

**AMNESTY
INTERNATIONAL**



Submission to the

AUSTRALIAN HUMAN RIGHTS COMMISSION:
FREE AND EQUAL: AN AUSTRALIAN CONVERSATION ON
HUMAN RIGHTS

Submitted by
AMNESTY INTERNATIONAL AUSTRALIA

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

About this Submission

This submission sets out a series of areas which highlight the need for overarching human rights protection, rather than covering every gap in human rights protection in Australia.

The reference to a Human Rights Act can mean a Charter as well, with the key point being that it is a federal legislative act which protects human rights, however named.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Australian Human Rights Commission's project on 'Free and Equal: an Australian conversation on human rights' on 8 November 2019
- 1.2 Amnesty International believes that overarching human rights protection – such as a human rights act or charter - is the best way to protect, promote and defend the human rights of all in Australia.
- 1.3 To date, rights protections are found in individual pieces of Commonwealth, State and Territory legislation (aside from protections introduced in Queensland, Victoria and the ACT). As a result, jurisprudence to inform how best to balance human rights when they are in competition is equally piecemeal or underdeveloped.
- 1.4 The certainty and level of clarity provided by one overarching document - and the jurisprudence that would flow in its interpretation - would greatly assist individuals, entities, governments and their agencies to best respect every person's human rights.

Recommendations

Amnesty International recommends that:

A Human Rights Act

- (1) The Federal Government legislate a Human Rights Act for Australia, to ensure the rights to freedom of religion and other fundamental rights are protected and appropriately balanced. The objectives of a human rights act should contain as a minimum: right to recognition and equality, right to life, right to freedom of movement, right to privacy and reputation, right to religion and belief, right to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practise religion and use their language), rights to education and the rights of children in the criminal process, and their access to health care.

Parliamentary Scrutiny of Human Rights

- (2) The Federal Government amend the *Human Rights (Parliamentary Scrutiny) Act 2011* to stipulate what must be included in statements of compatibility, including a detailed and evidence-based assessment of proposed provisions that interfere with rights.
- (3) The Federal Government reconsiders Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in respect to who, or what agency, has responsibility for drafting statements of compatibility, with the purpose of improving the quality of the statements.
- (4) The Federal Government consider amending parliamentary procedures to allow for more time for scrutiny of legislation, including by legislating that outside of a 'clearly defined emergency', a bill should not be passed unless the Committee has considered the bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any relevant report.
- (5) The Federal Government amend the Standing Orders of the House of Representatives and the Senate to require all bills that receive feedback from the Human Rights Committee that the bill interferes with human rights, be referred for review by a legislation or general purpose committee.

- (6) The New South Wales, Tasmanian, South Australian, Western Australian, Northern Territory and Queensland Governments begin a process to legislate, in their respective jurisdictions, the creation of parliamentary committees that scrutinise all bills and legislative instruments for compatibility with human rights.

Indigenous Rights

- (7) The Federal Government develop, in consultation with Aboriginal and Torres Strait Islander peak organisations, a national action plan to implement the Declaration on the Rights of Indigenous Peoples.
- (8) The Federal Government: table the report of the Special Rapporteur on the Rights of Indigenous Peoples on the situation of Australia in Federal Parliament; provide an official response to the report of the Special Rapporteur on the Rights of Indigenous Peoples; and refer the report of the Special Rapporteur on the Rights of Indigenous Peoples to the Parliamentary Joint Committee on Human Rights for further investigation.

2. International Legal Framework

- 2.1 The entitlement of all people to be free and equal in dignity and rights is enshrined in Article 1 of the Universal Declaration of Human Rights (UDHR).
- 2.2 A number of key rights and freedoms have been subject to debate in Australia recently including religious freedom, freedom of the press, freedom from discrimination rights of asylum seekers, the rights of children and Indigenous people.
- 2.3 Australia is a party to those international treaties that protect these rights and freedoms however our domestic laws do not adequately implement these protections in Australia.
- 2.4 This section outlines Australia's obligations under the relevant international treaties.

