrimination is an ongoing and common occurrence in Australian workplaces' and 'can occur at all stages in the employment cycle'.[112] However, notwithstanding the common experience of age discrimination amongst older persons, the number of formal age discrimination complaints is low.[113]

People with disability

60. The purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[114] Its general principles include non-discrimination, full and effective participation and inclusion in society, respect for difference, equality of opportunity, and accessibility. At the domestic level, the *Disability Discrimination Act 1992* (Cth) prohibits unfair treatment of a person because of a disability. Despite these protections, many Australians with disabilities contend with discrimination, abuse and neglect.

61. For example, recent reports indicate that people with disability are more likely to experience violence, abuse, neglect and exploitation than people without disability. People with an intellectual disability are reportedly ten times more likely to

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[107] See, eg, Nicole Hasham, 'PM calls royal commission into aged care after inexcusable 'failures' (online), 15 September 2018; Matt Garrick, 'Graphic evidence of wounds as royal commission hears of dementia patient left to deteriorate' *ABC* (online), 9 July 2019.
[108] Royal Commission into Aged Care, 'Aged Care in Australia: A Shocking Tale of Neglect' (Media Release, 31 October 2019).
[109] Ibid.
[110] Ibid.
[111] AHRC, 'Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability' (2016) 38 (***Willing to Work***).
[112] Ibid 59.
[113] AHRC, *2015-2016 Complaint Statistics* (2016) <https://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf>.
[114] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 A/RES/61/106 (entered into force 3 May 2008), art 1.

experience violence and three times more likely to be victims of assault, sexual assault and robbery compared to those without an intellectual disability.[115] Meanwhile, people living with dementia and other forms of cognitive impairment also have a heightened risk of abuse, and their reports are sometimes dismissed as being unreliable.[116] Again, these concerns have led to the establishment of the Disability Royal Commission.

62. People with disability face ongoing discrimination in the community, including in educational institutions, the workplace and in public places. Between 2015 and 2016, the highest number of discrimination complaints received by the AHRC was for disability discrimination (37 per cent) – most relating to employment.[117] The AHRC Inquiry into employment discrimination against people with disability in 2016 found that employment discrimination is 'systemic and acts as a significant barrier to workforce participation'.[118] A 2012 report found that 47 per cent of persons with a disability of working age were not in the labour force, and their labour force participation rate had decreased by two per cent since 1993. The same report found that Indigenous people with disabilities were particularly disadvantaged due to a lack of culturally appropriate services, and that the education system did not cater to the needs of young people with a disability.[119]

63. People with disability are also strikingly over-represented in the criminal justice system, and often present with a long history of undiagnosed or untreated impairment.[120] For example, psychosis is reportedly ten times more prevalent in Australian prisons than in the community.[121] A 2015 study found that nearly 63 per cent of the adult population in correctional centres in NSW had received a mental health diagnosis, most commonly depression and anxiety.[122]

64. Amongst a multitude of human rights breaches experienced by people with disability in the criminal justice system, particularly notable are Australia's unfitness to stand trial laws, under which people with disability face protracted, sometimes indefinite, periods of detention– such as Marlon Noble, who spent ten years behind bars despite never having been convicted of a crime.[123] The Committee on the Rights of Persons with Disabilities considered Mr Noble's case to constitute inhuman and degrading treatment in violation of the CRPD.[124]

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[115] Carolyn Frohmader and Therese Sands, Australian Cross Disability Alliance, Submission No 147 to Senate Community Affairs References Committee, *Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings,* August 2015, 36.
[116] Law Council of Australia, Justice Project – Final report (August 2018), People with Disability chapter, 23-24, citing Alzheimer's Australia submission.
[117] AHRC, *2015-2016 Complaint Statistics* (2016) 1.
[118] AHRC, 'Willing to Work', 6.
[119] Australian Bureau of Statistics, *Disability and labour Force participation* (Catalogue Number 4433.0.55.006, 2012).
[120] Law Council, *Justice Project – Final report* (August 2018), People with Disability chapter, 18-23.
[121] UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover* 14th sess, UN Doc. A/HRC/14/20/Add.4, 70 (3 June 2010).
[122] Justice Health & Forensic Mental Health Network, 2015 Network Patient Health Survey Report, NSW Government, 52.
[123] Ibid, 72-74.
[124] Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012*, 16th sess, UN Doc CRPD/C/16/D/7/2012 (2 September 2016) 17.

65. Furthermore, prisoners with disability, both adults and juveniles, are particularly vulnerable to abuse and mistreatment in custody.[125] In its recent report following its visit to 14 prisons, Human Rights Watch found that prisoners with disabilities are viewed as easy targets and as a result are at serious risk of violence and abuse, including bullying and harassment, and verbal, physical, and sexual violence.[126] The report included numerous harrowing case studies which illustrate the mistreatment and heightened vulnerability of prisoners with disability. For example, one prisoner was assaulted by four officers and left naked on the floor of the exercise yard for several hours, while another was sexually assaulted by other prisoners but was discouraged from reporting it by superintendents. [127]

66. Despite their rights under international human rights law,[128] people in the criminal justice system in Australia are also excluded from mental health support under Medicare and the National Disability Insurance Scheme. There are also critical concerns about a lack of mental health care available in custodial facilities.[129] In 2018, the NSW Legislative Council Portfolio Committee on Legal Affairs considered the issue of custodial mental health care in its report into Parklea Correctional Centre. It noted it was 'extremely concerned about the lack of provision for mental health services and infrastructure in New South Wales… [and] by the blockages that exist due to a lack of mental health care beds throughout the system, most especially forensic mental health beds'.[130]

67. In jurisdictions with human rights legislation, these laws have been utilised to:

- close the 'implementation gap' for rights under the CRPD. The UK Act sets out the fundamental rights and freedoms that everyone in the UK is entitled to including people with disability. Courts in the UK have relied upon this law in several cases to rule that the rights of people with disability have been breached and ordered remedies to be made available.[131] In one matter, a decision by the UK Supreme Court led to a shift in Government policy, with a discriminatory rule being changed as a result;[132] and
- protect the right to health of people in custody. For example, in the ACT, the ACT Act has informed the *Human Rights Principles for ACT Correctional Centres*, a tool that guides the ACT Corrective Services and the ACT Government in performing their functions.[133] These principles stipulate that 'detainees should be provided with quality health care to a standard equivalent to that available in the ACT community'.[134] A 2011 review of the Alexander

[125] See, eg, Human Rights Watch, *I Needed Help, Instead I Was Punished*; Michael Brull, 'Behind Bars: Australia's Shocking Cruelty to Aboriginal People with Disabilities', *New Matilda* (online), 15 February 2018 <https://newmatilda.com/2018/02/15/behind-bars-australias-shocking-cruelty-aboriginal-people-disabilities/>.
[126] Human Rights Watch, *I Needed Help, Instead I Was Punished* (February 2018), 3.
[127] Ibid 1.
[128] The ICESCR recognises at Article 12 the right of everyone 'to the enjoyment of the highest attainable standard of physical and mental health' and the ICCPR provides at Article 10 that 'all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person'.
[129] NSW Inspector of Custodial Services, *Full House: The growth of the inmate population in NSW* (April, 2015), 53.
[130] Portfolio Committee No 4 – Legal Affairs, NSW Legislative Council, *Parklea Correctional Centre and other operational issues*, December 2018, 120.
[131] See, eg, *Coughlan & Ors, R (on the application of) v North & East Devon Health Authority* [1999] EWCA Civ 1871 (16 July 1999); *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629 (15 May 2012); and *RF v Secretary of State for Work And Pensions* [2017] EWHC 3375 (Admin) (21 December 2017).
[132] *Mathieson v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 47.
[133] Under the *Corrections Management Act 2007* (ACT).
[134] ACT Government Justice and Community Safety Directorate, *Human Rights Principles for ACT Correctional Centres* (January 2019), 10.

Maconochie Centre, the ACT's first prison, found it to be 'unique in relation to other prisons in Australia in the high level of attention paid to detainees' human rights in its legislation, policies and procedures'.[135]

Refugees and asylum seekers

68. A number of international treaties are relevant to Australia's treatment of refugees and asylum seekers, including the CAT, the CRC, the ICCPR and the ICESCR. Other relevant treaties that Australia has either ratified or acceded to include the *Convention Relating to the Status of Refugees* and the *Convention on the Reduction of Statelessness*. The rights protected under these treaties include the right to *non-refoulement*, the right to work, the right not to have freedom of movement unnecessarily restricted, and the right to be free from cruel, inhumane or degrading treatment.

69. Australia's breaches of international human rights and its broader international obligations with respect to asylum seekers have been well documented.[136] For example, its mandatory detention regime breaches international rights against arbitrary detention[137] as established in numerous petitions to the HRC given its automatic, lengthy and potentially indefinite nature, and individuals' inability to successfully challenge their detention's legality.[138] Meanwhile, its reintroduction of offshore processing for asylum seekers arriving by boat has removed their access to Australian territory, refugee status determination procedures and courts. The UN Working Group on Arbitrary Detention has previously found that this regime constituted 'widespread and systematic violation of international law'[139] while the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment has found that some aspects of Australia's treatment of asylum seekers violated prohibitions on torture or cruel, inhuman or degrading treatment.[140] Australia's offshore detention policies have also been recognised as causing 'serious physical and mental pain and suffering'.[141]

70. The Law Council recognises the Australian Government's efforts to improve this situation, and that the numbers of people in offshore processing centres have reduced. In particular, the recent transfer of all remaining asylum seeker and refugee children out of Nauru has been welcome. However, the recent debate concerning the 'Medevac Law'[142] has highlighted that while necessary, it does not

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[135] Knowledge Consulting, 'Independent Review of Operations at the Alexander Maconochie Centre: Report for ACT Corrective Services' (12 March 2011), 37.
[136] AHRC, *Asylum seekers, refugees and human rights: Snapshot Report (*2nd edition, 2017), 6.
[137] *ICCPR*, art 9(1); *CRC*, art 37(b).
[138] *ICCPR*, *Views: Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/81/D1011/2011 (20 August 2013); *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013)*; Al-Kateb v DIMA* (2004) 219 CLR 562; *Behrooz v DIMIA* (2004) 219 CLR 486; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1. Constitutional detention limits imposed in *S4/2014 v MIBP* (2014) 88 ALJR 847 do not overcome its mandatory application: Law Council, *Submission to the Second Universal Periodic Review of Australia: Office of the High Commissioner for Human Rights,* 23 March 2015, 4-5.
[139] Working Group on Arbitrary Detention, *Opinions: Communication No. 52/2014 (Australia and Papua New Guinea*, 71st sess, UN Doc A/HRC/WGAD/2014/52, (13 February 2015), [48].
[140] Juan E. Mendez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment*, UN Doc A/HRC/28/68/Add.1 (6 March 2015).
[141] Committee against Torture, *Concluding Observations: Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014) [17].
[142] That is, certain provisions added to the *Migration Act 1958* (Cth) by Schedule 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth), as discussed in the Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee*, the Migration Amendment (Repairing Medical Transfers) Bill 2019*, 23 August 2019.

of itself provide long-term, durable solutions to the situation of refugees transferred to regional processing centres. Such solutions are urgently needed.

71. UN experts[143] have recently expressed alarm at the worsening health situation in offshore centres, remarking that:

> *These individuals are subject to years of effective confinement in Australia's custody, based solely on their migration status. The situation of their indefinite and prolonged confinement, exacerbated by the lack of appropriate medical care amounts to cruel, inhuman and degrading treatment according to international standards...Australia should look for long-term solutions for these migrants while solutions cannot be found in the offshore facilities.*[144]

72. The Law Council's longstanding concerns regarding onshore asylum seeker responses span multiple dimensions, including the system's discrimination against asylum seekers based on their mode of arrival, 'fast track' processing, temporary protection visa schemes, and restrictions on merits and judicial review.[145]

73. The Law Council has also consistently called for further protections for unaccompanied minors, who lack an independent legal guardian in Australia.[146] Strong concerns have also been raised that dramatic recent cuts to the Status Resolution Support Services Program have left many asylum seekers without access to income, casework support, medication and mental health counselling.[147] The position of stateless persons to whom Australia has pre-existing obligations, who lack existing avenues for redress and have been subject to indefinite detention in some cases, also warrants attention.

74. It also remains particularly concerned that following severe funding cuts in 2014, only a small number of asylum seekers in Australia have access to government-funded legal assistance whilst most rely on pro-bono services.[148] Legal assistance is crucial to refugees and asylum seekers. Immigration application forms can be extremely complex, especially for people who have limited understanding of English or legal terminology.[149] A lack of access to interpreters compounds this problem.[150]

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[143] Including the Special Rapporteur on the Human Rights of Migrants, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Special Rapporteur on the Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.
[144] OHCHR, 'Australia: UN experts urge immediate medical attention to migrants in its offshore facilities' (Media Release, 18 June 2019).
[145] For an overview of the Law Council's concerns in this area, see Law Council, *Justice Project Final Report* (2018) Asylum Seekers Chapter, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Asylum%20Seekers%20%28Part%201%29.pdf>.
[146] See eg Law Council, Submission to 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 (*10 November 2016).
[147] Refugee Council of Australia, *Understanding Status Resolution Support Services (SRSS) Program and the impact of the 2018 changes* (8 February 2019) <http://www.nssrn.org.au/social-security-rights-review/understanding-status-resolution-support-services-srss-program-and-the-impact-of-the-2018-changes/>.
[148] Kelly Newell, *The latest hurdles for people seeking asylum in* Australia (22 March 2017) Kaldor Centre for International Refugee Law <https://www.kaldorcentre.unsw.edu.au/news/latest-hurdles-people-seeking-asylum-australia>.
[149] Ibid.
[150] Law Council, *Justice Project Final Report* (2018), Asylum Seekers Chapter, 28.

