



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Mr Smithers,

Free and equal: An Australian conversation on human rights

Thank you for the opportunity to contribute to a Law Council submission to the Australian Human Rights Commission (“AHRC”) *Free and equal: An Australian conversation on human rights* consultation (“the consultation”).

The views of the Law Society have been informed by a number of our policy committees. Our input is linked to the questions posed in the AHRC Issues Paper released in April 2019 to guide the consultation.

1. Introductory comments

Australia has a long history of consultations, 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 23.¹

This result set the tone for future human rights law reform proposals in Australia. In 1973, 1984 and 1985, three different Attorneys-General – Lionel Murphy, Gareth Evans and Lionel Bowen – introduced bills to establish a federal human rights law. In each case, the bill either lapsed or was withdrawn.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 *Canadian Charter of Rights and Freedoms*, containing a number of core rights. And in 2009, the National Human Rights Consultation (“NHRC”), 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.

The Law Society has contributed to past human rights consultations and inquiries at the state and federal level. In 2000 we contributed a submission to the NSW Legislative Council

¹ Justice Michael Kirby AC CMG, ‘A Bill of Rights for Australia’ (4 October 1994), address delivered at the Young Presidents’ Association Queensland Chapter.

Standing Committee on Law and Justice inquiry into a Bill of Rights for NSW.² In 2009, the Law Society contributed a submission to the National Human Rights Consultation, in which we affirmed our support for a federal Human Rights Act.³ In addition to these submissions, the Law Society regularly provides responses to inquiries that enliven the human rights considerations and implications of legislative reform.

While proposals for human rights legislation at the federal level in Australia have, to date, failed to gain traction, there is an increasing acceptance of human rights protections at the state and territory level. In February 2019 the Queensland Parliament passed the Human Rights Bill 2018. This follows passage of the ACT's *Human Rights Act 2004* and Victoria's *Charter of Human Rights and Responsibilities Act 2006*. Prior to the 2019 state election, the Law Society's State Election Policy Platform called on all parties in NSW to commit to following the example of neighbouring states, and enact human rights legislation.⁴

The UN has noted gaps in Australia's human rights protection at the federal level a number of times over recent years. In 2017, the UN Human Rights Committee ("UN HR Committee"), 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]" and recommended Australia "adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions".⁵ 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.⁶

2. Which human rights should be protected in Australia?

Australia has an obligation to protect and promote the rights contained in the seven core international human rights treaties to which it is a party.

- The *International Covenant on Civil and Political Rights* ("ICCPR");
- The *International Covenant on Economic, Social and Cultural Rights* ("ICESCR");
- The *Convention on the Rights of the Child* ("CRC");
- The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT");
- The *Convention on the Elimination of All Forms of Racial Discrimination* ("CERD");
- The *Convention on the Elimination of All Forms of Discrimination against Women* ("CEDAW"); and
- The *Convention on the Rights of Persons with Disabilities* ("CRPD").

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*;

² The Law Society of NSW, *Submission of the Human Rights Committee to the Inquiry into a Bill of Rights for NSW (Legislative Standing Committee on Law and Justice)* (2000). Available at: <https://www.parliament.nsw.gov.au/lcdocs/submissions/40455/LawSociety.PDF>

³ The Law Society of NSW, *Submission to the National Human Rights Consultation* (2009). Available at: <https://www.hrc.org.au/s/Law-Society-of-New-South-Wales.pdf>

⁴ The Law Society of NSW, *2019 State Election Policy Platform* (December 2018). Available at: <https://www.lawsociety.com.au/2019-state-election-platform>

⁵ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017).

⁶ 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), 6.

- The *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*;
- The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*;
- The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*;
- The *Optional Protocol to the Convention on the Rights of Persons with Disabilities*; and
- The *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

In addition to the treaties outlined above, Australia is a party to a number of other treaties that contain human rights obligations, including but not limited to the *Convention relating to the Status of Refugees* (1951), the *Convention on the Reduction of Statelessness* (1961), the *Geneva Conventions* (1949), the *Slavery Convention* (1926), the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), the *Rome Statute of the International Criminal Court* (2002), the *Forced Labour Convention* (1930) and the *Worst Forms of Child Labour Convention* (1999).

The 1969 *Vienna Convention on the Law of Treaties*, to which Australia is a party, provides at Article 26 that:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁷

The *Vienna Declaration and Programme of Action*, adopted in 1993 by 171 states (including Australia), affirms at Article 5 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. While the significance of national and regional particularities 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.⁸

The implications of these Articles are that human rights are of equal importance, belong to everyone, must be implemented into the domestic laws of State parties (subject to any reservations registered), cannot be disregarded by governments, and apply regardless of distinctions such as race, sex, language or religion.

3. How should human rights be protected in Australia?

3.1. The existing framework protecting human rights at the national level

3.1.1. Human rights protection through statutory interpretation

The principle of legality operates as a rule of statutory interpretation. Courts will presume Parliament did not intend to infringe on common law rights except through express terms or necessary implication.⁹ This operates as an aspect of the rule of law and actively informs

⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

⁸ UN General Assembly, *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna, A/CONF.157/23 (25 June 1993), 5.