Non-discrimination

- 2.5 Article 7 of the UDHR and Articles 2.1 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and other related human rights treaties recognise the right to equality and non-discrimination.
- 2.6 Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires State Parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²
- 2.7 It is now well established that the phrase 'other status' has been interpreted by human rights treaty bodies to include attributes such as age, disability, and sexual orientation, gender identity or intersex status.³

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 1.

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 26.

³ Australian Government Attorney-General's Department, *Rights of equality and non-discrimination*, available at

2.8 Constitutional amendments must also be consistent with Australia's obligations to eliminate racial discrimination, as enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which states:

"States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law".⁴

State obligation to protect religious freedom and prohibit racial vilification

2.9 Article 27 of the ICCPR provides particular protection for ethnic, religious, or linguistic minorities to 'enjoy their own culture, to profess and practise their own religion or to use their own language'.⁵

2.10 The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief further provides that States shall take 'effective measures to prevent and eliminate discrimination on the grounds of religion or belief,' including the enactment or repeal of legislation. Under the Declaration, States shall also take 'all appropriate measures' to prevent intolerance on the basis of religion or belief.⁶

2.11 Article 18 of the ICCPR provides "[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."⁷

Freedom of Expression

2.12 Australia became a State Party to the ICCPR in 1980. Under the ICCPR Australia is obliged to protect the rights to freedom of opinion and expression. Article 19(2) states that:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."⁸

2.13 Article 19(3) states:

"The exercise of the right [to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals."⁹

<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx>.

⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, entered into force 4 January 1969, art 5(3).

⁵ *ICCPR* art 27.

⁶ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55 (25 November 1981), art 4.

⁷ *ICCPR* art 18.

⁸ *Ibid* art 19(2).

⁹ *Ibid* art 19(3).

- 2.14 Any such limitations on freedom of expression must remain an exception. Such restrictions “may not put in jeopardy the right itself” and “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”¹⁰
- 2.15 While article 19(3) describes the general test for permissible limitations to freedom of expression, there are a small number of ‘very specific limitations’ that are required by international law in order to avoid ‘serious injury to the human rights of others’.¹¹ The two most relevant requirements for the purposes of this submission are found in:

Article 20(2) ICCPR: which establishes that ‘*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*’; and

Article 4(a) ICERD: which establishes the requirement to ‘*declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...*’.

Freedom from Arbitrary Detention and Right to Seek Asylum

- 2.16 As a party to the Refugee Convention, Australia has agreed to ensure that people who meet the United Nations definition of refugee are not sent back to a country where their life or freedom would be threatened.
- 2.17 Australia also has obligations not to return people who face a real risk of violation of certain human rights under the ICCPR, the Convention Against Torture (CAT) and Convention on the Rights of the Child (CROC), known as ‘non-refoulement’ obligations.¹² It is also prohibited to send people to third countries where they would face a real risk of violation of their human rights under these instruments.¹³

Rights of Children

- 2.18 A fundamental principle in Australian law is that all decisions with regards to children, should be made in the child’s best interest. Article 3 of CROC states:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”*¹⁴

¹⁰ UNHRC, General Comment No. 34.

¹¹ Frank La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 79(h). At http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23.

¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 6; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, entered into force 26 June 1987, art 3; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990, art 11.

¹³ United Nations High Commissioner for Refugees *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007. At <http://www.refworld.org/docid/45f17a1a4.html>.

¹⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990, art 3.

2.19 Australia has an obligation under CROC to take legislative, administrative and other necessary measures to protect the rights of the child and ensure they are not subject to discrimination on any basis. Article 2 states:

“State Parties shall respect and ensure and the rights...to each child...without discrimination of any kind, irrespective of the child’s or his/her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”¹⁵

Freedom of Association

2.20 The right to freedom of assembly and association is contained in the ICCPR:

Article 21: states that *“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”¹⁶*

Article 22: states that *“everyone shall have the right to freedom of association with others, including the right to form and join trade unions” and “no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”¹⁷*

2.21 Article 22 of the ICCPR overlaps with Article 8 of the ICESCR which makes clearer, in relation to trade unions, that the freedom of association includes the right to participate in lawful activities of the association.¹⁸

¹⁵ Ibid art 10.

¹⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 21.

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 22.