75. Without assistance, poorly made or incomplete applications could result in wrong decisions, with the consequence that asylum seekers are returned to countries where they face persecution and other forms of serious harm such as torture or even death. Legal assistance is particularly important for children and for female asylum seekers, who often experience heightened vulnerability. There are also critical and increasing pressures on Federal courts and the Administrative Appeals Tribunal in responding to migration matters involving asylum seekers, many of whom are unrepresented, resulting in backlogs and delays.[151] This adds to the distress of individuals in the system.

76. In New Zealand, international law provisions regarding the rights of refugees and asylum seekers have found expression in the *New Zealand Bill of Rights Act 1990* (**the NZ Act**). New Zealand's Supreme Court has relied upon sections 8 and 9 of the New Zealand Act in clarifying the country's obligations to asylum seekers.[152]

People who are homeless

77. The ICESCR recognises the right to an adequate standard of housing.[153]

78. The high rate of homelessness in Australia indicates that many people across the country are not accessing this basic right. Data published by the Australian Bureau of Statistics (**ABS**) in 2018 demonstrated a 4.6 per cent increase in the rate of homelessness across Australia between 2011 and 2016.[154] An estimated 116,000 people experience homelessness in Australia, representing 50 homeless persons for every 10,000 Australians.[155] Between 2011 and 2016 there was also an increase in the number of people 'sleeping rough' – using improvised dwellings, tents or sleeping outside – from 3.2 to 3.5 persons per 10,000.[156]

79. In jurisdictions with a human rights act, advocates have used these laws successfully to protect citizens' right to housing. For example, in Victoria, Justice Connect has identified 20 matters in which the state's human rights charter prevented a total of 37 people from eviction from social housing.[157] Some case studies are described further below.

LGBTI+ people

80. As noted in the Law Council's recent Justice Project,[158] LGBTI+ people generally experience high rates of discrimination and harassment. For example, a 2012 survey found that 26 per cent of respondents experienced homophobic abuse or harassment in the previous 12 months.[159] Nearly nine per cent reported experiencing threats of violence or actual physical violence.[160] The 2014 First

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[151] Ibid.
[152] *Zaoui v The Attorney-General and Ors* SC CIV 13/2004.
[153] *IESCR*, art 12.
[154] Australian Bureau of Statistics, *Census reveals a rise in the rate of homelessness in Australia* (Catalogue Number 2049.0, 14 March 2018).
[155] Ibid.
[156] Ibid.
[157] Justice Connect, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (June 2015).
[158] Law Council, *Justice Project – Final Report* (August 2018), LGBTI+ Chapter, 8-10; 14-17.
[159] AHRC, National Consultation Report, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights,* (2015), 15 (***Resilient Individuals***), citing William Leonard et al, 'Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians' (Monograph Series Number 86, The Australian Research Centre in Sex, Health & Society, La Trobe University, 2012) (***Private Lives 2***).
[160] AHRC, *Resilient Individuals,* 15, citing William Leonard et al, *Private Lives 2*.

Australian National Trans Mental Health Study found that 65 per cent of participants reported experiencing discrimination or harassment.[161] In addition to outright attacks and discrimination, LGBTI+ people must deal with homophobia and/or transphobia in every facet of public life, and within their families and social groups.[162]

81. Experiences of discrimination and social exclusion contribute to LGBTI+ people facing a higher prevalence of a range of risk factors that increase disadvantage, a reality that is sometimes referred to as 'secondary victimisation'.[163] Research indicates very poor levels of mental health amongst LGBTI+ groups generally,[164] including high rates of suicide. Studies have found that same-sex attracted Australians have up to 14 times higher rates of suicide attempts than their heterosexual peers,[165] and up to 50 per cent of transgender people have attempted suicide at least once in their lives.[166]

82. LGBTI+ young people are particularly affected by poor mental health.[167] Research has indicated that 55 per cent of young LGBTI+ women (aged 16─24) experienced high or very high psychological distress compared to 18 per cent in the national population. Additionally, 40 per cent of young LGBTI+ men experienced high psychological distress compared to seven per cent in the mainstream population.[168]

Women

83. Despite the rights of women to protection from discrimination contained in CEDAW, and domestically under Australian legislation,[169] there is a persistent gender pay gap in Australia. Data from 2017-18 illustrates that men in Australia still out-earn women, on average by 21.3 per cent.[170] While the gender pay gap in Australia has dropped from 24.7 per cent in 2013-2014, progress remains slow: at

[161] Zoe Hyde et al, School of Public Health, Curtin University, *The First Australian National Trans Mental Health Study: Summary of Results* (2014), v.
[162] Michael Flood and Clive Hamilton, *Mapping homophobia in Australia*, Australia Institute Web Paper (2005), 3-13 <http://www.glhv.org.au/files/aust_inst_homophobia_paper.pdf>.
[163] Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Angela Dwyer, 'Policing Lesbian, Gay, Bisexual and Transgender People: A Gap in the Research Literature' (2011) 22 *Current Issues in Criminal Justice* 3, 415.
[164] Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9 citing Gabi Rosenstreich, National LGBTI Health Alliance, *LGBTI People: Mental Health and Suicide Revised 2nd Edition* (2013) (***LGBTI People: Mental Health***), 3 <http://lgbtihealth.org.au/sites/default/files/Biefing_Paper_FINAL_19_Aug_2-11.pdf>.
[165] Rosenstreich, *LGBTI People: Mental Health*, 3 citing Commonwealth Department of Health and Aged Care, *LIFE – A framework for prevention of suicide and self-harm in Australia: Learnings about suicide* (2000).
[166] Ibid citing Domenico Di Ceglie, 'Gender Identity Disorder in Young People',(2000) *Advances in Psychiatric Treatment* 6, 458-466; National Transgender HIV/AIDS Needs Assessment Project (Australia), University of New South Wales, *Transgender lifestyles and HIV/AIDS* (1994); Jay McNeil et al, *Trans Mental Health Study* (2012) <www.scottishtrans.org>.
[167] Law Council, *Justice Project Final Report* (August 2018), LGBTI+ Chapter, 9.
[168] St Kilda Legal Service, *Submission to the Justice Project,* citing Rosenstreich, *LGBTI People: Mental Health*.
[169] See, eg, *Sex Discrimination Act 1984* (Cth), s14(1)(c).
[170] Australian Government Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key findings from the Workplace Gender Equality Agency's 2017-18 reporting data* (November 2018), 1.

the present rate of change, Australia will not reach gender pay equity until the year 2060.[171]

84. Meanwhile, family violence is endemic and a major health and welfare issue in Australian society. On average, one women is killed by her current or former partner each week in Australia.[172] Women experiencing intersectional disadvantage are particularly at risk. For example, in 2014-15, Aboriginal and Torres Strait Islander women were 32 times more likely to be hospitalised due to family violence than non-Indigenous women.[173]

Systemic barriers

Lack of human rights awareness in the community

85. In 2018, Ipsos conducted a survey on attitudes to human rights in Australia that included over 1,000 people aged 16-64, with the sample weighted to balance demographics so as to be representative of the wider population. The findings illustrate low awareness of human rights in Australia. 47 per cent of people surveyed answered that they knew 'not very much' or 'nothing' about human rights. 32 per cent of respondents believed that laws protecting human rights made 'no difference' to their life, and 30 per cent of respondents answered that 'human rights abuses are a problem in some countries' but not a problem in Australia. When asked whether specific rights – such as the right to life, the right to a fair trial, and the right to freedom from discrimination – were part of the UDHR, respondents had around a 50 per cent success rate.[174]

86. The lack of appreciation and understanding of human rights within the community in Australia represents a significant systemic barrier to the promotion and protection of human rights in Australia. As Smith and Tibbitts have stated, knowledge of human rights is a prerequisite to citizens holding their government accountable for their rights.[175] Without knowledge of human rights, it is difficult for citizens to be aware of when rights are being undermined, or of avenues for remedy. This view is affirmed by the *UN Declaration on Human Rights Education and Training*, adopted in 2011, which acknowledges the 'fundamental importance of human rights education and training in contributing to the promotion, protection and effective realisation of all human rights'.[176]

87. The Law Council is particularly concerned that the lack of awareness amongst many Australians of their human rights, leaves a vacuum in which these rights are not respected and upheld. This may in turn facilitate an environment in which breaches can occur, particularly concerning the most vulnerable members of the community, as illustrated above. These include children, older Australians and people with disability.

88. This lack of awareness extends to a frequently poor understanding of which individual rights are incorporated into domestic law, the extent to which they may

[171] Australian Government Workplace Gender Equality Agency, *Five years of Workplace Gender Equality Agency data: the key trends* (2018).
[172]Australia's National Research Organisation for Women's Safety, *Fast Facts: Impacts of Family, Domestic and Sexual Violence* (2018).
[173] Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (2018).
[174] Ipsos Public Affairs, *Human Rights in 2018: A Global Advisor Survey* (2018).
[175] Rhona Smith and Felisa Tibbitts, Norwegian Centre for Human Rights, *Four reasons why human rights education is key to change* (28 April 2016).
[176] UN General Assembly, *Declaration on Human Rights Education and Training,* UN Doc A/RES/66/137 (19 December 2011).

be limited, and how they sit alongside intersecting human rights. Recent debate suggests that there may be some public confusion regarding whether certain rights are protected by statute or the Australian Constitution, such as freedom of expression. In addition, it may not always be well understood that while some human rights are absolute, others may be limited provided that certain conditions are met. Instead, specific rights are sometimes raised by different community sectors in isolation, to the detriment of other rights and in a manner which can distort the debate. This reinforces the need for rights and freedoms to be protected in a coherent legal framework, which promotes the understanding that human rights are universal, indivisible, interdependent and interrelated.

89. The National Consultation found that insufficient attention was paid to human rights by both the Federal Government and Parliament.[177] It concluded that establishing a human rights culture in the Commonwealth public sector was essential to protect and promote human rights in Australia.[178]

90. The Law Council's observation, however, is that in the ensuing decade the Federal Government and Parliament have not, by and large, responded to the challenge of establishing a human rights culture in public policy and lawmaking. While individual measures have been adopted, some of which are discussed below, the level of attention and scrutiny paid to human rights by Ministers and senior public servants is frequently at a minimum. This contributes to the ongoing lack of a human rights culture amongst Australian governments.

Inadequate legal protection of human rights

91. The Law Council considers that the following observations made by McGinty in 2010 remain accurate:

> *Human rights are not given comprehensive legal protection in Australia. Coverage is fragmented and ad hoc. Many basic rights remain unprotected. Further most of the statutory and common law protects can potentially be removed; while other protections are not enforceable, for example, those afforded by international law that have not been incorporated into domestic law.*[179]

92. Under Australia's existing legal framework, the Law Council is concerned that inadequate protection of human rights exists, particularly at the federal level. Its concerns are outlined below.

Constitutional protection

93. Unlike other Western constitutions, Australia's Constitution lacks entrenched guarantees of internationally recognised human rights.[180] Rather, it was designed as 'a mechanism for national government for federated states'.[181] Some of its provisions expressly provide for qualified rights of specific kinds. These include the right to be compensated on just terms for the acquisition of property for Commonwealth purposes,[182] the right to trial by jury for Commonwealth indictable

[177] National Consultation, 355.
[178] Ibid, 358.
[179] Jim McGinty, 'A Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1, 25.
[180] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 348.
[181] Ibid, 349.
[182] *Australian Constitution*, s 51(xxxi).

offences;[183] a right to free movement of people and free trade between states;[184] certain rights in relation to the freedom of religion[185]; the right not to be discriminated against on the basis of state residence;[186] the right to vote in Commonwealth elections subject to certain restrictions;[187] and the right to judicial review of government action.[188] The High Court has also identified a freedom of political communication that is implicit in the representative parliamentary democracy established in the Constitution.[189] This may extend to some limited protection for freedom of association.[190] Certain other rights have also been implied.[191]

94. Beyond these, the Constitution is silent on the recognition of other human rights. Moreover, several of the above rights have been interpreted narrowly. For example, there is 'no freestanding right to religion'[192], while the implied freedom of political communication is a prohibition on legislative or executive interference and does not protect freedom of expression more generally.[193] The Constitution does not prevent Parliament from enacting retrospective laws.[194] Reynolds and Williams comment that:

> *The protection the Constitution gives to human rights is often weak. Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian Constitution and any charter of rights in a like nation makes this clear. Where, for example, is our freedom from discrimination on the basis of race or sex or freedom from cruel and unusual punishment or torture?*[195]

Federal legislative protection

95. Under federal legislation, Australia's steps to implement its international human rights obligations have been characterised as 'faltering, sporadic and

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[183] Ibid, s 80.
[184] Ibid, s 92.
[185] Ibid, s 116.
[186] Ibid, s 117.
[187] Ibid, ss 24 and 41.
[188] Ibid, s 75(v).
[189] *Australian Capital Television Pty Ltd v Commonwealth* (1992)177 CLR 106 (***ACTV v Cth***); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.
[190] *ACTV v Cth*, 212; *Wainohu v New South Wales* (2011) 243 CLR 181, 230. However, there is a significant body of law that permits an encroachment upon freedom of association if it is in pursuit of public interest for prevention of criminal activity: ALRC, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report 129, 2015) 168.
[191] See discussion in George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017), 63-65, identifying High Court findings that guilt or innocence of a crime must be determined by a court, Parliaments cannot pass laws that deprive courts of their defining characteristics as courts, and that Parliament cannot detain people for the purposes of punishment. The ALRC has also commented that The *Australian Constitution* does not expressly provide that criminal trials must be 'fair', nor does it set out the elements of a fair trial, but it does protect many attributes of a fair trial and may by implication be found to protect other attributes: ALRC, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report 129, 2015) 226.
[192] Jim McGinty, 'A Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1, 7 citing *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 and *Kruger v Commonwealth* (1997) 190 CLR 1.
[193] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506.
[194] *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J).
[195] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017), 65.

inconsistent'.[196] Australia 'has no federal law that proclaims and protects human rights, and has not legislated to implement either the ICCPR or IESCR'.[197] It has partially implemented its international obligations to prohibit discrimination on a number of grounds, such as race, sex, pregnancy, sexual orientation and gender identity, disability and age.[198] Other grounds, such as religion, are protected primarily through the use of exemptions.