⁹ *Coco v The Queen* (1994) 179 CLR 427 at 437.

judicial decisions.¹⁰ The principle of legality extends beyond domestic legislation, presuming consistency with international law obligations including treaty law.¹¹

Additionally, statutes are presumed to not operate retrospectively. However, the Constitution does not prevent Parliament from enacting retrospective laws, as Higgins J affirmed in *R v Kidman* (1915) 20 CLR 425.

There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit.¹²

3.1.2. Constitutional rights

The Constitution of Australia provides for protection for a limited number of rights: freedom from discrimination against a person based on their state of residence (s 117); right for judicial review by the High Court (s 75(v)); compulsory acquisition of property by the Commonwealth must be on just terms (s 51(xxxi)); right to trial by jury for an indictable offence (s 80); and the right to freedom of religion (s 116).

It is also well established that within Australia there exists an implied Constitutional freedom of speech pertaining to communication of government and political matters.¹³ This freedom operates to serve the public interest. Courts have recognised freedom of political speech as necessary for our system of representative government.¹⁴

3.1.3. Common law rights

- Freedom of association.

Freedom of association is not expressly protected in the Australian Constitution. There is also no free-standing right to association implied in the Constitution.¹⁵ The High Court has said, however, that “freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*”.¹⁶ There is a significant body of law that permits an encroachment upon freedom of association if it is in pursuit of the public interest for the prevention of criminal activity.¹⁷

- Right to a fair trial and procedural fairness.

The common law right to a fair trial is considered a crucial foundation of the Australian justice system,¹⁸ as manifested in the rule of law and practice.¹⁹

¹⁰ *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309.

¹¹ *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

¹² *R v Kidman*, (1915) 20 CLR 425, 451; see also *Mutual Pool & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 13.

¹³ *Nationwide News v Wills* (1992) 177 CLR 1, 32; *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 67; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁴ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (2015), ALRC Report 129, 4.17.

¹⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (2015), ALRC Report 129, 35.

¹⁶ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234.

¹⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (2015), ALRC Report 129, 168.

¹⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 298; *Brown v Scott* [2003] 1 AC 681, 719.

¹⁹ *Jago v The District Court of NSW* (1989) 168 CLR 23, 29.

There is also a common law right to procedural fairness which embodies the legitimate expectation to protect a persons' rights or interest by affording them a fair hearing free from bias.²⁰

3.2. Consolidation of federal anti-discrimination laws

The Law Society supports consolidation of the existing Commonwealth discrimination laws into a single Act, as proposed by the Law Council's 2011 policy statement on the federal anti-discrimination regime.²¹ We further submit that any consolidation of Commonwealth anti-discrimination laws should preserve or enhance – rather than weaken – existing protections against discrimination, promote substantive equality, and remove the regulatory burden on business to the extent possible. In this regard, we note that the *Racial Discrimination Act 1975* (Cth) has a wide level of protection under sections 9 and 10 in respect of the areas covered, and a small number of exceptions. It 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).

The Law Society notes that the current President of the AHRC, Rosalind Croucher, has described Australia's anti-discrimination regime as “out of date, not comprehensive and falling behind practices across most other democratic nations in the world”.²² Professor Croucher has further described our anti-discrimination laws as a “mishmash, reflective of the context and times of their introduction” and noted that “amendments have been somewhat haphazard”. The UN HRC has also called for Australia to consolidate its anti-discrimination laws. In its November 2017 concluding observations on the sixth periodic report of Australia, the UN HRC 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 substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and inter-sectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.²³

3.3. Constitutional recognition relating to Aboriginal and Torres Strait Islander peoples

The Law Society notes that the substance of, and process for, constitutional recognition of Aboriginal and Torres Strait Islander people continue to be unresolved. This has implications for Indigenous Australians' right to self-determination, which is provided for by common Article 1 of the ICCPR and ICESCR. The *United Nations Declaration on the Rights of Indigenous Peoples*, which Australia supports as a non-legally binding document, also recognises the need to respect and promote the rights of Indigenous people, including through measures such as constitutional recognition.

The Law Society considers it significant that Indigenous delegates from across Australia identified as a consensus view in the Uluru Statement from the Heart the importance of Makarrata, or treaty, to capture “our aspirations for a fair and truthful relationship with the

²⁰ *Commissioner of Police v Tanos* (1985) 98 CLR 383, 395.

²¹ Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (March 2011).

²² Emeritus Professor Rosalind Croucher, 'Law, Lawyers and Human Rights' (speech delivered at the Law Week Breakfast, Law Society of Western Australia, 13 May 2019).

²³ UN Human Rights Committee, above n 5, 18.

people of Australia and a better future for our children based on justice and self-determination".²⁴

The Law Society supports the Uluru Statement from the Heart and has previously expressed the view that the Constitution should formally recognise the distinct identities and equal rights of Aboriginal and Torres Strait Islander people in Australia.²⁵ We further emphasise the importance of meaningful engagement, including consulting and co-designing, with Aboriginal and Torres Strait Islander people on any constitutional recognition option or implementation process.