¹⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, entered into force 3 January 1976, art 8.

3. Protection of religious freedom in Australia

- 3.1 The right to freedom of religion or belief is enshrined in ICCPR Article 18 and Article 19. As noted by the Special Rapporteur on freedom of religion or belief, this right has both a positive and negative component: “The first component of freedom of religion or belief is freedom to positively express and manifest one’s own religion or belief, while its (negative) flip side is freedom not to be exposed to any pressure, especially from the state or in state institutions, to perform religious or belief activities against one’s own will.”¹⁹
- 3.2 Freedom of religion in Australia is recognised in the Australian Constitution. Section 116 states that:
- “The Commonwealth shall not make any law for (1) establishing any religion, or for (2) imposing any religious observance, or (3) prohibiting the free exercise of any religion, and (4) no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”*²⁰
- 3.3 However, it has been recognised that protection of individuals under this Constitutional provision is limited as the first three prohibitions are expressed to apply only to laws made by the Commonwealth and not the States.²¹ Consequently, the Australian Constitution offers no direct protection in respect of religion or belief at the State level. The drafters’ primary purpose in Section 116 was not to protect religious freedom, but “to preserve the States exclusive powers to regulate religious practices and local affairs”.²²
- 3.4 The states and territories have different legislative frameworks for racial and religious vilification. Western Australia protects discrimination on the ground of religious or political conviction. Queensland, Victoria, Tasmania and the Australian Capital Territory prohibit both racial and religious vilification - Queensland, Victoria and the ACT under the criminal law, and Tasmania under the civil law. However legislation in New South Wales and South Australia which prohibits racial vilification do not extend to religious vilification. The Northern Territory also has no laws against inciting racial or religious hatred.²³ There are clearly inconsistencies in how religious freedom is protected across Australian jurisdictions.

Balancing Freedom of Religion and Other Rights

- 3.5 Unlike other countries with comparable legal systems, Australia does not have overarching human rights legislation to balance the freedom of religion with other fundamental human rights, such as the right to freedom of expression and the right to non-discrimination.²⁴ While these rights may run alongside each other in harmony, they are in competition with one another from time to time leading to these rights becoming, to an extent, mutually exclusive.²⁵

¹⁹ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, 17th sess, Agenda item 3, A/HRC/16/53 (15 December 2010) para.39.

²⁰ *Commonwealth of Australia Constitution Act* 1900.

²¹ Joint Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (Interim Report November 2017) paragraph 4.4 citing Professor George Williams, Submission 71, p.2.

²² *Ibid.*

²³ Legislative Council Standing Committee on Law and Justice, Parliament of Australia, *Racial vilification law in New South Wales* (Report 50, December 2013); Anthony Klann, ‘NSW government to overhaul race hate laws after Parramatta shooting’, *The Australian*, 19 October 2015, available at <<http://www.theaustralian.com.au/national-affairs/state-politics/nsw-government-to-overhaul-race-hate-laws-after-parramatta-shooting/news-story/10d8d7d3dee7b1d4be235c8621846d4b>; see>.

²⁴ For example, New Zealand, Canada and United Kingdom

²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the status of the Human Right to freedom of religion or belief*, (Interim Report, November 2017) para.7.2.

- 3.6 Commonwealth anti-discrimination laws make it unlawful to discriminate against a person on the basis of their personal attributes, such as sex or sexual orientation, in areas of public life, including employment, education and the provision of goods, services and facilities. Under the Sex Discrimination Act 1984 (Cth) (SDA), it is unlawful to discriminate against a person on the basis of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, and family responsibilities.
- 3.7 Exemptions from federal anti-discrimination legislation, including the SDA, for religious bodies and educational institutions established for religious purposes, are used and justified to protect freedom of religion by balancing that right with the right to non-discrimination. These issues have proved contentious. Professor Evans clearly summarises this issue:

*"...discrimination laws intersect with religious freedom when religious groups or individuals claim that they should be exempt from certain aspects of discrimination law... and engage in discrimination. Religious groups believe that it is essential that they maintain autonomy when it comes to...selection of clergy or other key religious appointments. This autonomy is an important element of religious freedom, impacts on a relatively small number of people and would be hard to justify removing. However, religious groups often also wish to be permitted to discriminate in other areas in which they are active, for example in relation to admissions to religious schools and employment in religious organisations. In such cases, the religious freedom of individuals or groups can come into conflict with the right of other individuals not to be discriminated against."*²⁶