96. A key feature of the existing federal legislation is that it primarily centres upon anti-discrimination law. As such, it is focused on prohibiting conduct (that is, protecting against certain breaches of human rights) rather than on positively fulfilling and ensuring Australians' enjoyment of those rights. It is individualised, remedial and dispute-driven, rather than proactive, systemic and educative. Because it is based around disputes, it provides an often tense forum in which human rights are discussed.

97. Further and as discussed further below, federal anti-discrimination laws are fragmented, complex and there are gaps in the protection they provide. Some rights take precedence over others, whose protection depends on exemptions. These exemptions can also be overly broad.

98. Beyond anti-discrimination law, some federal legislation protects certain rights to some extent, including privacy, access to social security, health care and public education, and also protects to an extent against acts constituting torture or other cruel, inhuman or degrading treatment or punishment.[199]

99. However, many rights receive 'only limited or indirect protection'.[200] The rights guaranteed by the ICCPR 'have a small and almost random presence in Australian law'.[201] Australia has not enacted the ICCPR into federal law, although it is scheduled to the *Australian Human Rights Commission Act 1986* (Cth). This enables the AHRC to inquire into an alleged breach but not to offer an enforceable remedy.[202]

100. Meanwhile, while many of IESCR rights are reflected in legislation, such as education or social security, 'such services are not made available as a right, and at any time the service can be withdrawn'.[203] They are not enforceable.

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[196] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press: 2011), 351.
[197] Ibid.
[198] See, eg, the RDA; SDA; *Age Discrimination Act 2004* (Cth); and *Disability Discrimination Act 1992* (Cth). The *Fair Work Act 2009* (Cth) includes protections against discrimination in the context of employment.
[199] *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth): see discussion in Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press: 2011), 358-360.
[200] Jim McGinty, 'A Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1.
[201] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press: 2011), 356.
[202] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017), 69.
[203] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press: 2011), 354.

Common law

83. Some human rights are ensconced in common law principles established by the courts.[204] However, in *South Australia v Totani*[205], French CJ said that it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.[206]

84. The 'protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation'.[207] Under the principle of legality, courts will presume parliament did not intend to infringe on common law rights except through express terms or necessary implication.[208] This operates as an aspect of the rule of law and actively informs judicial decisions.[209]

85. While there is no definitive list of rights protected by the principle of legality, examples include procedural fairness, freedom of access to the courts, the right to a fair trial, the writ of habeas corpus, non-retrospectivity of statutes overriding the common law, freedom from arbitrary arrest, the liberty of the individual, freedom of speech, legal professional privilege and the privilege against self-incrimination.[210]

86. As noted by the ALRC, it should be stressed that the principle 'does not constrain legislative power'.[211] Subject to the Constitution, parliament has the power to modify or extinguish common law rights.[212]

87. The High Court in *Minister for Immigration and Ethnic Affairs v Teoh*[213] (***Teoh***) has further held that when Australia has ratified an international treaty, this creates 'a legitimate expectation… that administrative decision-makers will act in conformity with the Convention'.[214] However, it later established that *Teoh* principle is 'only an entitlement to procedural fairness and cannot generate a right to any particular substantive outcome'.[215]

Lack of federal human rights charter

88. Australia is the only Western democracy and the only common law country in the world not to have adopted some form of bill or charter of rights, whether

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[204] National Consultation, 120, citing for example: the right of an accused to a fair trial (*Dietrich v The Queen* (1992) 292); the right against self-incrimination (*Sorby v Commonwealth* (1983) 152 281); immunity from search without warrant (*George v Rockett* (1990) 170 CLR 104); and the onus of proof in criminal proceedings (*Woolmington v DPP* [1935] AC 462).
[205] (2010) 242 CLR 1 (***Totani***).
[206] *Totani*, [31].
[207] ALRC, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report 129, 2015), 36, citing James Spigelman, 'The Common Law Bill of Rights' (2008) 3 Statutory Interpretation and Human Rights: McPherson Lecture Series, 9.
[208] *Coco v The Queen* (1994) 179 CLR 427 [437].
[209] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309.
[210] *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).
[211] ALRC, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report 129, 2015) 38, citing *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ).
[212] Ibid, 38.
[213] (1995) CLR 183 273.
[214] *Teoh*, 291.
[215] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] 214 CLR 1; see Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 350, citing J Ford 'Review of R Creyke & P Keyzer (eds), 'The Brennan Legacy: Blowing the Winds of Legal Orthodoxy' (2003) 25(3) *Sydney Law Review* 413.

constitutionally entrenched or legislated.[216] As noted by Emeritus Professor Gillian Triggs, this has left Australia:

> *… increasingly isolated from the legal standards and jurisprudence of the countries with which we compare ourselves – Canada, the United Kingdom, the United States, France, Germany and New Zealand – an isolation and failure to meet international human rights standards that has been criticised by over 44 nations in the Human Rights Council.*[217]

89. Commentators have noted that the fact that certain nations, such as Burma, Libya and Yemen, possess a charter of rights does not mean that human rights are better protected in those countries than in Australia.[218] However, 'a more useful comparison is to consider how rights are protected in nations with like political traditions, and economic resources'[219], such as those listed above. Moreover, 'no western nation has given up a bill or charter of rights once adopted'.[220]

90. Comparable jurisdictions in this regard include:

- the United Kingdom (**UK**) – which has the *Human Rights Act 1998* (UK) (**the UK Act**) providing UK courts the power to enforce the rights provided for under the European Convention of Human Rights (**ECHR**)[221] and some of its protocols;
- New Zealand – which in 1990 passed the NZ Bill of Rights, which sets out to affirm, protect and promote human rights and fundamental freedoms in NZ. It also affirms NZ's ICCPR obligations; and
- Canada – which has the *Canadian Charter of Rights and Freedoms* of 1982, which is embedded in the Canadian Constitution and supersedes the statutory Canadian Bill of Rights of 1960.

91. As previously discussed, in Australia, three states or territories have now adopted human rights charters: the ACT, Victoria and Queensland. The Law Council considers that it is incongruous that a form of 'postcode justice' has developed in Australia in which an individual's rights are better protected depending on the state or territory in which he or she is living. Western Australians and Tasmanians are no less deserving of human rights protection than Queenslanders or Victorians. A more comprehensive approach is needed.

Ineffective role of parliament

Federal parliamentary measures to protect human rights

92. A key reason advocated against a charter of rights is that should individuals' human rights be breached, such as by a Minister, it is the proper role of an elected parliament to bring him or her to account in an Australian democracy.[222] However, this overlooks the fact that generally, parliament is not the forum where individual

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[216] Gillian Triggs, 'A Charter of Rights for Australia' (Speech, Amnesty International and the Australian National University Law School, 18 April 2018).
[217] Ibid.
[218] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017), 17.
[219] Ibid, 18.
[220] Ibid, 17.
[221] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
[222] Jim McGinty, 'A Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 1, 10-11; Gillian Triggs, 'A Charter of Rights for Australia' (Speech, Amnesty International and the Australian National University Law School, 18 April 2018).

justice can be righted, and that courts have a fundamental and legitimate role in ensuring justice. Further, the reality in which parliaments approach questions of human rights is often somewhat different.

93. In practice, in parliament, voting generally occurs along party lines and the majority vote rules. This brings little comfort to specific individuals whose rights are breached, particularly if they are members of an unpopular minority. As illustrated above, it is frequently the rights of the most vulnerable, least powerful or popular in society which are most at risk. Relying on parliamentary majorities is insufficient.

94. Not only is parliament often reluctant to act on human rights issues, it also authorises actions which in fact breach the human rights of unpopular groups.[223] As noted by McGinty,

> *From time to time legislators are tempted to bring in legislation which deals harshly with marginalised or unpopular people so that the politician will look 'tough' in the eyes of the community. This is frequently the case when laws deal with indigenous people, asylum seekers, prisoners, criminals and others who are not seen as 'mainstream'. Such legislation has a detrimental effect on the community in two ways. Firstly, the human rights of all are debased, and secondly, the community becomes accustomed to accept human rights breaches as normal and acceptable.*[224]

95. As flagged above, at certain times when existing human rights protections have been most needed, parliament has also acted to suspend them. This occurred, for example, during the NTER, when the RDA was suspended and the anti-discrimination protections to First Nations Peoples were withdrawn.[225] This means that the system only applies at the discretion of parliament, which is highly problematic when parliament is the organ of the law from which protection is needed.

96. Legislative action which may abrogate human rights should be the subject of careful scrutiny during its development and consultation stage. Reflecting this principle, key measures were adopted under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (**the Parliamentary Scrutiny Act**), following recommendations made by the National Consultation[226]. They were designed to improve rights protection by enhancing deliberation within Parliament.

97. This legislation required federal bills and legislative instruments to be accompanied by a statement setting out whether they would be compatible with Australia's key international human rights obligations. It also established the PJCHR. The PJCHR reviews the proposed law and its compatibility statement, determining the extent to which the proposed law is compatible with human rights.

98. Despite initially high hopes that such measures would play a transformative role in Parliament,[227] the Law Council notes that opinions regarding the PJCHR's utility

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[223] Ibid.
[224] McGinty, 27.
[225] Luke Buckmaster, Diane Spooner and Kirsty Magarey, 'Income management and the Racial Discrimination Act' (Background Note, Parliament of Australia, Parliamentary Library, Parliament of Australia, 28 May 2012).
[226] National Consultation, Recs 6 and 7, xxxi.
[227] Commonwealth, *Parliamentary Debates*, Senate, 25 November 2011, 9661 (George Brandis); Commonwealth *Parliamentary Debates*, House of Representatives, 30 September 2010, 272 (Robert McClelland).

have been varied. In 2013, Father Frank Brennan described it as a 'useful addition to the legislative process enhancing the prospect of human rights compliance without the need for judicial intervention.'[228]

99. However, in 2015, Williams and Reynolds published an empirical analysis of the PJCHR over its first four years.[229] Notwithstanding that the PJCHR had consistently produced impressive reports, both in terms of their high quality and output, these authors found that this work was frequently ignored by Parliament, finding that the regime had 'significant shortcomings'.[230] Their analysis indicated that, of all the instances in which the PJCHR had found that draft legislation was, or may be, incompatible with human rights, for 73 per cent, that finding had no bearing on the outcome of the relevant legislation's passage.[231] The Law Council has also observed that often, PJCHR reports and recommendations are not cross-referenced by other parliamentary inquiries. This should occur more frequently as a matter of ensuring consistent parliamentary approaches.

100. The Law Council is further concerned that statements of compatibility with human rights, contained in explanatory memoranda to bills, sometimes fail to provide sufficient legal analysis of human rights impacts. It has previously outlined several examples in this regard.[232] Williams and Reynolds have indicated that, while statements of compatibility have improved, including due to the PJCHR's sustained and constructive efforts, questions remain regarding their quality.[233]

101. On these issues, the UN HR Committee has relevantly noted that:

> *While appreciating the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR) to scrutinize bills with a view to ensuring their compatibility with international human rights treaties, including the Covenant, the Committee is concerned that bills are sometimes passed into law before the conclusion of review by the PJCHR, and about reports questioning the quality of some statements of compatibility.*[234]

Passage of legislation encroaching on rights and rise of Executive powers

102. Despite the measures adopted following the National Consultation, Parliament has continued to adopt measures which infringe human rights. This frequently occurs when the passage of the legislation is being rushed by the Parliament. The circumstances in which this occurs are frequently rushed. The Law Council is concerned that consequently, insufficient care is taken to assess the implications of the incursions upon human rights or to consider whether the restrictions being legislated are necessary, proportional and reasonable.

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[228] Frank Brennan, 'The Practical Outcomes of the National Human Rights Consultation' (Address to Judicial Conference of Australia Colloquium, Sydney 12 October 2013).
[229] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469.
[230] Ibid, 498.
[231] Ibid, 490.
[232] Law Council, *Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Submission to the Australian Law Reform Commission, 9 October 2015.
[233] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 506-7.
[234] UN HR Committee, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017).

103. In 2016, the ALRC conducted a review of federal laws that encroach upon a wide range of 'traditional rights, freedoms and privileges',[235] including interferences with freedoms of speech, religion, association or movement. It found numerous examples of laws which interfered with almost every category of rights, ranging from control orders and preventative detention orders, advocacy and declared area offences in the anti-terrorism context,[236] to mandatory data retention laws, to the visa cancellation 'character' test and the fast track review process under the *Migration Act 1958* (Cth),[237] to general secrecy offences.[238] The ALRC concluded that many of these laws should be reviewed further to determine whether they unjustifiably limited the relevant freedoms. However, despite the Australian Government commissioning the review, the Law Council is concerned that little action has been taken to implement its findings, and in some cases, measures have been taken to further infringe relevant rights.