3.4. *Federal Human Rights Act*

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

The Law Society notes that if Australia were to enact a federal human rights charter or bill of rights, it could take one of the following forms.

- a) A 'dialogue' model, as recommended by the 2009 NHRC report.
- b) A different legislative model, similar to the 1960 *Canadian Bill of Rights*, that would empower courts invested with federal jurisdiction to hold that:
 - State and territory legislation inconsistent with the human rights law is invalid; and
 - In the absence of an express statement to the contrary, all federal legislation is to be read subject to the human rights law of the federal Parliament.²⁶
- c) A Constitutional model, which would – contingent on a successful referendum – embed a bill of rights in Australia's Constitution.

We further note that since the NHRC report's recommendations were issued, the High Court issued its ruling in *Momcilovic v The Queen* [2011] HCA 34 ("*Momcilovic*"), which has implications for any future federal charter of human rights in Australia based on the 'dialogue' model. In *Momcilovic*, the majority held that Chapter III of the Constitution would preclude the 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. The Law Society recommends that any proposal for a federal human rights act take the ruling in *Momcilovic* into account, to ensure Constitutional validity.

3.5. *NSW Human Rights Act*

The Law Society supports the enactment of human rights legislation in NSW. 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

²⁴ Referendum Council 2017, *Uluru Statement from the Heart* (26 May 2017).

²⁵ Law Society of NSW, 'Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018' (submission to the Law Council of Australia, 22 May 2018).

²⁶ Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009), *Australian International Law Journal*, 225.

as 14 to be detained for two weeks for questioning without charge, in relation to specific offences.

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”.²⁷ It is not uncommon for legislation to pass within 24 hours, with no possibility of public scrutiny.²⁸ 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 detention including prisons and mental health institutions, child protection, health, education, housing and homelessness.

As noted above, the ACT, Victoria and Queensland passed human rights legislation in 2004, 2006 and 2019 respectively. A 2014 review of the ACT’s human rights act found that it had increased “awareness through Government of human rights issues” and provided “an impetus for agencies to properly consider human rights obligations”.²⁹ A 2015 review of the Victorian charter found that “implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector”.³⁰

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

4.1. Systemic barriers

4.1.1. Limitations of the Parliamentary Joint Committee on Human Rights

As part of its response to the NHRC report, the Commonwealth Government created the Parliamentary Joint Committee on Human Rights (“PJCHR”) through the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which came into effect in early 2012. The Shadow Attorney-General at the time described this as “the most important piece of human rights legislation in a quarter of a century”³¹ while his counterpart in Government stated that:

The measures in this bill will deliver improved policies and laws in the future by encouraging early and ongoing consideration of human rights issues in the policy and law-making process and informing parliamentary debate on human rights issues.³²

The PJCHR is required to examine bills and legislative instruments for compatibility with human rights. It may also examine existing Acts and inquire into any matter relating to human rights referred to it by the Attorney-General. Furthermore, any Bill or legislative instrument introduced to Parliament must be accompanied by a ‘statement of compatibility’ which includes an assessment of whether the Bill (or instrument) is compatible with human rights. Reports of the PJCHR and statements of compatibility can be considered by courts in determining the meaning of new Commonwealth statutes, pursuant to s 15AB(2) of the *Acts Interpretation Act 1901* (Cth).

²⁷ 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.

²⁸ 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).

²⁹ ACT Justice and Community Safety Directorate, *Economic, social and cultural rights in the Human Rights Act 2004: section 43 review* (November 2014) 26.

³⁰ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), State of Victoria, 22.

³¹ Commonwealth, Parliamentary Debates, Senate, 25 November 2011, 9661 (George Brandis).

³² Commonwealth, Parliamentary Debates, House of Representatives, 30 September 2010, 272 (Robert McClelland).

Opinions as to the utility of the PJCHR are varied. In 2013, 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.”³³ In a 2015 article, George Williams and Daniel Reynolds presented the results of an empirical analysis of the operation of the PJCHR over its first four years in light of key indicators of its effectiveness. The analysis found “significant shortcomings in both the design and practice of the scrutiny regime, and that it is having a limited impact by way of achieving its goals”.³⁴ In considering the available information, Williams and Reynolds stated that:

[H]aving now completed its fourth year, the major achievements of the regime are difficult to identify. Although in SOCs [statements of compatibility] and via direct correspondence, Ministers have started justifying their policies through a human rights lens, there is no evidence that this burgeoning ‘culture of justification’ has in fact led to better laws. On the contrary, there is evidence that recent years have each seen extraordinarily high numbers of rights-infringing Bills passed into law.³⁵

In 2017, the UN Human Rights Committee applied a critical eye to the operation of the PJCHR, including the following comment in its concluding observations on the sixth periodic report of Australia:

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.³⁶

4.1.2. Low community awareness of human rights.

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% of people surveyed answered that they knew “not very much” or “nothing” about human rights. 32% of respondents believed that laws protecting human rights made “no difference” to their life, and 30% 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 Universal Declaration of Human Rights (“UDHR”), respondents had around a 50% success rate.³⁷

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 Professor Rhona Smith and Felisa Tibbitts have stated, knowledge of human rights is a prerequisite to citizens holding their government accountable for their

³³ Frank Brennan, ‘The Practical Outcomes of the National Human Rights Consultation’ (speech delivered to the Judicial Conference of Australia Colloquium, Sydney, 12 October 2013). Available at: http://jca.asn.au/wp-content/uploads/2013/11/P01_13_02_28-Brennan-paper.docx.pdf

³⁴ 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*, 498.