- 3.8 Furthermore, the debate on changing the Marriage Act to make civil marriage available, without discrimination, to all couples regardless of sex, sexual orientation, gender identity or intersex status found that some individuals and religious organisations are concerned that their religious freedom may be compromised in the future.²⁷
- 3.9 Existing legislation does not adequately balance freedom of religion with other competing rights within the general community and in the workplace.

Balancing competing rights – a European example

- 3.10 Amnesty International's report, "Choice and Prejudice: Discrimination against Muslims in Europe"²⁸ examines the consequences of discrimination on the grounds of religion or belief. While the report looks specifically at the experience of Muslims in a European context, such forms of discrimination are experienced across a broad range of religions in all parts of the world. The issue of religious discrimination is expressed in the employment sector with regards to wearing religious dress, taking religious holidays and hate speech, as well as in relation to obtaining employment.
- 3.11 Restrictions imposed by employers on the wearing of religious and cultural symbols and dress in the workplace have been found to violate the right to non-discrimination on the ground of religion or belief if such restrictions are not based on an objective and reasonable justification, with the aim of satisfying a genuine occupational requirement as established by the EU Framework Employment Directive.²⁹ Restrictions on religious and cultural symbols

²⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the status of the Human Right to freedom of religion or belief*, (Interim Report, November 2017) para. 7.2.

²⁷ Australian Human Rights Commission, Submission to Expert Panel, *Religious Freedom Review (2018)* (14 February 2018) para. 83.

²⁸ Amnesty International, *Choice and Prejudice: Discrimination against Muslims in Europe* (Report, 2012) available at <<https://www.amnesty.org/download/Documents/20000/eur010012012en.pdf>>.

²⁹ Ibid p.23, Article 4.1 of Directive 2000/78/EC relating to determining the occupation requirement.

and dress in public employment are based on the interpretation of the principle of neutrality in public employment where employees should not manifest their religion or belief although they are protected against discrimination on the ground of religion in their access to employment.

Case study: An example of redress obtained in Switzerland

A Swiss citizen of Macedonian origin was advised by the Regional Employment Office of Zurich to apply for a cleaning position with APS Reinigungen GmbH. The company sent an email to the office stating that it did not employ people from the Balkans, and Muslims and headscarves were not welcomed. The message concluded, "I am upset that you do not understand that we do not hire people wearing headscarves." The trade union UNIA supported the victim to file a complaint. In 2006 the Court found a violation of Article 28 of the Civil Code (protection of personality).

- 3.12 In the 2013 decision of *Eweida and Others v UK*, it was considered that, given the importance of freedom of religion in a democratic society: where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate³⁰

Balancing competing rights in Australia

- 3.13 Amnesty International agrees with the AHRC's argument in the Religious Freedom Review that any limitations on religion should be 'prescribed by law', either set out in legislation or under an established rule of the common law, in a manner adequately specified so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.³¹ Limitations must be applied in a manner that is not arbitrary. If the limitation grants discretion to public authorities, it must be clearly articulated and specify the manner in which it is to be exercised.³²
- 3.14 Amnesty International strongly supports the introduction of a federal mechanism for ensuring an appropriate balance of rights. We believe that an overarching Human Rights Act would enable all competing rights to be addressed in one place so that courts, organisations and individuals understand how to deal with cases involving competing rights.

³⁰ *Eweida and Others v United Kingdom* [2013] ECHR 37 [49].

³¹ Manfred Nowak, UN Convention on Civil and Political Rights: CCPR Commentary (2nd ed, 2005), 425.

³² Australian Human Rights Commission, Submission to Expert Panel, *Religious Freedom Review (2018)* (14 February 2018) para. 48.