104. Additionally, Williams' recent survey of laws which undermine fundamental democratic values, such as freedom of speech and freedom of association,[239] identified:

> *…350 instances of laws that arguably encroach upon rights and freedoms essential to the maintenance of a healthy democracy. Most of these laws have entered onto the statute book since September 2001… the terrorist attacks of that month marked a watershed moment in the making of Australian laws, and … since that time parliamentarians have been less willing to exercise self-restraint by not passing laws that undermine Australia's democratic system.*[240]

105. At the federal level, the laws identified by Williams again included terrorism advocacy offences[241] and preventative detention orders (enabling a person to be held in secret without arrest or charge for up to two weeks),[242] ASIO questioning and detention powers,[243] laws abrogating client legal privilege (so authorities may monitor conversations with lawyer) and the right to silence (compelling a person to answer federal government agency questions or be imprisoned);[244] the offence for disclosure regarding special intelligence operations,[245] data retention laws[246], and mandatory immigration detention (which can extend to indefinite detention when combined with an adverse ASIO assessment). [247] A pattern has also been observed, in which anti-terrorism laws undermining rights and freedoms have been

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[235] ALRC, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129, 2016).
[236]Ibid, chs 4 and 6, citing *Criminal Code Act 1995* (Cth) ss 80.2C, 102.8, divs 104-105.
[237] Ibid, chs 6 and 14, citing *Migration Act 1958* (Cth), s 501 and pt 7AA, div 3.
[238] Ibid, ch 4, citing eg *Crimes Act 1914* (Cth), ss 70 and 79.
[239] These were freedom of speech, freedom of the press, freedom of association, freedom of movement, the right to protest, and the presumption of innocence: George Williams, 'The Legal Assault on Australian Democracy' [2016] 16:2 *QUT Law Review* 19, 23.
[240] Ibid, 19.
[241] Ibid, 26.
[242] *Criminal Code* s 105.35.
[243] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34E, 34G.
[244] See, eg, *Criminal Code,* s 195.38(1); *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ; *Broadcasting Services Act 1992* (Cth) s 202; *Fair Work Act 2009* (Cth) s 712; *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 13C.
[245] *Australian Security Intelligence Organisation Act 1979* (Cth), 35P.
[246] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).
[247] *Migration Act 1958* (Cth) s 189, *Australian Security Intelligence Organisation Act 1979* (Cth), ss 35 and 37.

replicated in other areas of Australian law, such as freedom of association offences with respect to bikies and organised crime.[248]

106. The Law Council is also concerned that there are few safeguards available concerning increasing numbers of Executive discretionary powers at the federal level, particularly those which are made in the 'public interest' or the 'national interest'. Triggs states that according to one estimate, the Minister for Home Affairs now has 47 kinds of discretion that for practical purposes, are not judicially reviewable, more than any other Minister.[249] These include the powers to:

- issue conclusive certificates so that certain decisions are not subject to merits review;[250]
- refuse or cancel a visa on 'character test' grounds without notice;[251]
- set aside a delegate/ Administrative Appeals Tribunal (**AAT**) 'character test' decision against visa refusal/cancellation and refuse/cancel the visa, choosing whether to afford natural justice;[252]
- determine that certain persons are to be excluded from Australia;[253]
- determine that certain information is non-disclosable[254] (eg visa refusal reasons);[255]
- determine that certain maritime safety/navigation laws do not apply in the exercise of maritime powers;[256] and
- lift the bar precluding visa applications by unauthorised maritime arrivals.[257]

107. With limited exceptions, these powers are personal and non-compellable, and decisions made under them are not merits reviewable. Nor, as mentioned, do they lend themselves to judicial review.[258]

108. Australian courts demonstrate great deference to the Executive regarding the interpretation of 'national interest' provisions. While such provisions may be justifiable with respect to nationally significant decisions which are subject to public scrutiny and stringent parliamentary accountability, unease is caused where they are increasingly attached to decisions which are unlikely to attract such attention, are geared primarily towards individuals, are privately exercised and lack accountability.

109. Triggs has raised particular concerns about the passage of legislation in Australia that has increased the Executive's powers, including to detain people without charge or trial, including asylum seekers for indefinite periods, and terrorist suspects for extended periods of questioning.[259] The role of the courts is limited in curbing these powers.

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[248] Williams and Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017) 42-44.
[249] Gillian Triggs, 'A Charter of Rights for Australia' (Speech, Amnesty International and the Australian National University Law School, 18 April 2018).
[250] *Migration Act 1958* (Cth) ss 339; 411(3); 473BD.
[251] Ibid s 501(3).
[252] Ibid ss 501A(2)-(3).
[253] Ibid s 502 (also ss 5H(2), 36(1C), 200-201).
[254] Ibid s 5(1).
[255] See, eg, Ibid s 5(1), s66(3).
[256] *Maritime Powers Act 2013* (Cth), ss75D, 75F, 75H.
[257] *Migration Act 1958* (Cth), s46A(2).
[258] See, eg, *O'Sullivan v Farrer* (1989) 168 CLR 210, 216; *Plaintiff S156/2013 v MIBP* [2014] HCA 22.
[259] Gillian Triggs, 'A Charter of Rights for Australia' (Speech, Amnesty International and the Australian National University Law School, 18 April 2018).

How should human rights be protected in Australia?

Constitutional recognition of Aboriginal and Torres Strait Islander peoples

110. The Law Council provides its full and unqualified support for the Uluru Statement from the Heart (**the Uluru Statement)** and the Referendum Council's recommendations, including for a referendum to amend the Australian Constitution to create a First Nations' Voice for the purpose of representing Aboriginal and Torres Strait Islander people in Parliament. [260] It reiterates that there is no legal impediment to making provision for such a body in the Constitution.

111. It considers the creation of a representative body providing a Voice to Parliament to be a unique opportunity to recognise and respond to the will of Aboriginal and Torres Strait Islander peoples. It supports a constitutionally enshrined Voice to Parliament that is designed through a process both led, and endorsed by, Aboriginal and Torres Strait Islander peoples. Respecting the principles of self-determination and its manifestation in practice by empowering communities and individuals is critical.

112. The Law Council strongly maintains this position, notwithstanding the Australian Government's recent announcement that it will pursue a legislated Voice to Government, rather than a Constitutionally-entrenched Voice to Parliament.[261]

113. Indigenous delegates from across from Australia also agreed in the Uluru Statement on the importance of Makarrata, or treaty, to capture 'our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination'.[262] The Law Council supports the call for a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about Australia's history.

Federal human rights charter

114. The Law Council considers that to promote the implementation of Australia's international human rights obligations, appropriate constitutional, legislative, administrative and other measures must be adopted. These should include, as a minimum, a federal charter of rights.[263]

115. It submits that a federal charter of rights would advance a national approach in which human rights are universal, indivisible and interdependent and interrelated, and invite attention to the important obligations of protection.

116. While careful consideration needs to be given to the human rights charter model which should be implemented at the federal level, a charter nevertheless, has the potential to influence a more pluralistic and informed approach to human rights in Australia.

117. A well-drafted federal human rights instrument could contribute to a government culture of respect for human rights through requiring the executive arm of government to act in accordance with human rights in the conduct of its

[260] Referendum Council, *Final Report of the Referendum Council* (2017), 2.
[261] The Hon Ken Wyatt AM MP, 'A Voice for Indigenous Australians' (Media Release, 30 October 2019).
[262] Referendum Council 2017, *Uluru Statement from the Heat* (26 May 2017).

duties. It could also require courts to interpret legislation in a way that is compatible with human rights, so far as it is consistent with the statute's purpose.

118. Reviews of the ACT Act and Victorian Charter indicate that, contrary to the prior expectations of some commentators,[264] they have not caused the courts to be flooded with litigation.[265] Instead, key benefits are often experienced in an improved parliamentary and bureaucratic culture of respect for human rights – in a preventative sense.

119. The five year review of the ACT Act found that its:

> *'…impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government. While it has not attracted extensive public attention, and its workings have not always been apparent to the broader community, the [*ACT Act*] has operated in subtle ways to enhance the standing of human rights in the Act… One of the clearest effects of the* [ACT Act] *has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy... These improved laws are likely to have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community.*[266]

120. A relevant example was the comprehensive updating and codifying of legislation for the protection, care and wellbeing of children and young people. Human rights issues were raised by practices such as therapeutic protection orders, pre-natal reporting of children at risk, strip-searching of detailed children, and behavioural management schemes proposed for a youth detention centre. These issues were considered extensively in the development of the relevant legislation.[267] Improvements in previously poor juvenile detention practices, which had involved routine use of solitary confinement and strip searches, resulted.[268]

121. In 2012, the Human Rights Law Centre (**HRLC**) published a report into the Victorian Charter's first five years of operation, highlighting case studies from that period.[269] It found that the Charter played a crucial preventative role in stopping human rights abuses (and the associated social and economic costs) before they occur. This was illustrated by its impacts through government policies, local council projects or the affording of protected rights to vulnerable individuals and groups.[270] Rather than resulting in a 'lawyers picnic', it found that the Charter's key impacts often lay outside formal court proceedings. It had:

- required the Victorian Parliament to more fully consider and safeguard human rights in legislation;

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[264] 'Countering claims of a 'lawyers' picnic', *Lawyers Weekly*, 9 July 2009.
[265] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government, 2015) 158.
[266] *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety*, ACT Human Rights ACT Research Project, Australian National University, May 2009, 6.
[267] Ibid, 29.
[268] George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017), 144.
[269] HRLC, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).
[270] Ibid, 5.

- enabled government departments and public authorities to undertake organisational and cultural change to embed its principles in their work – through early identification of potential human rights issues, providing a platform for effective advocacy on human rights issues, and an impetus for cultural change;
- initiated human rights education programs to create a better awareness of Charter rights and empower people to take action;
- provided a framework of language and ideas by which human rights could be more effectively articulated and realised without the need for litigation;
- had a notably beneficial impact in the courtroom, where although seldom employed, it had been used to challenge arbitrary or unjust policies and decisions.[271]

122. Examples of benefits illustrated in the HRLC report included a better outcome for a 40 year old man with disability living in an aged care home. His grandparents communicated his Charter rights to the Transport Accident Commission. It accepted responsibility for its failure to respond to an opportunity to assist him to live in a more appropriate care facility within a specified timeframe, revisited its decision and recognised the need to uphold his rights.[272]

123. Another example involved a 96 year old woman who was given a 60 day notice to vacate her home of 21 years, and was unable to find alternative accommodation in this time. Her advocate argued to VCAT that it was a breach of Charter rights and she was consequently given an additional 30 days and was assisted in finding alternative accommodation.[273]

124. The most recent review of the Victorian Charter was undertaken in 2015.[274] It found that 'implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector'.[275] The reviewer concluded that it was 'clear that the Charter has helped to promote and protect human rights in Victoria'.[276] An example of the Charter shaping policy and putting it into practice involved work undertaken by the Department of Human Services and Corrections Victoria, in collaboration with the Victorian Equal Opportunity and Human Rights Commission, to minimise the number of young people, particularly children, transferred from youth justice centres to adult prison. This followed the 2012 transfer of five children to adult prison, including a 16 year old Aboriginal boy who was held at Port Philip Prison for several months. Following the review of policy and operational documents and tailored human rights training for staff, there were no further transfers of children to adult prison.[277]

125. Case studies regarding the beneficial operation of the *Human Rights Act 1998* (UK) (**the UK Act**) include:

- helping an older couple married for 59 years live in the same care home, when local authorities had determined to move one spouse into a permanent nursing home that was too far away for her husband and children to visit – the authority agreed to allow the wife to remain in her nursing home close by;

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[271] Ibid, 5-10.
[272] Ibid, 39.
[273] Ibid, 40.
[274] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government, 2015).
[275] Ibid, 22.
[276] Ibid, iii.
[277] Ibid, 33-34.

- challenging the use of restraint on an older woman in hospital, who was strapped into her wheelchair against her wishes and was 'crying in distress' – staff agreed to unstrap the woman and after she was assessed by a physiotherapist, were encouraged to support her to improve her mobility;
- challenging inaction on possible poor treatment of a young man in residential care with unexplained bruising, and the managerial refusal to permit his parents to visit after a complaint was raised – the ban on their visit was revoked and an investigation was conducted into the bruising; and
- challenging a reduction in supported visits between two children and their mother, who was living in a mental health care home, to once a week – the three times weekly visits were restored and the family remained close.[278]

126. The Law Council currently revising its position on the specific details and features of a federal human rights charter, having regard to legislative, political and judicial developments since its policy on this issue[279] was adopted in 2008. It expects to release a refreshed policy early in 2020.

127. The Law Council further notes that since the National Consultation recommendations were made, the High Court handed down its decision in *Momcilovic v The Queen*[280] (***Momcilovic***), which has implications for any future federal charter of human rights in Australia based on the 'dialogue' model.[281] The majority remarks in this decision suggest that Chapter III of the Constitution would preclude federal parliament from conferring the power on a federal or state court to issue a 'declaration of incompatibility', in cases when a law is incompatible with a particular human right.[282] The Law Council notes the need for any proposal for a federal human rights charter to take the decision of *Momcilovic* into account, to ensure Constitutional validity.