³⁵ *Ibid.*, 506.

³⁶ UN Human Rights Committee, above n 5, 11.

³⁷ Ipsos Public Affairs, *Human Rights in 2018: A Global Advisor Survey* (2018). Available at: <https://www.ipsos.com/sites/default/files/ct/news/documents/2018-07/human-rights-in-2018-ipsos-global-advisor.pdf>

rights.³⁸ Without knowledge of human rights, it is difficult for citizens to be aware of when rights are being de-legitimised, and 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 realization of all human rights”.³⁹

4.2. *Specific examples and case studies*

This section outlines a set of examples that demonstrate the gap between the promise and the implementation of human rights in Australia. Each example is accompanied by a reference to the potential for human rights legislation to assist in closing these ‘implementation gaps’ by translating international human rights obligations to national law and practice. This is not intended to be an exhaustive list; rather, it is informed by the current priorities of the Law Society Human Rights Committee and the expertise of Committee members.

4.2.1. Housing and homelessness

The UDHR states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including... housing”. The ICCPR and ICESCR similarly recognise the right to an adequate standard of housing.

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% increase in the rate of homelessness across Australia between 2011 and 2016.⁴⁰ There are an estimated 116,000 people experiencing homelessness in Australia, representing 50 homeless persons for every 10,000 Australians.⁴¹ 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.

In jurisdictions with a human rights act, advocates have used these laws successfully to protect citizens’ right to housing. As one 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.⁴²

4.2.2. Disability discrimination

The purpose of the CRPD, which Australia ratified in 2008, 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”.⁴³ Its general principles include non-discrimination, full and effective participation and inclusion in society,

³⁸ Rhona Smith and Felisa Tibbitts, *Four reasons why human rights education is key to change* (28 April 2016), Norwegian Centre for Human Rights. Available at:

<https://www.jus.uio.no/smr/english/about/programmes/news/human-rights-education.html>

³⁹ UN General Assembly, *Declaration on Human Rights Education and Training* (adopted by Resolution 66/137 on 19 December 2011), UN Doc A/RES/66/137. Available at:

[https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UnitedNationsDeclarationonHumanRightsEducationandTraining\(2011\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UnitedNationsDeclarationonHumanRightsEducationandTraining(2011).aspx)

⁴⁰ Australian Bureau of Statistics, ‘Census reveals a rise in the rate of homelessness in Australia’ (14 March 2018). Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/lookup/2049.0Media%20Release12016>

⁴¹ Ibid.

⁴² Justice Connect, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (June 2015) <<https://justiceconnect.org.au/wp-content/uploads/2018/08/Charting-a-Stronger-Course-June-2015.pdf>>.

⁴³ *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.

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. The DDA defines “disability” broadly, as including physical, intellectual, psychiatric, sensory, neurological and learning disabilities, along with physical disfigurement and the presence in the body of disease-causing organisms.⁴⁴

Despite these protections, people with disabilities in Australia continue to contend with discrimination and adverse outcomes. A 2016 report by the ABS found that 8.6% of persons with a disability reported experiencing discrimination or unfair treatment due to their disability.⁴⁵ The 2012 National Disability Strategy Consultation Report, also produced by the ABS, found that 47.3% of persons with a disability of working age were not in the labour force, and the labour force participation rate for people with a disability had decreased by over 2% since 1993. The same report found that Indigenous people with disabilities are particularly disadvantaged due to a lack of culturally appropriate services and programs, and that the education system did not cater to the needs of young people with a disability.⁴⁶

There are a diverse set of factors contributing to adverse outcomes for people with disabilities in Australia. As the AHRC have noted, however, Australia’s existing anti-discrimination regime is unnecessarily complex, not comprehensive in its protection, and often lacks an effective remedy.⁴⁷ The Federal Court decision of *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78 has also created challenges for people with a disability seeking to prove discrimination, given the Court’s interpretation of “reasonable adjustments”.⁴⁸

Comprehensive human rights legislation is not a panacea for disability discrimination, however it is one part of the solution to closing the ‘implementation gap’ for rights under the CRPD. In the UK, the *Human Rights Act 1998* sets out the fundamental rights and freedoms that everyone in the UK is entitled to, including people with a disability. Courts in the UK have relied on this law in a number of cases to rule that the rights of people with a disability have been breached and ordered remedies to be made available.⁴⁹ In one matter, *Mathieson v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 47, a decision by the UK Supreme Court led to a shift in Government policy, with a discriminatory rule being changed as a result.

⁴⁴ Disability Discrimination Act 1992 (Cth), s 4(1).