4. Freedom of Speech

- 4.1 Freedom of speech is a 'common law freedom', according to the High Court of Australia, particularly in relation to the 'expression of concerns about government and political matters.³³ The High Court has recognised that 'political communication' is an implied right in the Australian Constitution, but that the Constitution has not been found to protect free speech more broadly.³⁴
- 4.2 The United States, for example, provides a general exemption in the first amendment to its Constitution that no statute can abridge freedom of the press.³⁵

Protecting Press Freedom

- 4.3 Freedom of the press is fundamental to preserving Australia's democracy. However, various statutes have heavily limited the freedom of the press including laws regarding obscenity, sedition, defamation and national security. When these laws interfere unjustifiably with press freedom, there is no guidance as to how these various rights and freedoms may be balanced. Consequently, press freedom may be limited beyond what is necessary and justifiable in a functioning democracy.
- 4.4 Amnesty International is concerned about the limitations on press freedom in Australia from national security laws and the inadequacy of laws protecting whistleblowers. The ALRC's *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* identified a number of laws "as being of concern" from a freedom of speech perspective.³⁶ These include, among other things, various terrorism-related secrecy offences in the *Criminal Code, Crimes Act 1914 (Cth)* and *Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)* and, in particular, those relating to 'special intelligence operations' (section 35P).³⁷
- 4.5 Australia's defamation laws also limit freedom of the press while secrecy laws in Australia provide that anyone who breaches them, including journalists, be imprisoned for up to 5 years for publishing classified information obtained from a federal public servant.
- 4.6 Despite a National Human Rights Consultation in 2008 which showed widespread community support for a Human Rights Act, Australia does not have any overarching human rights protections.
- 4.7 The best way for the Parliament to ensure freedom of speech/press freedom and other fundamental rights are protected and appropriately balanced in Australia is to legislate a Human Rights Act which resolves issues of competing rights. Such an act will recognise that press freedom and freedom of speech are not absolute and may be subject to reasonable and proportionate limitations. In particular, freedom of speech must be balanced against statutory limitations on hate speech and vilification laws, limitations in the Defamation Act, national security legislation and secrecy legislation.

³³ *Monis v The Queen* (2013) 249 CLR 92 [60] (French CJ) cited in ALRC Report, p.79 [4.14].

³⁴ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570. cited ALRC Report, p. 80 [4.18].

³⁵ Alliance for Journalists' Freedom, *Press Freedom IN AUSTRALIA* (White Paper, May 2019).

³⁶ ALRC Report, p.79 [4.6].

³⁷ *Ibid*, p.23 [1.81].

5. Right to seek asylum and not be subject to arbitrary detention

- 5.1 Amnesty International is concerned that asylum seekers and refugees who are being held in immigration detention around Australia (and in offshore detention) are deprived of a multitude of human rights. The Australian Government, through its policies of deterrence, effectively punishes people forced to flee persecution and other violations of their human rights, seeking safety for themselves and for their families.³⁸
- 5.2 Under the Migration Act 1958 (Cth), asylum seekers who arrive in Australia without a valid visa must be held in immigration detention until they are granted a visa or removed from Australia. There are no limitations in statute or common law on the length of time for which a person may be detained. Furthermore, while the majority of individuals in immigration detention are asylum seekers, others may include people who have overstayed a visa; or have had their visa cancelled on character grounds.
- 5.3 Amnesty International believes that in these circumstances, such individuals are subject to arbitrary detention as they are unable to challenge the lawfulness of their detention in court. They may also experience violence and sexual assault, compromised physical and mental health, lack of adequate medical care and trauma. Meanwhile children are detained for prolonged periods which negatively impacts their health, mental health and development. A study from University of Melbourne researchers examined all self-harm incidents between August 2014 and July 2015 of asylum seekers in detention. They found that there were 260 incidents per 1,000 people on Nauru and 54 incidents per 1,000 people on Manus Island.³⁹ Those in community detention had rates of 27 incidents per 1,000 people whilst community-based arrangements had a rate of 5 per 1,000 people.⁴⁰ By contrast, the incidence of hospital-treated self-harm events in the general Australian community during 2012-13 was 1.2 per 1,000.
- 5.4 Current migration laws are highly inadequate in balancing the right to freedom from arbitrary detention, the rights of the child, general economic, social and cultural rights, and the right to not be subject to torture.
- 5.5 The proposed 'character test amendment' to the Migration Act increases the potential for human rights violations, particularly in regard to the rights of the child as well as against those convicted non-citizens receiving non-custodial sentences. Children under the age of 18 and first-time offenders who might ordinarily be given a non-custodial or lower level sentence are more likely to be caught up in these expanded powers. The explanatory memoranda accompanying the Bill contains a clause with specific grounds for not differentiating between adults and persons under the age of 18 in the application of section 501.
- 5.6 Amnesty International believes that an overarching Human Rights Act is necessary for balancing the various rights of refugees and ensuring that Australia is compliant with our international obligations under *ICCPR*, *CROC*, *CAT* and *ICESCR*.