State and Territory human rights acts

128. As noted above, Australian human rights acts have only been passed in Queensland, the ACT and Victoria.

129. The NSW LS in particular advises that human rights protections at the state level are important, given states have jurisdiction over matters that can have a significant adverse impact on the rights of individuals, such as crime, places of

[278] Anti-Discrimination Commission Queensland, Submission to the Queensland Parliament Legal Affairs and Community Safety Committee*, Human Rights Inquiry*, April 2016, 40-42, citing the British Institute of Human Rights website (https://www.bihr.org.uk/Pages/FAQs/).
[279] Law Council, *A Charter: Protecting the Rights of All Australians Policy Statement* (2008), < https://www.lawcouncil.asn.au/docs/369b4912-cd39-e711-93fb-005056be13b5/081129-Policy-Statement-Bill-of-Rights.pdf>.
[280] (2011) 280 ALR 221 (***Momcilovic***).
[281] Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 19; Chief Justice Helen Murrell, 'ACT Human Rights Act – A Judicial Perspective Conference on the Tenth Anniversary of ACT Human Rights Act' (Speech, 1 July 2014) 22.
[282] All members of the Court held that an exercise of power under section 36 is not judicial in nature, as it has no impact on the legal rights of the parties in dispute before the court: *Momcilovic*, 253, 257 (French CJ), 282 (Gummow J), 306 (Hayne J), 357 (Heydon J), 388 (Crennan and Kiefel JJ), 404-5 (Bell J). Further, five judges considered that the declaration was not *incidental* to the exercise of judicial power: 257-8 (French CJ), 284 (Gummow J), 306 (Hayne J), 357 (Heydon J), 404-5 (Bell J). See Bateman and Stellios, Ibid, 22.
[282] Ibid, 261 (French CJ), 275 (Gummow J), 306 (Hayne J), 404-5 (Bell J).

detention including prisons and mental health institutions, child protection, health, education, housing and homelessness.

130. The NSW LS strongly supports the enactment of human rights legislation in NSW. It notes that in NSW, there continue to be laws that encroach upon the common law and human rights of individuals, including laws that criminalise association, limit the right to protest, and encroach upon legal professional privilege, the presumption of innocence and the privilege against self-incrimination. Some of these encroachments are serious, such as allowing children as young as 14 to be detained for two weeks for questioning without charge, in relation to specific offences.

131. It further indicates that the existing legislative scrutiny mechanisms fail to provide sufficiently strong safeguards against legislative encroachment. For example, studies about the effectiveness of the NSW Legislation Review Committee have argued that there is an 'entrenched culture' held by Parliament of 'ignoring and deflecting the Committee's advice'.[283] It is not uncommon for legislation to pass within 24 hours, with no possibility of public scrutiny.[284]

Consolidated anti-discrimination law

132. The Law Council considers that the Commonwealth anti-discrimination regime provides an important legislative framework for promoting equality in Australia. However, many individuals and groups within the Australian community experience discrimination, and the notion of substantive equality remains, at least for some, still out of reach[285] and the framework is in need of reform. In this regard, the Law Council notes comments made by the President of the AHRC, Emeritus Professor Rosalind Croucher AM, describing Australia's anti-discrimination regime as 'out of date, not comprehensive and falling behind practices across most other democratic nations in the world'.[286] Professor Croucher has further described Australia's anti-discrimination laws as a 'mishmash, reflective of the context and times of their introduction and noted that 'amendments have been somewhat haphazard'.[287]

133. As set out in its Policy Statement - Consolidation of Commonwealth Anti-Discrimination Laws,[288] the Law Council supports reforms to the current Commonwealth anti-discrimination regime that make it easier to understand, improve its capacity to address all forms of discrimination, promote equality and implement Australia's international obligations in this area. It considers that any consolidation of existing Commonwealth laws into a single Act must preserve or enhance – rather than weaken - existing protections against discrimination and remove the regulatory burden on business to the greatest extent possible.

134. In this regard, the Law Council notes that the RDA has a wide level of protection in respect of the areas covered, and a small number of exceptions. It

[283] L McNamara and J Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21.
[284] For example, the *Liquor Amendment Act 2014* (NSW), the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (NSW), the *Sydney Public Reserves (Public Safety) Act 2017* (NSW), and the *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (NSW).
[285] See, eg, Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* report (Scanlon Foundation and University of Monash, 2018), 67-69.
[286] Emeritus Professor Rosalind Croucher AM, 'Law, Lawyers and Human Rights' (Speech, Law Society of Western Australia Law Week Breakfast, 13 May 2019).
[287] Ibid.
[288] Law Council, *Policy Statement – Consolidation of Commonwealth Anti-Discrimination Laws* (March 2011).

also allows for the invalidation of some laws. This level of protection should not be reduced by making its form resemble less comprehensive statutes, with a greater number of exceptions, such as the *Sex Discrimination act 1984* (Cth) (**SDA**).

135. The UN HR Committee has also called for Australia to consolidate its anti-discrimination laws. In its November 2017, it noted its concern about barriers for accessing effective remedies for discrimination, and recommended that:

> *The State party [Australia] should take measures, including by considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantial procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.*[289]

136. The Law Council will provide a separate submission to the AHRC regarding Commonwealth anti-discrimination law priorities, noting that the AHRC has released a specific technical discussion paper on these issues.

How should the Government address the situation where there is a conflict between different peoples' rights?

137. The issue of conflicts between rights is often based on the assumption that all rights are absolute and cannot have overlapping operation. This is not the case. As discussed, while some rights – such as freedom from slavery – are absolute, most can be subject to limitations under appropriate circumstances, such as when their exercise impacts another person's rights, breaches a law of general application, or has a negative impact on community interests.

138. One advantage of a robust federal human rights charter is that it could include direct protections for internationally guaranteed human rights, while providing provision for a proportionality approach to its application. The NZ Bill of Rights includes such a 'proportionality' provision, stating that the rights and freedoms it protects 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[290] The Canadian Charter similarly guarantees the rights and freedoms it contains.[291] The Victorian Charter and Queensland Act also include similar clauses.[292]

139. Several international jurisdictions with statutory human rights protections have developed a body of caselaw illustrating how a proportionality approach to balancing rights works in practice. The European Court of Human Rights has through cases including *Wasmuth v Germany*[293] developed a two-part test to determine whether an interference with an individual's right to freedom of thought, conscience and religion,[294] is 'necessary... for the protection of the rights and

[289] UN HR Committee, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) 18.
[290] *The New Zealand Bill of Rights Act 1990*, s 5.
[291] *Canadian Charter of Rights and Freedoms* s 1.
[292] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[293] [2011] ECtHR No. 12884/03
[294] ECHR, art 9(1).

freedoms of others'[295]. Firstly, the interference must serve a legitimate aim, and secondly it must be proportionate to that aim.

140. This test, or a close variation on it, has been applied by the African Commission on Human and Peoples' Rights,[296] and national courts in South Africa,[297] the UK,[298] and Canada.[299] One recent example at the national level is *R (AR) v Chief Constable of Greater Manchester Police*.[300] In this decision, the UK Supreme Court held that interference with the applicant's right to respect for his private and family life[301] was justified, as it satisfied proportionality requirements.[302] In reaching this position, the Court referred to the UK Home Office's practical guidance for police officers on how to apply the proportionality test to requests for police information.[303]

141. In Australia, however, it is clear is that there is no overarching legislative framework to enable this kind of nuanced approach, particularly federally, which:

- implements its full range of key international human rights obligations into domestic law;
- indicates the extent to which these freedoms and freedoms are absolute, limited and/or derogable; or
- provides a mechanism for how these might be resolved when tensions between rights arise, having regard to principles of legitimacy, necessity, reasonableness and proportionality.

142. In the absence of such a framework, the Law Council is concerned that the ensuing debate surrounding various groups' human rights can be conflict-driven and potentially harmful to vulnerable individuals.

143. Legislative mechanisms are needed to facilitate this kind of analysis - not only by the courts, but more importantly, parliament, the executive and the public. The Law Council is currently revising its position on how a federal charter provision could be framed to achieve this objective.

What should happen if someone's human rights are not respected?

Right to remedy

144. As Remedy Australia has noted, 'the right to remedy goes hand-in-hand with every other human right'[304]. Where Australia is in breach of international human rights law, the person whose rights have been violated is entitled to remedies. For example, article 2(3) of the ICCPR obliges Australia to ensure that:

[295] ECHR, art 9(2).
[296] *Garreth Anver Prince v South Africa* [2004] AHRLR 105.
[297] *Christian Education South Africa v Minister of Education* [2000] CCT4/00 (Constitutional Court).
[298] *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.
[299] *Chamberlain v Surrey School District No. 36*[2002] 4 S.C.R. 710, 2002 SCC 86.
[300] [2018] UKSC 47.
[301] ECHR, art 8.
[302] *R (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47.
[303] Ibid, [32]-[33].
[304] Remedy Australia, 'The Right to a Remedy', <https://www.remedy.org.au/>.

- any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and
- the competent authorities shall enforce such remedies when granted.

145. A state's duty to provide remedies is also reflected in article 3(d) of the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[305] Article 11 provides that a right to remedy for such violations includes 'equal and effective access to justice', adequate and prompt reparations, and 'access to relevant information concerning violations and reparation mechanisms'. Part IX further provides that reparations should be proportionate to the degree of violation and harm suffered, and that the victim should be restored, whenever possible, to their original situation prior to having their rights violated. Compensation should be given for any material, physical or mental harm as well as lost opportunities and moral damage. Other non-monetary solutions should also be adopted, including effective measures to stop any continuing violations.

146. Since 1994, UN treaty bodies have found Australia to be in breach of the ICCPR and other treaties 47 times.[306] Remedy Australia has found that of these 47 communications complaints upheld against Australia, only 13 per cent have been fully remedied in accordance with the final views of the treaty body. This reluctance by Australia to implement findings of treaty bodies compromises the right to remedy to which all Australians are entitled under international human rights law. This poor record must be redressed.

What can the community do to protect human rights? How should the government support this?

Role of professions

147. Professions can play an important role in promoting and defending human rights. The Law Council, as the peak body representing the legal profession nationally, is proud of the role that it plays in this regard. Its constituent bodies also perform this role at the state and territory level admirably.

148. The Law Council's commitment to realising human rights is set out in a number of its foundational documents and policies. For example, its current Strategic Plan provides that one of its principal responsibilities is to promote and defend human rights.[307]

149. Many other professions are also voicing their support for realising human rights in Australia, such as under the auspices of Global Compact Network Australia. Going forward, building additional commitments to human rights

[305] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN Doc A/RES/60/147 (16 December 2005).
[306] Remedy Australia, 'Complaints upheld against Australia', https://www.remedy.org.au/cases/.
[307] Law Council, *Strategic Plan 2015-2020*, https://www.lawcouncil.asn.au/docs/0e2e6ac5-2eb5-e611-80d2-005056be66b1/Strategic_plan_A3.pdf; see also LCA Policy.

amongst a broader cross-section of professions will be important going forward. The Law Council considers that increased engagement on human rights topics of interest with diverse peak bodies, building professional awareness of human rights in specific training modules, and adopting a national Business and Human Rights Action plan may all assist in facilitating this objective.

A strong and well-resourced AHRC

150. Preserving and bolstering the role of the AHRC as a statutorily independent national human rights institution into the 21st century and beyond is essential. The AHRC has the capacity to conduct inquiries (including on its own motion)[308], undertake research and provide educational programs on human rights.[309] It has a fundamental role in promoting community understanding of human rights.

151. In the last decade, there has been, to the dismay of the Law Council, strident and public criticism of the AHRC.[310] Such criticism may interfere with the AHRC's necessary independence.[311]

152. It is essential that bipartisan leadership and vigilance is exercised by federal politicians of all political persuasions to uphold the essential role of the AHRC in defending and promoting human rights in Australia. This leadership should extend to the following.

- *ensuring sufficient resourcing* for the AHRC to perform its functions effectively. The Law Council has previously raised its concerns that the AHRC has been subject to substantial funding cuts which undermine its capacity to do so, particularly during periods when it has been subject to public criticism.[312] Under the *Principles relating to the Status of National Institutions*, in order to be effective and granted an 'A status', national human rights institutions must be independent, adequately funded and have a broad human rights mandate.[313] In 2017, the HRC expressed concern about the AHRC's budget cuts, and called on Australia to restore these.[314]
- *strengthening the independence of human rights commissioners*. This includes mandating transparent, arm's length and merit-based selection criteria for appointments to these offices. Public respect for the important role undertaken by commissioners is also critical.
- *requiring the Australian Government to table a response to any AHRC report* on complaints within six months of receiving that report. Many publications of the AHRC are still awaiting a formal government response. This

[308] *Australian Human Rights Commission Act 1986* (Cth) s 14(1).
[309] Ibid, s 11(1)(h).
[310] Australian Bar Association and Law Council of Australia, 'Personal attacks on Human Rights Commissioner alarming say the legal profession's leaders' (Media Release, 14 February 2015).
[311] As set out as a core requirement for national human rights institutions in the *Principles relating to the Status of National Institutions* (the **Paris Principles**), adopted by General Assembly resolution 48/134 20 December 1993.
[312] Law Council, *Interim Report into Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Submission to the Australian Law Reform Commission, 9 October 2015.
[313] *Principles relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UN Doc E/CN.4/RES/1993/55 (20 December 1993).
[314] HRC, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [13]-[14].

recommendation is consistent with recommendations arising from the National Consultation.[315]

Access to justice

153. The rule of law and human rights of all people are core tenet of our modern democracy and access to justice is an important part of protecting those rights. Human rights must not only be formally available under the law, they must be available in practice.