⁴⁵ Australian Bureau of Statistics, ‘Disability, Ageing and Carers, Australia: Summary of Findings 2015’ (18 November 2016). Available at:

<https://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?Opendocument>

⁴⁶ Australian Bureau of Statistics, ‘Disability and labour Force participation’ (2012). Available at:

<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4433.0.55.006>

⁴⁷ Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform* (2019). Available at:

https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_discrimination_law_reform_2019.pdf

⁴⁸ *Sklavos v Australasian College of Dermatologists* [2017] 347 ALR 78.

⁴⁹ See for example: *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).

4.2.3. Modern slavery

Estimates of the number of people in modern slavery in Australia vary from 1,300⁵⁰ to 15,000.⁵¹ The Australian Institute of Criminology further estimates that there are approximately four undetected victims for every victim detected.⁵²

Slavery is an abhorrent crime, and its prohibition is one of the few norms under international law with *jus cogens* status, with no derogation permitted.⁵³ It is proscribed under various international treaties including the 1926 *Slavery Convention*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (ratified by Australia in 1958), and the *Worst Forms of Child Labour Convention* (ratified by Australia in 2006). In domestic law, slavery and trafficking are prohibited by divisions 270 and 271 of the *Criminal Code Act 1995* (Cth). The *Marriage Act 1961* (Cth) makes child marriage an offence, and the *Proceeds of Crime Act 2002* (Cth) includes provisions for tracing and confiscating proceeds of trafficking and slavery.

A human rights law prohibiting slavery or forced labour can provide additional protections against modern slavery. Article 4 of the UK's *Human Rights Act 1998*, which prohibits slavery and forced labour, compels authorities to: properly protect victims of modern slavery; investigate any allegations of slavery, servitude, forced or compulsory labour; and cooperate effectively in cross-border trafficking cases.⁵⁴

4.2.4. Refugee and asylum seeker rights.

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.

In 2015, the UN Special Rapporteur on Torture found some aspects of Australia's treatment of asylum seeker violated the CAT. This finding was based, in part, on Australia's policy of indefinite detention on Manus Island as well as the harsh treatment of asylum seekers and failure to end the violence within the detention facilities.⁵⁵

In addition, only a small number of asylum seekers in Australia have access to government-funded legal assistance whilst most rely on pro-bono services.⁵⁶ Legal assistance is crucial

⁵⁰ Australian Institute of Criminology, 'Estimating the dark figure of human trafficking and slavery victimisation in Australia' (February 2019), *Statistical Bulletin* 16, 2. Available at: <https://aic.gov.au/publications/sb/sb16>

⁵¹ Walk Free Foundation, *Global Slavery Index 2018: Country Study, Australia* (2018). Available at: <https://www.globalslaveryindex.org/2018/findings/country-studies/australia/>

⁵² Australian Institute of Criminology, above n 50.

⁵³ David Weissbrodt and Michael Dottridge, *Abolishing Slavery and its Contemporary Forms* (2002), Office of the United Nations High Commissioner for Human Rights, HR/PUB/02/4, 6. Available at: <https://www.ohchr.org/documents/publications/slaveryen.pdf>

⁵⁴ The National Council for Civil Liberties, *A Parliamentarian's Guide to the Human Rights Act* (2010), 23. Available at: <https://www.refworld.org/pdfid/4ed640552.pdf>

⁵⁵ Human Rights Law Centre, 'UN Finds Australia's Treatment of Asylum Seekers Violates the Convention Against Torture' (9 March 2015). Available at: <https://www.hrlc.org.au/news/un-finds-australias-treatment-of-asylum-seekers-violates-the-convention-against-torture>

⁵⁶ Kelly Newell, 'The latest hurdles for people seeking asylum in Australia' (22 March 2017), *Kaldor Centre for International Refugee Law*. Available at: <https://www.kaldorcentre.unsw.edu.au/news/latest-hurdles-people-seeking-asylum-australia>

to refugees and asylum seekers. Immigration application forms can be extremely complex, especially for people who have limited understanding of English or legal terminology.⁵⁷ Legal assistance is particularly important for female asylum seekers, as they often experience heightened vulnerability. In this regard, Dr Linda Bartolomei and Eileen Pittaway of the UNSW Centre for Refugee Research have noted that “[women] are not inherently vulnerable, but the refugee experience puts them at risk... Cultural differences often give women lower social status, dependent on men.”⁵⁸

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* (“BORA”). New Zealand’s Supreme Court have relied on ss 8 and 9 of the BORA in clarifying the country’s obligations to asylum seekers.⁵⁹

4.2.5. Indigenous incarceration rate

The general principle of equality and non-discrimination is a fundamental element of international human rights law. It is recognised in Article 2 of the UDHR and is a cross-cutting issue of concern in different treaties, such as the ICCPR (Article 2 and 26), the ICESCR (Article 2(2)) the CRC (Article 2), and the CRPD (Article 5). As noted above, Australia has a suite of legislation protecting the right to non-discrimination. Nonetheless, inequality remains prevalent in Australia.