³⁸ Amnesty International, *A Better Plan: Human rights-based policies for the protection of refugees and people seeking asylum* (Report, April 2018) available at <https://www.amnesty.org.au/wp-content/uploads/2018/06/Amnesty-A-Better-Plan-refugees-May2018.pdf>

³⁹ Kyli Hedrick et al, 'Self-harm in the Australian asylum seeker population: A national records-based study' (2019) 8 *SSM – Population Health* 100452.

⁴⁰ *Ibid.*

6. Rights of Children

- 6.1 Amnesty International is concerned that the current age of criminal responsibility in Australia of 10 years old undermines the “best interests of the child” under Article 3 of CROC.⁴¹
- 6.2 Under international law, all fair trial and procedural rights that apply to adults apply equally to children, but additional juvenile justice protections exist under the international human rights framework in recognition that children differ from adults in their physical and psychological development. The Convention on the Rights of the Child is the primary source of these rights.
- 6.3 Children arrested before the age of 14 are three times more likely to commit offences as adults than children arrested after 14. Many children entering the criminal justice system become trapped, and are less likely to complete their education and find employment. They are more likely to be stuck in a cycle of poverty and disadvantage. Aboriginal and Torres Strait Islander children are hit hardest by these regressive laws with a study between 2016 and 2017 finding that Indigenous children make up 69% of the children in prison aged 10-13 years and 50% of the children in prison aged 14-17 years.⁴²
- 6.4 A UK study into developmental factors affecting children in the justice system found that children between 10 and 15 years who offend should be treated with an educational or welfare system that recognises their development capacities and ‘emphasizes the opportunity for maturation and rehabilitation, rather than within a criminal justice system that places a heavy emphasis on punishment.’⁴³
- 6.5 An Independent Expert report presented to the UN General Assembly has recommended that the minimum age of criminal responsibility should be at least 14. It stated:
- “...offences, petty crimes and low minimum ages of criminal responsibility, as well as widespread discrimination and corruption, contribute to a large number of children being deprived of liberty. Similar reasons are behind restrictive migration and asylum policies and extensive counter-terrorism practices.”⁴⁴*
- 6.6 The median age of criminality in the international community is 14 years old.⁴⁵ Most European countries set their age of criminal responsibility at between 14 and 16 years. Countries like China, Russia, Kazakhstan, Japan, Sierra Leone and Azerbaijan have 14 years as the minimum age.⁴⁶ Australia is clearly lagging behind its international peers in protecting the rights of children and has been repeatedly criticised by the United Nations,

⁴¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990, art 3.

⁴² Amnesty International, *The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility* (Report, September 2018) available at <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>>; Australian Institute of Health and Welfare, Youth Justice in Australia 2016-17, ‘Table S80b: Young people in detention during the year by age, states and territories, 2016-17’, accessed 23 October 2018, available at <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/data>>.

⁴³ Michael Lamb and Megan Sim, ‘Developmental Factors Affecting Children in Legal Contexts’ (2013) 13(2) *Youth Justice* 131, p.139.

⁴⁴ Manfred Nowak, *Global study on children deprived of liberty*, GA 72/245, 74th sess, Agenda Item 63(a), UN Doc A/74/136 (11 July 2019) para. 95.

⁴⁵ Australian Human Rights Commission, National Children’s Commissioner, *Children’s Rights* (Report 2016) p.187; Amnesty International, *The sky is the limit: Keeping young children out of prison by raising the age of criminal responsibility* (Report, September 2018) available at <<https://www.amnesty.org.au/wp-content/uploads/2018/09/The-Sky-is-the-Limit-FINAL-1.pdf>>.