154. The Law Council's recent Justice Project inquiry highlighted the often insurmountable difficulties faced by many people experiencing significant economic or social disadvantage in upholding their rights under Australian law. Many people face complex barriers to resolving these problems, including financial, language and literacy barriers, lack of education and awareness of legal issues, discrimination, distance, and lack of social accommodation of their needs.

155. It was apparent that the gulf between the law as it is framed and access to the protection it provides in practice to marginalised groups is often very large. The Justice Project reinforced the personal costs when people cannot access justice. These include, for example:

- a greater likelihood of incarceration, including in circumstances in which charges and arrest were unwarranted, and the right to a fair hearing had been undermined;
- family violence victims being evicted for reasons beyond their control, such as damage to the rental home by the perpetrator;
- an inability to resolve debts and fines, resulting in poverty, eviction and homelessness, as well as deteriorating mental and physical health, and in some jurisdictions, imprisonment;
- an inability to access a person's entitlements, such as unpaid wages, income support or a pension;
- an inability to seek redress as a victim of crime, to address workplace exploitation or discrimination;
- people remaining at risk of harm, violence and exploitation – such as family violence victims, elder abuse victims, people with disability who are abused by carers, and people who are trafficked or subject to forced marriages;
- people being unable to make decisions concerning their own medical treatment;
- children being unnecessarily removed from their parents;
- a greater likelihood of people being returned to their countries of origin to face persecution, torture or death; and
- unresolved legal problems frequently escalating from civil, to family, to criminal matters.

156. These costs are not only personal, in terms of an individual's ability to uphold their human rights, but also have broader implications – such as to health, housing, social services, child protection, families, corrections, policing and justice portfolios. They also entrench individuals' disadvantage and an intergenerational cycle of poverty, violence and harm – with opportunity costs to all Australians given the loss of healthy, productive and vibrant communities.

[315] National Consultation, Recommendation 13.

157. As further reflected in the Justice Project, many disadvantaged or socially excluded people are particularly vulnerable to legal problems, including substantial and multiple problems.[316] Just nine per cent of Australians account for 65 per cent of legal problems,[317] and people with six or more indicators of disadvantage reported six times as many problems as those with none.[318] Disadvantaged groups are particularly vulnerable to civil legal problems,[319] and certain groups are significantly more likely than other members of the community to ignore their legal problems.[320] People who take no action have the poorest outcomes.[321]

158. Government-funded legal assistance services play a fundamental role in addressing the legal needs of people experiencing disadvantage and the broader community. Such services are not only called upon when disputes arise, but provide preventative early education and advice to communities. This precludes matters from spiralling into more expensive, serious matters before the courts.

159. However, these services are critically under-resourced in Australia. As identified by the Productivity Commission, while around 14 per cent of Australians live below the poverty line, just eight per cent of all Australian households qualify for Legal Aid Commission grants under overly tight means tests.[322] Fewer than three per cent of legal aid grants are for civil law matters – which can involve serious breaches of human rights, including for discrimination, victims of crime, exploitation or abuse, child removal and eviction matters. For groups with high civil needs, such as older people, access to legal aid grants is almost non-existent.

160. Meanwhile, in 2015-2016, community legal centres (**CLCs**) had to turn away nearly 170 000 people.[323] A recent survey of community services found that 72 per cent of CLCs reported being unable to meet demand. Unmet demand for their services was higher than any other category of commuity service surveyed, including accommodation, counselling and family support/child protection services.[324]

161. Finally, ATSILSs and NVPLSs are experiencing extremely high levels of unmet legal need for criminal, family and civil law services. While ATSILSs have had to prioritise criminal matters, despite a simultaneous need for civil assistance, they struggle to meet existing demand.[325] Against a rising tide of Aboriginal and Torres Strait Islander incarceration, this is of significant concern. Some FVPLSs estimate turning away 30 to 40 per cent of Aboriginal and Torres Strait Islander women who seek assistance for family violence matters.[326]

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[316] Ibid xv.
[317] Coumarelos et al, *Law Survey,* xiv.
[318] Pleasence et al, *Reshaping Legal Assistance Services*, 9.
[319] Pascoe Pleasence and Hugh McDonald, 'Crime in context: criminal victimisation, offending, multiple disadvantage and the experience of civil legal problems' (Updating Justice Paper No 33, Law and Justice Foundation, 2013), 1.
[320] For example, people whose main language is not English, the unemployed or people with low educational levels: McDonald and Wei, *How people solve legal problems,* 1.
[321] Coumarelos et al, *Law Survey*, xx.
[322] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 719, 1020-1022 (*'Access to Justice Arrangements'*).
[323] National Association of Community Legal Centres, *Submission to the Australian Government: Federal Budget 2018-2019* (21 December 2017).
[324] Australian Council of Social Services, *Australian Community Sector Survey 2014* (2014) 2, 17, 20.
[325] National Aboriginal and Torres Strait Islander Legal Services, *Submission No 121*; see also generally Aboriginal and Torres Strait Islander People Chapter (Part 1).
[326] National Family Violence Prevention Legal Services, *Submission No 105*. See also Aboriginal and Torres Strait Islander People Chapter (Part 1); People Experiencing Family Violence Chapter (Part 1).

162. To this end, the Law Council strongly opposes the proposed mainstreaming of the funding of ATSILS. Since 2015, funding for legal aid commissions and CLCs has been delivered through the National Partnership Agreement on Legal Assistance Services (**NPA**) and funding for ATSILS has been delivered through the separate and independent Indigenous Legal Assistance Program (**ILAP**). Both the NPA and ILAP are due to expire on 30 June 2020. The Australian Government has proposed measures to dissolve ILAP and instead fund ATSILS under a single national funding mechanism for legal assistance services, with a five-year quarantine to ensure Aboriginal-specific funding. This proposal goes against the dire need for culturally responsive, community-led services given the over-incarceration crisis. Mainstreaming also undermines the Australian Government's own objectives in ensuring genuine partnership with Aboriginal peoples and co-designing solutions in tackling new Closing the Gap refresh targets.

163. The Justice Project recommended substantial additional investment in legal assistance services. The Law Council estimated that a minimum of $390 million per annum was needed across the criminal and civil law spectrum (noting that the Productivity Commission has previously recommended an urgent additional injection of $200 million into civil services alone, which has not been realised), but recognises that this is not the full picture.

164. It also recommended the introduction of Justice Impact Tests to facilitate the smoother development of laws and policies which have downstream impacts on the justice system, creating spikes in demand and pressures on vulnerable individuals in the system. These tests would ensure that when new laws and policies are designed, efforts are adopted to plan for the likelihood of demand for legal assistance services, the courts and on the correction system.

Lifting restrictions on advocacy by community legal centres

165. The Law Council considers that as part of a healthy and functioning democracy, it is vital that non-government organisations, particularly those which work closely with vulnerable individuals, can contribute to the development of laws and policies which may impact on their rights.

166. Despite the Productivity Commission's recognition of law reform advocacy as central to the efficacy of legal assistance services,[327] the federal government has restricted CLCs community legal centres from engaging in systemic advocacy through the NPA funding agreements since 2014. Under the NPA, CLCs are restricted from using federal funding for advocacy for law and policy reform. The current agreement, which is now being renegotiated, provides that 'Commonwealth funding should not be used to lobby governments or to engage in public campaigns'.[328] Previous federal funding agreements had included law reform and legal policy as core services under the NPA. Some states still allow CLCs receiving state government funding to engage in law reform and policy work.

167. CLCs, due to the volume of disadvantaged clients they service, are in a unique position to identify systemic issues in law and policy and recommend reform measures that will improve the lives of their clients and the communities in which they work. CLCs have traditionally taken a community development approach, placing client voices at the centre of their law reform work, and have

[327] Productivity Commission of Australia, *Access to Justice Arrangements Inquiry* Final Report, Vol 2 (2014) 709.
[328] Council of Australian Governments, *National Partnership on Legal Assistance Services: Intergovernmental Agreement on Federal Financial Relations* (2015) cl B7.

brought about many positive reforms. The Law Council considers that the NPA restriction on the use of Commonwealth funding by community legal centres to undertake law reform and policy advocacy work must be removed.

How should individuals, businesses, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

168. In addition to the role of government and the community in promoting and protecting human rights, businesses have their own responsibility to protect human rights. These responsibilities are articulated by the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*[329] (**Guiding Principles**), which were endorsed by the UN Human Rights Council in 2011. Together with the Organisation for Economic Cooperation and Development (**OECD**) *Guidelines for Multinational Enterprises*[330] and other sector-specific international guidelines, these set out standards and guidelines for companies to ensure that they respect human rights and avoid causing adverse human rights impacts through their activities.

169. The Guiding Principles recommend that companies ensure compliance with this responsibility to respect human rights through:

- expressing their commitment through a statement of policy;
- implementing effective human rights due diligence to identify, prevent and address actual or potential human rights impacts;
- mainstreaming human rights consideration across business operations and activities based on that due diligence; and
- enabling access to effective grievance mechanisms by affected groups and individuals.[331]

170. In 2017, a multi-stakeholder advisory group convened by the Minister for Foreign Affairs advised how the Australian Government could best implement the Guiding Principles, including through the development of a National Action Plan on Business and Human Rights. However, federal action to implement such a plan has not been further considered.

171. To spur action within the private sector, the Law Council recommends that the Federal Government consider adopting a National Action Plan on Business and Human Rights to support a shift to sustainable, ethical, and human rights compliant business practices.[332] In doing so, Australia can draw on international best practice: 23 countries around the world already have a National Action Plan on Business and Human Rights, and 12 other countries are in the process of developing one.[333] The Law Council also recommends that the Government continue reform of the National Contact Point for the OECD Guidelines on Multinational Enterprises to ensure additional resources for joint fact-finding,

[329] The Guiding Principles were developed by the Special Representative of the Secretary-General, on the issue of human rights and transnational corporations and other business enterprises. They were annexed to his final report to the United Nations Human Rights Council (UN Doc A/HRC/17/31) and endorsed by the Human Rights Council in its resolution 17//4 of 16 June 2011.
[330] OECD, *OECD Guidelines for Multinational Enterprises* (2011 edition), OECD Publishing.
[331] United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) HR/PUB/11/04.
[332] Law Council of Australia, *2019 Federal Election: Call to Parties,* 19.
[333] Unicef Australia, *Building Better Business for Children* (2019) 8.

improved mediation services, determination of grievances and wider promotion of the National Contact Point.

172. The *Modern Slavery Act 2018* (NSW) (**NSW Modern Slavery Act**) and the *Modern Slavery Act 2018* (Cth) (**Modern Slavery Act**) are positive developments, which enable business to contribute to tackling modern slavery in their operations and supply chains. The United Nations has estimated there are more than 40 million victims of modern slavery worldwide.[334] Around 16 million of these are exploited in the private economy.[335] Human trafficking, forced labour, debt bondage and forced marriage are all human rights abuses and are all encompassed within the definition of modern slavery in the Commonwealth legislative regime.

173. While the Law Council welcomed the Modern Slavery Act when it was introduced, there is room for improvement. Firstly, the Law Council considers the $100 million revenue threshold for attracting the reporting requirements too high, and would prefer a lower threshold closer to $60 million.[336] Other important ways the legislation should be amended is to include penalties for non-compliance and to create an Anti-Slavery Commissioner.[337]

174. These stronger aspects are already features of the NSW Modern Slavery Act, which is currently under review by the New South Wales Standing Committee on Social Issues. The Law Council considers that these features should remain in the NSW Modern Slavery Act and serve to inform the review of the Modern Slavery Act which will occur after three years, thereby enhancing the consistency of state and federal regimes in a manner which enshrines best practice rather than the lowest common denominator.

175. The Law Council, drawing on the expertise of its Business and Human Rights Committee, has played a proactive role in increasing awareness amongst the legal profession, and businesses more generally, of their responsibilities under the Modern Slavery Act, the Guiding Principles and the OECD Guidelines. In 2019, this has included assisting in the development of detailed Guidance, writing to its constituent bodies and conducting presentations on the Modern Slavery Act. It will also shortly develop factsheets aimed at subsections of the legal profession. In 2018. the Law Council also delivered, in collaboration with the International Bar Association, Business and Human Rights training in Sydney and Melbourne focused on preparing members of the Australian legal profession to advise clients on business and human rights issues at home.

What should the Australian Human Rights Commission and the government do to educate people about human rights?

176. As already flagged, the Law Council is concerned that generally, many people in the community lack awareness of human rights and their practical role in the community. Despite the National Consultation's recommendations for greater human rights education and the excellent educative work undertaken by the AHRC, it is clear that this need remains.

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[334] Department of Home Affairs, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* (26 September 2019) 9.
[335] Ibid.
[336] Law Council, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Modern Slavery Bill 2018* (24 July 2018) <https://www.lawcouncil.asn.au/docs/452edee3-8693-e811-93fc-005056be13b5/3475%20-%20Modern%20Slavery%20Bill%202018.pdf>.
[337] Ibid.

177. For human rights to matter in practice, they must not only be known and understood by lawyers – they must be incorporated in the education and practice of everyone in the Australian community. This includes for example, teachers, the police, health, disability and aged care providers, small businesses, business leaders, religious leaders and the media.

178. The extent to which human rights form a normal and embedded part of Australians' education should, therefore, form a part of the Inquiry. This includes the incorporation of human rights into the Australian civics curriculum and into specific training modules for a range of professions. It should involve formal and informal human rights education at universities and further education institutions. This would reinforce that human rights are for the benefit of all Australians, and that all Australians have responsibility in ensuring them in practice.