One area where inequality is evident in Australia is in the dramatic disparity in the number of Aboriginal and Torres Strait Islander incarcerations. While approximately 2% of the adult Australian population are Aboriginal or Torres Strait Islander peoples, Indigenous prisoners comprise 28% of the total Australian prison population.⁶⁰ The Australian Law Reform Commission (“ALRC”) *Pathways to Justice* report noted Indigenous over-representation in the criminal justice system is a “persistent and growing problem”, with the incarceration rate having increased by 41% between 2006 and 2016.⁶¹ In NSW, the Indigenous incarceration rate increased by 63% between 1993 and 2016 and was 13.5 times higher than that of non-Indigenous people in 2016.⁶² This was similar to the national Indigenous incarceration rate in 2016 at 13 times the non-indigenous incarceration rate.⁶³

The inequality is even more pronounced when comparing the rates between Indigenous and non-indigenous women and children. As of 2016, Indigenous women made up 2.2% of Australia’s adult female population, but accounted for 34% of the female prison population.⁶⁴ In NSW, the number of Aboriginal and Torres Strait Islander women in prison increased by 77% – from 195 to 340 – from 2011 to 2017, compared with a 40% growth in the number of non-Indigenous women in prison over the same time period.

⁵⁷ Ibid.

⁵⁸ Linda Bartolomei and Eileen Pittaway, ‘The international protection system is failing refugee women and girls’ (17 November 2017), *Thomson Reuters Foundation*.

⁵⁹ *Zaoui v The Attorney-General and Ors* SC SC CIV 13/2004 .

⁶⁰ Australian Bureau of Statistics, (2018) *Prisoners in Australia*, 2018. Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>

⁶¹ The Australian Law Reform Commission, *Pathways to Justice – An inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (December 2017) 21-23.

⁶² Don Weatherburn and Jessie Holmes, NSW Bureau of Crime Statistics and Research (2017) *Indigenous Imprisonment in NSW: A closer look at the trend*, Issues Paper no 126, 1 <https://www.bocsar.nsw.gov.au/Documents/BB/Report-2017-Indigenous-Imprisonment-in-NSW-BB126.pdf>

⁶³ Australian Bureau of Statistics (2016) *Prisoners in Australia*, 2016. Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12>

⁶⁴ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper* (July 2017), Discussion Paper 84 (DP 84), 26.

Aboriginal and Torres Strait Islander children are likewise overrepresented in the youth justice system. Aboriginal and Torres Strait Islander children make up 5% of children aged 10-17 in Australia. However, they account for 49% of children aged 10-17 under youth justice supervision.⁶⁵ Indigenous children comprised of over half (56%) of the total number of children in detention and are 23 times more likely than non-Indigenous children to be in detention.⁶⁶

Under the UN Convention on the Rights of the Child, Australia has an obligation to only arrest, detain or imprison a child as a measure of last resort. 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 more rehabilitative conditions and further commented that the 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".⁶⁷

In the ACT, the *Human Rights Act 2004* contains several provisions relevant to non-custodial measures and diversion from the criminal justice system, including at 8(3), 11, 18, 20 and 22. The *Human Rights Act 2004* has been cited by a Magistrate in the ACT to support an application to refer an offender to the Ngambra Circle Court.⁶⁸ The objective of circle sentencing is to engage the Indigenous community in the sentencing process, and reduce the number of people coming into contact with the criminal justice system.

4.2.6. Mental health services for people in the custodial system

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". Despite these protections under international human rights law, people in the criminal justice system in Australia are excluded from mental health support under Medicare and the National Disability Insurance Scheme.

A 2015 report by the NSW Inspector of Custodial Services found that the waiting time for people in a correctional centre to see a mental health nurse and psychiatrist was 27 days and 42 days respectively.⁶⁹ In December 2018, the NSW Legislative Council Portfolio Committee No. 4 - Legal Affairs considered the issue of custodial mental health care across the state in its report into Parklea Correctional Centre. On examination of the material available, the Committee 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".

⁶⁵ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-2018* (2019) v <https://www.aihw.gov.au/getmedia/f80cfc3-c058-4c1c-bda5-e37ba51fa66b/aihw-juv-129.pdf.aspx?inline=true>

⁶⁶ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-2018* (2019) 9.

⁶⁷ UN Office of the High Commissioner for Human Rights, 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Corpuz on her Visit to Australia' (2017). Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>

⁶⁸ Adam Fletcher and André Dao, *Alternatives to Imprisonment for Vulnerable Offenders: International Standards and Best Practice: Report for Australian Government Attorney-General's Department* (July 2012), 99.

⁶⁹ NSW Inspector of Custodial Services, *Full House: The growth of the inmate population in NSW* (2015), NSW Government, 53.

This lack of mental health care in custodial facilities is of particular concern given the scale of the need arising from demographic and environmental factors. A 2015 study conducted by the NSW Justice Health and Forensic Mental Health Network found nearly 63% of the adult population in correctional centres in NSW had received a mental health diagnosis, most commonly depression and anxiety. In 2010, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health reported that in NSW 43% of prisoners met the diagnostic criteria for at least one mental illness, compared with 15% of adults in the general population. Psychosis was reported as 10 times more prevalent in prisons than in the community.⁷⁰

In jurisdictions with human rights legislation, these laws have been utilised to protect the right to health of people in custody. For example, in the ACT, the *Human Rights Act 2004* 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 under the *Corrections Management Act 2007* (ACT). These principles stipulate that “detainees should be provided with quality health care to a standard equivalent to that available in the ACT community”.⁷¹ A 2011 review of the Alexander 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”.⁷²

5. How should the Government address the situation where there is a conflict between different people’s rights?

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. 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. One advantage of a robust Commonwealth human rights act or charter is that it could include direct protections for internationally guaranteed human rights, while providing provision for a proportionality approach to its application. New Zealand’s Bill of Right 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.” The Canadian Charter of Rights similarly guarantees the rights and freedoms contained in the Charter. The Victorian *Charter of Human Rights* and Queensland’s *Human Rights Act 2018* also include similar clauses.

Several international jurisdictions with statutory human rights protections have developed a body of case law illustrating how a proportionality approach to balancing rights works in practice. The European Court of Human Rights (“ECtHR”) has through cases including *Wasmoth v Germany*⁷³ developed a two-part test to determine whether an interference with an individual’s right to freedom of thought, conscience and religion, protected under Article 9(1) of the European Convention on Human Rights (“ECHR”) is “necessary... for the protection of the rights and freedoms of others” per Article 9(2) of the ECHR. Firstly, the interference must serve a legitimate aim, and secondly it must be proportionate to that aim.

⁷⁰ 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* (3 June 2010), 14th session, agenda item 3, A/HRC/14/20/Add.4, 70.

⁷¹ ACT Government Justice and Community Safety Directorate, *Human Rights Principles for ACT Correctional Centres* (January 2019), 10.

⁷² Knowledge Consulting, ‘Independent Review of Operations at the Alexander Maconochie Centre: Report for ACT Corrective Services’ (12 March 2011), 37.

⁷³ *Wasmoth v Germany* [2011] ECtHR No. 12884/03.

This test, or a close variation on it, has been applied by the African Commission on Human and Peoples' Rights,⁷⁴ and national courts in South Africa,⁷⁵ the UK,⁷⁶ and Canada.⁷⁷ To take one recent case from the national level, in *R (AR) v Chief Constable of Greater Manchester Police*, the UK Supreme Court held that interference with the Applicant's right to respect for his private and family life under Article 8 of the ECHR was justified, as it satisfied proportionality requirements.⁷⁸ In reaching this position, the Court referred to the 2015 *Statutory Disclosure Guidance* produced by the UK Home Office, which provides practical guidance for police officers on how to apply the proportionality test to requests for police information.

Firstly [there must be] a legitimate aim pursued by the disclosure; this might be the legitimate aim of crime prevention and/or the protection of the rights and freedoms of others and/or ensuring public safety.

If there is a legitimate aim pursued, the next step is to consider whether the disclosure of the information is necessary to pursue that aim including consideration of whether there are any other realistic and practical options to pursue that aim. If disclosure is considered necessary to pursue that aim then the question becomes one of proportionality. In practice this will involve weighing factors underpinning relevancy, such as seriousness, currency and credibility against any potential interference with privacy. All decisions must be proportionate. This means that the decision is no more than necessary to achieve the legitimate aim and that it strikes a fair balance between the rights of the applicant and the rights of those the disclosure is intended to protect.⁷⁹

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

As Remedy Australia has noted, "the right to remedy goes hand-in-hand with every other human right".⁸⁰ Where Australia is in breach of international human rights law, the person whose rights have been violated is entitled to remedies. The right to an effective remedy is an essential component of all the rights in the ICCPR and the prohibitions against discrimination in CERD and CEDAW.

A state's duty to provide remedies is 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*. Article 11 provides that a right to remedy 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.

Since 1994, UN treaty bodies have found Australia to be in breach of the ICCPR and other treaties 47 times.⁸¹ Remedy Australia has found that of these 47 complaints upheld against Australia, only 13% have been fully remedied in accordance with the final views of the treaty

⁷⁴ *Garreth Anver Prince v South Africa* [2004] AHRLR 105 (ACHPR 2004).

⁷⁵ *Christian Education South Africa v Minister of Education* [2000] CCT4/00 (Constitutional Court).

⁷⁶ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.

⁷⁷ *Chamberlain v Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

⁷⁸ *R (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47.

⁷⁹ UK Home Office, *Statutory Disclosure Guidance* (2nd edition, 2015).

⁸⁰ Remedy Australia, 'The Right to a Remedy'. Available at: <https://www.remedy.org.au/>

⁸¹ Remedy Australia, 'Complaints upheld against Australia'. Available at: <https://www.remedy.org.au/cases/>

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.