179. Legal assistance services play a particularly vital role in building awareness within diverse communities of their rights and responsibilities under the law. Given their detailed knowledge of different groups, their barriers to accessing such information and their educational needs, the effective and preventative role played by such services in delivering legal education should be better understood and fully resourced.[338]

180. In particular, the role of policymakers and legislators is also fundamental in respecting, protecting and fulfilling rights. Educational efforts should be directed towards building a strong government and parliamentary human rights culture which facilitates better decision-making, policy development and lawmaking. Some key measures in this regard are discussed below.

What actions are needed to ensure that the government meets its obligation to fulfil human rights – for example, in addressing longstanding inequalities in the community?

Building a strong government human rights culture

181. As discussed below, certain duties upon public authorities should be adopted in a federal charter to ensure their respect for and fulfilment of rights in practice. Positive duties could also be adopted in Commonwealth anti-discrimination law consolidation and reform.

182. As noted in the 2015 review of the Victorian Charter,[339] having the law is not enough to achieve human rights protection: a government culture is required that makes human rights real and operative in people's everyday interactions with government. This review prioritised three important influences: senior leadership and vision; operational capacity; and external input and oversight. Its recommendations included:

[338] See overview of the role played by legal assistance services, and examples of their effective delivery of tailored legal education in practice, in Law Council, *Justice Project – Final Report* (2018), People – Building Legal Capability and Awareness Chapter, < https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/People%20Building%20Legal%20Capability%20and%20Awareness%20%28Part%202%29.pdf>.

[339] Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government, 2015), 19.

- the Victorian Government making a clear public commitment to human rights, and departmental secretaries placing them on their agenda, supported by an inter-departmental committee;
- ensuring that public sector entities' organisational vision, plans, policies and procedures support good human rights practice;
- public sector entities building relevant human rights capabilities into position descriptions and ongoing professional development; and
- an internal human rights unit to develop guidance materials and provide advice and specialist training.[340]

183. These recommendations may also provide important guidance regarding actions needed in the Commonwealth public sector.

Targeted national actions

184. The Law Council encourages the proactive and coordinated national adoption of legislative, policy and program measures to fulfil Australia's obligations regarding certain core human rights matters domestically. Its priorities in this area include:

- comprehensive Closing the Gap justice targets under the Council of Australian Governments' (**COAG's**) Closing the Gap (**CtG**) framework. These would necessitate concrete Commonwealth, State and Territory commitments, actions and timeframes, informed by the recommendations of and tailored responses to different Aboriginal and Torres Strait Islander groups who are grossly and disproportionately incarcerated, including women, children and people with disability. The independent role of community-controlled Aboriginal legal services under a standalone Commonwealth Indigenous Legal Issues Program remains vitally important in this regard, as does justice reinvestment, and reform of specific laws which drive up imprisonment (including bail, parole and mandatory sentencing laws). Aboriginal Justice Agreements adopted in true partnership are needed to underpin these reforms. It is important to address the underlying causes of imprisonment through Indigenous-led approaches which are preventative, therapeutic and holistic. These should be community-based and coordinated across key sectors such as health, disability, education, employment, housing and family support. The Law Council further supports broader ambitious **CtG** targets including to address highly disproportionate rates of family violence and child removal.
- Reform of juvenile detention facilities in Australia against applicable human rights standards and recent inquiry recommendations, particularly the NT Royal Commission. This reform would be complemented by raising the MACR in all jurisdictions to 14 years, and underpinned by sufficient and culturally appropriate preventative and rehabilitative services focused on children's and families' health and welfare.
- Disability Justice Strategies adopted by all levels of government, noting that the current National Disability Strategy has been ineffective in addressing the dire and unmet needs of people with disability in the criminal and civil justice systems. While some states (South Australia and Tasmania) have now adopted Disability Justice Strategies, and the ACT Government is pursuing such a strategy[341], others are yet to follow suit. The recommendations (when

[340] Ibid.
[341] ACT Government Department of Community Services, 'Disability Justice Strategy' (online), <https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy>.

delivered) of the Royal Commission into the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability should also be implemented.

- Older persons – including implementing the recommendations (when finalised) of the Royal Commission into Aged Care, and revisiting the recommendations made by the ALRC following its detailed inquiry into this issue in 2017.[342] While progress has been made,[343] the Law Council notes that several of these recommendations remain unimplemented.[344]
- Major reforms with respect to Australia's fulfilment of its responsibilities to asylum seekers and refugees, both onshore and offshore, including:
  - establishing long-term, durable solutions for all refugees and asylum seekers who remain in offshore processing, in line with Australia's international obligations;
  - working with Australia's regional neighbours, the Office of the High Commissioner for Refugees and the International Organisation for Migration to establish a long-term, cooperative, transparent approach to address the flow of asylum seekers into the Asia-Pacific region, in line with Australia's international obligations;
  - free access to legal advice (reinstating Commonwealth funding in this regard) and interpreter services to asylum seekers to ensure fairer and more efficient processing of their claims and adequate resourcing for federal courts and the AAT;
  - enabling individual assessment of the need to detain asylum seekers, and enacting legislative limits on immigration detention and periodic reviews of detention;
  - ensuring that the best interests of the child are a primary consideration in all actions concerning children. Children should only be detained as a last resort for the shortest possible time. An independent guardian for unaccompanied minors must also be appointed;
  - reintroducing full merits and judicial review of all adverse decisions regarding protection status; and
  - implementing consistent legal processes for determining protection status which do not discriminate against applicants based on their mode of arrival.
- Strong commitments and actions across all governments towards the effective implementation of OPCAT across Australia through all necessary means (legislative, policy and program). It would include sufficient resourcing to ensure that the National Preventative Mechanism can be effective and ensure that it has the broadest possible reach into both traditional places of detention, such as police watch houses, prisons and juvenile detention facilities, as well as other closed facilities in which individuals' human rights have been systemically breached and at risk in Australia. It would be subject to clear reporting, independent oversight and complaints processes.

[342] ALRC, Elder Abuse—A National Legal Response (ALRC Report 131).

[343] For example, the Australian government has announced that it will implement a number of recommendations, including developing a national plan on elder abuse (launched March 2019), developing options for a serious incident response scheme, working with states and territories to establish a national online register for enduring powers of attorney, developing an elder abuse knowledge hub and funding a national prevalence study: ALRC, 'Implementation', https://www.alrc.gov.au/implementation-final-reports/.

[344] As noted by the Royal Commission into Aged Care, *Interim Report – Volume 1* (2019), 194. .

- Implementation of UNDRIP – given its own commitments to promoting the implementation of UNDRIP, the Law Council's ILIC is currently considering options under which it may be domestically implemented in Australia. Possibilities in this regard include legislative implementation – noting that this approach was recently attempted in Canada[345] but the relevant bill lapsed in the lead-up to its 2019 election. The AHRC relevantly suggested that the Parliamentary Scrutiny Act be amended to include UNDRIP in 2011.[346] Another option is a national UNDRIP action plan, noting that New Zealand is in the process of developing such a national plan.[347] Following the adoption of the World Conference on Indigenous Peoples' outcome document in 2014,[348] the Law Council is yet to resolve its views regarding how UNDRIP may be most appropriately progressed, and anticipates providing its settled position in due course. It suggests that this may be a fruitful area for a future AHRC inquiry.

Legislative development and scrutiny stage

185. Legislative action which may abrogate, rebalance or curtail human rights should be the subject of careful scrutiny during its development and consultation stage. The Parliamentary Scrutiny Act, which were designed to improve rights protection by enhancing deliberation within Parliament, deserve particular attention in this context. This legislation required federal bills and legislative instruments to be accompanied by a statement setting out whether they would be compatible with Australia's key international human rights obligations. It also established the PJCHR. The PJCHR reviews the proposed law and its compatibility statement, determining the extent to which the proposed law is compatible with human rights.

Role of PJCHR

186. The Law Council considers that the PJCHR should be enabled to play a stronger role in the scrutiny of human rights by federal parliament. It refers to Williams' and Reynolds' proposals in this regard, which would:

- insert a new provision into the Parliamentary Scrutiny Act allowing the PJCHR a guaranteed minimum time period to consider each new bill before it could be debated in Parliament (to be waived when the government introduces amendments to address the Committee's concerns);
- require the PJCHR to reach a majority view in its findings, with provision for dissenters to give reasons; and
- prompt a return to the PJCHR's former practice of detailing all the legislative instruments (as opposed to bills) it has considered. [349]

187. The Law Council supports these recommendations. It further considers that if government proposes to enact a bill which encroaches upon human rights, according to the PJCHR's findings, without making amendments, it should be

[345] Under BillC262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* (Canada).
[346] AHRC, Submission by the Australian Human Rights Commission under the Universal Periodic Review Process, *Australia's Second Universal Periodic Review*,(2015) 6.
[347]Cabinet Maori Crown Relations – Te Arawhiti Committee, *New Zealand's Progress on the United Nations on the Rights of Indigenous Peoples: Development of National Plan, Minutes of Decision* MCR-19-MIN-0003, 5 March 2019, available at Ministry of Maori Development. *Developing a plan on New Zealand's progress on the UNDRIP* (2019) <https:www.tpk.govt.nz/en/a-matou-mohiotanga.cabinet-papers/develop-plan-on-nz-progress-un>.
[348] *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN GAOR, 69th sess, UN Doc A/69/150 (15 September 2014) [8], [20].
[349] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469, 507.

required to table in Parliament a statement justifying why it is proceeding with the bill in that form.

188. In particular, the Law Council considers that the PJCHR should be better resourced and its functions expanded. It should not simply review legislation but should also be able to conduct own motion inquiries in relation to human rights issues. This would be consistent with the approach adopted in the United Kingdom.

189. The Law Council recommends that minimum statutory timeframes be established for conducting Parliamentary legislative review processes more broadly. These can be adjusted having regard to the level of public interest or concern regarding the legislation and the length or complexity of the bill.

190. The Law Council has held longstanding concerns regarding legislative review timeframes. Beyond their impact on parliamentary committees, these frequently do not permit for proper human rights scrutiny and debate by stakeholders, particularly people with lived experience of the issues at hand (some of whom require additional time, aids, adjustments and accommodations to tell their story), their representatives or human rights defenders.

Statements of compatibility

191. As noted above, the Law Council is concerned that statements of compatibility with human rights, contained in explanatory memoranda to bills, sometimes fail to provide sufficient legal analysis of human rights impacts.

192. It considers that further resources should be made to train government officers to draft statements of compatibility, in addition to templates and guidance notes. In addition, consideration could be given to some other means of preparing compatibility statements – such as by an independent statutory office holder. There may be considerable value in an independent assessment in the process, to enhance integrity and depoliticise human right assessments. The AHRC may be an appropriate body to prepare such statements.

How should we measure progress in respecting, protecting and fulfilling human rights?

193. In 2012, the UN Office of the High Commissioner for Human Rights (**OHCHR**) released a guide for measuring human rights entitled *Human Rights Indicators: A Guide to Measurement and Implementation* (**the Guide**). The Guide created an indicator framework for measuring a State's progress in realising human rights.[350] As part of this framework, the OHCHR has provided a set of indicators for 16 key human rights including the right to education, work, freedom of opinion and expression, and non-discrimination.[351]

194. The OHCHR notes that these indicators may need to be altered to suit the particular circumstances and needs of each society.[352] The UK for example, has adapted the OHCHR indicators into its own human rights measurement framework. The Equality and Human Rights Commission uses this framework to

[350] OHCHR, *Human Rights Indicators: a guide to measurement and implementation* (2012) , <https://www.ohchr.org/Documents/Publications/Human_rights_indicatorsen.pdf>.
[351] Ibid.
[352] Ibid.

monitor equality and human rights in England and Wales, and for their regular reporting duties to Parliament. The framework is also intended to be used by other organisations and individuals monitoring human rights in the UK.[353] It contains six core domains – education, work, living standards, health, justice, personal security and participation – and 25 indicators.[354]

195. In Australia, separate indicator frameworks have been developed to monitor the rights of people with disability[355] and Indigenous Australians.[356] Australia also reports on its compliance with international human rights instruments to UN treaty bodies and participates in the UN Human Rights Council Universal Periodic Review process. As a current member of the Council, Australia is obliged to uphold the highest standards in the promotion and protection of human rights.[357]

196. There is presently no comprehensive and clear indicator framework that caters to all, or key aspects of, Australia's human rights obligations. The Law Council suggests that such a framework – modelled on examples such as the UK's – should be developed as the standard for measuring human rights in Australia. While such a framework may take inspiration from the OHCHR Guide, it should be sufficiently adapted to Australia's current human rights landscape. We also emphasise that the framework must be reviewed regularly and adjusted if required to reflect the fact that human rights standards are constantly redefined over time.[358]

How should we hold government to account for its actions in protecting human rights?

Duties to act compatibly and give consideration to human rights

197. The Law Council notes that all three Australian human rights statutes now include an explicit obligation on public authorities to act compatibly with human rights.[359] There is also a procedural duty to 'give proper consideration' to human rights in the making of decisions.[360] This has had an impact in practice, and has provided a basis on which to bring proceedings where there is no direct right of action.

198. Consideration should therefore be given to including such explicit duties on public authorities in a federal charter of rights. This will require consideration of how to define a particular body as a public authority, and how to include private bodies carrying out functions on behalf of the State.