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

7.1. Appropriate resourcing for the AHRC

In order to promote community awareness of human rights the Commonwealth Government should support the AHRC so it can carry out its educative function. We note that the UN HR Committee in 2017 expressed concern about cuts in the budget of the AHRC, and called on Australia to restore the AHRC's budget to its previous level.⁸²

7.2. Lifting restrictions on advocacy by community legal centres

Despite the Productivity Commission's Access to Justice report noting law reform advocacy as central to the efficacy of legal assistance services,⁸³ the Commonwealth Government has restricted community legal centres ("CLCs") from engaging in systemic advocacy through the National Partnership Agreement on Legal Assistance Services ("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 provides that "Commonwealth funding should not be used to lobby governments or to engage in public campaigns". Previous federal funding agreements had included law reform and legal policy as core services under the NPA. Some states still allow CLCs that receive state government funding to engage in law reform and policy work.

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 brought about many positive reforms.

8. How should businesses be encouraged and supported to meet their responsibility to respect human rights?

In addition to the role of government and the community in promoting and protecting human rights, businesses have their own responsibility to respect human rights. These responsibilities are articulated by the UN Guiding Principles for Business and Human Rights ("UNGPs"), which were endorsed by the UN Human Rights Council in 2011. Under the UNGPs companies are expected to respect human rights and avoid causing adverse human rights impacts through their activities. The UNGPs 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

⁸² UN Human Rights Committee, above n 5, 13.

⁸³ Productivity Commission of Australia, *Access to Justice Arrangements Inquiry* (2014) Final Report, Vol 2, 709.

- enabling access to effective grievance mechanisms by affected groups and individuals.⁸⁴

To spur action within the private sector, we recommend that the Commonwealth 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. 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.⁸⁵ The Law Society 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, improved mediation services and determination of grievances where relevant.

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

Human rights are inherent to all individuals and are an important feature of our legal and political system. It is essential for Australians of all ages to have an understanding of human rights, when their rights are being violated and how they can access remedies.

The Law Society notes the low community awareness of human rights identified at 4.1.2 above, and recommends that awareness on human rights be raised through incorporating human rights education into school curricula, and facilitating formal and informal human rights education at universities and technical and further education institutions.

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

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.⁸⁶ 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.⁸⁷

The OHCHR notes that these indicators may need to be altered to suit the particular circumstances and needs of each society.⁸⁸ 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 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

⁸⁴ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) HR/PUB/11/04.

⁸⁵ Unicef Australia, *Building Better Business for Children* (2019) 8.

⁸⁶ UN Office of the High Commissioner for Human Rights, *Human Rights Indicators: a guide to measurement and implementation* (2012), HR/PUB/12/5, III. Available at: https://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf

⁸⁷ UN Office of the High Commissioner for Human Rights, *Human Rights Indicator Tables*. Available at: https://www.ohchr.org/Documents/Issues/HRIndicators/SDG_Indicators_Tables.pdf

⁸⁸ UN Office of the High Commissioner for Human Rights, above n 86, 85.

UK.⁸⁹ It contains six core domains – education, work, living standards, health, justice, personal security and participation – and 25 indicators.⁹⁰

In Australia, separate indicator frameworks have been developed to monitor the rights of people with disability⁹¹ and Indigenous Australians.⁹² Australia also reports on its compliance with international human rights instruments to UN treaty bodies and participates in the UN HRC UPR process and. As a current member of the UN HRC, Australia is obliged to uphold the highest standards in the promotion and protection of human rights.⁹³

There is presently no comprehensive and clear indicator framework that caters to all or key aspects of Australia's human rights obligations. The Law Society suggests that such a framework – modelled on like 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 regularly adjusted to reflect the fact that human rights standards are constantly redefined over time.⁹⁴

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

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 a fundamental common law right necessary for our system of representative government. 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”.⁹⁵ 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.⁹⁶

We note that the freedom of opinion and expression may be limited, however any restrictions must be provided by law and conform to strict tests of necessity and proportionality.⁹⁷ Any restrictions placed on a free press in the interests of protecting national security must,

⁸⁹ Equality and Human Rights Commission, *Measurement framework for equality and human rights* (October 2017). Available at: <https://www.equalityhumanrights.com/en/publication-download/measurement-framework-equality-and-human-rights>

⁹⁰ Ibid.

⁹¹ Australian Human Rights Commission, *National Disability Strategy Submission* (November 2008). Available at: <https://www.humanrights.gov.au/our-work/national-disability-strategy-australian-human-rights-commission-submission>

⁹² Productivity Commission, Australian Government, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (17 November 2016). Available at: <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage>

⁹³ UN General Assembly, *Resolution adopted by the General Assembly: Human Rights Council*, 60th session, UN Doc A/RES/60/251 (3 April 2006), 9. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf

⁹⁴ 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.

⁹⁵ Human Rights Committee, *General Comment No. 34 Article 19: Freedoms of opinion and expression*, 102nd session, CCPR/C/GC/34 (12 September 2011), 22.

⁹⁶ 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 session, A/HRC/23/40, (17 April 2013), 52.

⁹⁷ Human Rights Committee, above n 95, 22.

therefore, be a proportionate response to that objective, and not unnecessarily stifle legitimate reporting of information in the public interest.

Thank you for the opportunity to contribute to the Law Council's submission on this issue. Questions may be directed in the first instance to Andrew Small, Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Espinosa". The signature is written in a cursive style with a large initial 'E'.

Elizabeth Espinosa
President