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[353] Equality and Human Rights Commission, *Measurement framework for equality and human rights* (October 2017) <https://www.equalityhumanrights.com/en/publication-download/measurement-framework-equality-and-human-rights>.
[354] Ibid.
[355] AHRC, Submission to the Australian Government, *National Disability Strategy Submission*, November 2008.
[356] Productivity Commission, Australian Government, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (17 November 2016) <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage>.
[357] UN General Assembly, *Resolution adopted by the General Assembly: Human Rights Council*, 60th sess, UN Doc A/RES/60/251 (3 April 2006), 9.
[358] Christopher J Fariss, 'Respect for human rights has Improved over time: Modelling the changing standard of accountability' (2014) 108(2) *American Political Science Review* 297.
[359] ACT Act, s 40B(1)(a); Victorian Charter, s 38(1); Queensland Act, s 58(1)(a).
[360] ACT Act, s 40B(1)(b); Victorian Charter s 38(1); Queensland Act, s 58(1)(b).

Freedom of the press

199. Robust public debate and a free press allow citizens to hold their government to account for its actions in protecting human rights. As noted above, the High Court of Australia has recognised freedom of political communication as fundamental to Australia's system of representative government.

200. The Law Council considers that a free media exists for the benefit of all Australians. It serves the critical function of scrutinising misconduct, misinformation and misuse of power. It is worth all Australians defending.

201. At the international level, Article 19 the ICCPR protects the right to freedom of opinion and expression, and the UN HR Committee has stated that 'a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression' and 'the public also has a corresponding right to receive media output'.[361] The former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted in 2013 that surveillance of journalists can serve to stymie freedom of the press and – by implication – limit the right to freedom of opinion and expression.[362]

202. The Law Council notes that the freedom of expression may be limited, however any restrictions must be provided by law and conform to strict tests of necessity and proportionality.[363] Any restrictions placed on a free press in the interests of protecting national security must, therefore, be a proportionate response to that objective, and not unnecessarily stifle legitimate reporting of information in the public interest.

203. The Law Council has called for substantive legal reforms to national security legislation to ensure that Australia's legal framework respects the role a free, independent media plays in safeguarding human rights and freedoms, as follows:

- first, the Law Council believes that disclosure of classified by the media should only be criminalised if it can e proven the disclosure was not in the public interest. The prosecution should lead evidence on this, and it should not be the journalist's responsibility to show why it was in the public interest;
- secondly, the Law Council believes that disclosures of classified information should only be criminalised if they cause real harm to national security. 'Harm' under the *Criminal Code Act 1995* (Cth) must mean more than mere embarrassment to the government, and requires clarification;
- thirdly, in terms of formal investigation of journalists suspected of breaching secrecy provisions, reforms are needed at every step of the process. In this regard, search warrants must be issued by judges of a superior court of record. Further, when considering whether to issue a search warrant, judges should apply a statutory public interest test, such as that needed for access to metadata. Creating a public interest advocate or monitor role would provide greater transparency and scrutiny of search warrants relating to journalists; and

[361] Ibid.
[362] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 23rd sess, UN Doc. A/HRC/23/40, (17 April 2013), 52.
[363] Human Rights Committee, *General Comment No. 34 Article 19: Freedoms of opinion and expression*, 102nd sess, CCPR/C/GC/34 (12 September 2011), 22.

- the Law Council does not support the updated ministerial direction requiring the Attorney-General's consent before journalists may be prosecuted, as this may serve as a deterrent to public interest reportage.[364]

Are there other issues on which you wish to comment?

Human rights, technology and artificial intelligence

204. The Law Council considers that new technologies such as Artificial Intelligence (**AI**), robotics, the Internet of Things and virtual reality have the potential both to promote and threaten the protection of human rights. For example, AI may improve human rights by making access to justice more affordable and may remove human bias in decision-making. However, it may also introduce the risk of design biases being built into systems, a lack of transparency and the loss of discretion in decision-making.

205. New technologies may affect a range of human rights, from the right to education, to the right to a fair trial, to the right to benefit from scientific progress. In this context, the Law Council considers that:

- the digital divide has the potential to result in already marginalised groups missing out on new opportunities, or facing further systemic disadvantage;
- new technologies have the potential to assist in access to justice, however, a nuanced, evidence-based and people-centred approach is needed in order to avoid leaving digitally excluded groups behind;
- decision-making informed by AI may improve human rights by improving access to justice and may remove human bias in decision-making. However, it may also introduce the risk of design biases being built into a system and a lack of transparency in decision-making;
- laws protecting individuals against breach of privacy have not kept pace with technological developments, and there is a need for such protections to be reviewed and reformed; and
- the best approach to the development of legislation to respond to new technologies is for principle-based laws that allow for flexibility and adaptability.[365]

206. The Law Council is further concerned that the rapid development of AI and related technologies is in many respects outpacing the legal and regulatory frameworks necessary to guide and govern them, giving rise to risks that the privacy and other fundamental rights of individuals may be placed at risk.

207. The Law Council's concerns in this area are illustrated by the example of Centrelink's online compliance system, which uses data-matching processes to compare averaged income data received from the Australian Tax Office with the earnings reported to Centrelink by the social security recipient as a basis for the calculation of debts. The use of averaged data in this context arguably fails to meet the requirements of the enabling legislation, places an effective onus on the beneficiary to disprove a claimed debt and has raised concerns regarding a lack of procedural fairness. The system has had a high error rate, a disproportionate

[364] Law Council, Submission to the Senate Standing Committee on Environment and Communications, *Inquiry into the Adequacy of Commonwealth Laws and Frameworks Covering the Disclosure and Reporting of Sensitive and Classified Information*, 23 August 2019.
[365] Law Council, Submission to the Australian Human Rights Commission, *Human Rights and Technology*, 25 October 2018

impact on already vulnerable people in the community, undermining their right to social security.[366] The Law Council considers that an ethics framework for AI should be rights-based and strongly grounded in overarching principles, including those drawn from international human rights law, and be subject to rule of law principles and procedural fairness. Such an ethics framework must also be enforceable.

208. The Law Council has welcomed the AHRC's current project on technology, artificial intelligence and human rights, and was pleased to submit its views on this topic.[367] It also made a detailed submission to the Department of Industry, Innovation and Science regarding its *Artificial Intelligence: Australia's Ethic Framework* inquiry.[368] It was pleased that the Department's recent release of its finalised AI Ethics Framework reflected a number of principles raised in the Law Council's advocacy, including that: AI systems should respect human rights; AI systems should be inclusive and accessible and avoid unfairly discriminating against individuals, groups or communities; AI systems should respect and uphold privacy rights and data protection, and ensure data security; there should be transparent and responsible disclosure regarding their operation; and processes to challenge their use or output.[369] However, the Framework is voluntary in its application.

209. The Law Council hopes that the AHRC's *Free and Equal* Inquiry provides a timely opportunity to embed a longer-term discussion of how human rights and AI must coexist. It considers that there is a strong need amongst the community, government and business for guidance on this subject.

Emerging rights – enjoyment of a safe, clean, healthy and sustainable environment

210. The Law Council also recognises and endorses increasing international attention to human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[370] As noted by the Office of the High Commissioner for Human Rights:

> *All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity. At the same time, protecting human rights helps to protect the environment. When people are able to learn about, and participate*

[366] Under ICESCR, art 9. See Law Council, Submission to the Senate Standing Committee on Community Affairs, *Centrelink Compliance Program*, 31 October 2019.
[367] Law Council, Submission to the Australian Human Rights Commission, *Human Rights and Technology*, 25 October 2018.
[368] Law Council, Submission to the Department of Industry, Innovation and Science, *Artificial Intelligence: Australia's Ethics Framework*, 28 June 2019.
[369] Australian Government Department of Industry, Innovation and Science, *AI Ethics Principles* (November 2019) https://www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework/ai-ethics-principles.
[370] The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment have been identified in framework principles which 'should be accepted as a reflection of actual or emerging international human rights law' John H. Knox, UN Special Rapporteur on Human Rights and the Environment, *Human rights and the Environment: Framework Principles on Human Rights and the Environment* (2018), 3.

in, the decisions that affect them, they can help to ensure that those decisions respect their need for a sustainable environment.[371]

211. In 2018, the former Special Rapporteur on human rights and the environment, John Knox, published *Framework Principles on Human Rights and the Environment*[372], a statement of the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. The first two principles demonstrate their interdependence:

- States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights; and
- States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.[373]

212. The Law Council's recently agreed *Sustainable Development Policy*,[374] recognises the interdependence of environmental protection and human rights. It states that decision-making about development that affects the environment or involves the exploitation of natural resources should respect, protect and fulfil human rights.[375]

213. The Law Council anticipates that any assessment of human rights obligations in the twenty-first century will need to grapple with this rapidly emerging area of human rights. The questions that climate change raises for domestic protections of human rights are already under debate. For example, Torres Strait Islander peoples on low-lying islands affected by sea level rises have made a complaint to the HRC alleging that the Australian Government has failed to address the impacts of climate change upon their homes, traditions and sacred sites.[376] The alleged breaches relate to the right to culture, the right to be free of arbitrary interference with privacy, family and home, and the right to life.[377]

Recommendations

A federal human rights act should be adopted.

Comprehensive, consolidated federal anti-discrimination legislation should be adopted which preserves and strengthens existing protections, improves the regime's ability to promote substantive equality and removes regulatory burdens on business.

The calls in the Uluru Statement, including for a Constitutionally-enshrined First Nations' Voice to Parliament, that is designed through a process that is both led and endorsed by Aboriginal and Torres Strait Islander peoples, should continue to be respected and pursued.

The Australian Government should strengthen its support for the AHRC by:

[371] OHCHR, *Special Rapporteur on human rights and the environment* (2019)<https://www.ohchr.org/en/Issues/environment/SRenvironment/Pages/SRenvironmentIndex.aspx>.
[372] Special Rapporteur on Human Rights and the Environment, *Framework Principles on Human Rights and the Environment* (2018) <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>.
[373] Ibid, 5-6 (Principles 1 and 2).
[374] Law Council, *Policy on Sustainable Development: Policy Statement*, September 2019.
[375] Ibid, 3, 6 (Principle 9).
[376] Ebony Beck and Rebecca Lucas, 'Climate change and human rights to collide before the United Nations Human Rights Committee', *Australian Public Law* (online), 17 July 2019.
[377] ICCPR, arts 27, 17 and 6.

- **ensuring sufficient resourcing for the AHRC to perform its important functions effectively;**
- **strengthening the independence of AHRC commissioners, including through mandating a transparent, arm's length and merits-based selection process; and**
- **requiring the Australian Government to table a response to any AHRC report on complaints within six months of receiving the report.**

All levels of government should:

- **provide substantial additional funds for legal assistance services to enable vulnerable groups to uphold their human rights effectively in practice, and to hold governments and others to account for any breaches; and**
- **introduce Justice Impact Tests to facilitate the smoother development of laws and policies which impact disproportionately on vulnerable individuals and drive up demands for legal assistance to uphold their human rights.**

The Federal Government should lift the current restriction on community legal centres upon using Commonwealth funds for lobbying or public campaigning purposes as part of the renegotiation of the National Partnership Agreement on Legal Assistance Services.

The Federal Government should:

- **develop, in consultation with state and territory governments, a National Action Plan on Business and Human Rights; and**
- **continue to reform, promote and support the National Contact Point for the OECD Guidelines on Multinational Enterprises.**

The AHRC, with the support and resourcing of the Federal Government, should expand its human rights education and awareness programs, with particular emphasis on primary, secondary and tertiary education, on engaging with diverse professional bodies, and on building a strong human rights culture across government and parliament.

The proactive and coordinated national adoption of agendas to fulfil Australia's human rights obligations should prioritise:

- **comprehensive Closing the Gap justice targets, underpinned by clear and specific commitments by all governments to address the over-incarceration of Aboriginal and Torres Strait islander peoples;**
- **implementation of the ALRC's recommendations from the *Pathways to Justice* Report*;***
- **reform of juvenile detention facilities in Australia in accordance with applicable human rights standards and recent inquiry recommendations, including the NT Royal Commission;**
- **raising the minimum age of criminal responsibility to 14 years;**
- **Disability Justice Strategies to address the dire and unmet needs of people with disability in the criminal and civil justice systems;**

- **Implementing outstanding recommendations made by the ALRC to address elder abuse, as well as the forthcoming recommendations of the Royal Commission into Aged Care, and the Royal Commission into Aged Care and Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability;**
- **major reforms to provide long-term, durable solutions for asylum seekers and refugees, both onshore and offshore; and**
- **strong commitments and actions across all governments towards the effective implementation of OPCAT across Australia.**

The AHRC should consider holding an inquiry into how UNDRIP may be most effectively implemented in Australia, having regard to recent international examples of domestic implementation.

The PJCHR should be enabled to play a stronger role in the scrutiny of human rights by federal parliament, including by:

- **allowing the PJCHR a guaranteed minimum timeframe to consider new bills before they can be debated;**
- **requiring the PJCHR to reach a majority view in its findings, with provision for dissenters to give reasons**
- **detailing all of the legislative instruments it has considered;**
- **requiring government, where it proposes to enact a bill without responding substantively to the PJCHR's findings, to table a statement of justification;**
- **better resourcing and expanding the PJCHR, including to conduct own motion inquiries into human rights issues.**

The Commonwealth Parliament should set minimum statutory timeframes for inquiry processes regarding legislation which substantially raises human rights issues.

Consideration should be given to developing an indicator framework for measuring Australia's progress in realising human rights, having regard to OHCHR guidance and the examples of other jurisdictions.

The AHRC should continue to provide leadership and practical guidance regarding important emerging human rights challenges facing governments, business and the community, including with regard to artificial intelligence and human rights, and the environment and human rights.