⁴⁶ Child Rights International Network, ‘Minimum ages of criminal responsibility around the world’ (Webpage, 2018) available at <<https://www.crin.org/en/home/ages>>.

including long-standing criticism from the United Nations Committee on the Rights of the Child.⁴⁷

Case study: Human rights abuses against children in the Brisbane City police watch house⁴⁸

On 10 May 2019, there were 89 children in the Brisbane City Watch House, a facility designed to hold adults. At least half of these children are Indigenous and at least three were just ten years of age. One of the boys had been there for 43 days, despite Queensland law dictating no child may stay even one night in the Brisbane watch house. Four young girls were being held in isolation to protect them from other inmates.

The cells of the Brisbane City Watch House are very small. There is no direct sunlight. All a child has inside their cell is a wafer-thin mattress, and often no pillow. Each cell is designed for one person, but overcrowding means that kids are often locked up with another person, sometimes much older than them.

Of the children in Queensland prisons, approximately 86 per cent are currently 'on remand' — this means they are locked up even though they have not been found guilty or sentenced. The situation is worse for Indigenous kids. They spend an average of 71 days in detention on remand, compared with 50 days for non-Indigenous children.

An investigation by Amnesty uncovered 2,655 breaches of domestic and international law, including keeping children in watch houses for illegal durations; failing to provide children with adequate clean clothes, underwear and personal hygiene products; the institutional use of violence; the use of isolation as a form of punishment; failure to provide adequate health and mental health care; and failure to provide access to adequate education.

The Queensland Government has subsequently sought to redress this situation, which has been welcomed by Amnesty International as a significant and positive step to recognising the unique rights of children in the criminal justice system.

⁴⁷ United Nations Committee on the Rights of the Child, Sessions of the Committee, 1997: para. 11 and 29, 2005: para. 73; 2012: para. 82(a).

⁴⁸ Amnesty International, 'Kids in watch houses: exposing the truth' (Webpage) available at <<https://www.amnesty.org.au/watch-houses/>>.

7. Racial Discrimination and Indigenous Peoples

7.1 The prevalence of racism against Aboriginal and Torres Strait Islander people is significant, with studies indicating as many as three in four Indigenous Australians regularly experience racism.⁴⁹ There are serious consequences for those experiencing racism, including poor physical and mental health.⁵⁰ Results of the National Australian Aboriginal and Torres Strait Islander Health Survey show:

- 16 percent of respondents reported being ‘treated badly because they are Aboriginal/ Torres Strait Islander’ in the previous 12 months.
- Of this cohort, 8 per cent reported this occurred 2–3 times per week and 5 per cent reported this was a daily occurrence.
- The most common situation of racially discriminatory behaviour or racism was by members of the public (45 per cent).⁵¹

7.2 Indigenous people who experience discrimination are more likely to be in poor health and engage in risky health behaviours like substance abuse.⁵² A BeyondBlue study found that over half of Indigenous people who experience discrimination also experience psychological distress, which increases the more a person is exposed to racism.⁵³

7.3 An estimated one in five Australian children experience racial discrimination on a daily basis at school.⁵⁴ Exposure to racial discrimination during school years may lead to the

⁴⁹ Yin Paradies, Ricci Harris and Ian Anderson, *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Cooperative Research Centre for Aboriginal Health, Discussion Paper Series No. 4, p.6. citing Forrest, Dunn & Pe-Pua 2007; Gallaher et al. 2007; Paradies & Cunningham, available at <http://www.crcah.org.au/sites/default/files/docs/Racism-Report.pdf>.

⁵⁰ Angeline Ferdinand, Yin Paradies and Margaret Kelaher, ‘Experiencing racism in health care: the mental health impacts for Victorian Aboriginal communities’, (2014) 201(1) *Medical Journal of Australia* 44-47; see also Pat Dudgeon, Helen Milroy and Roz Walker, *Working together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014); Australian Government Department of The Prime Minister and Cabinet, *Close the Gap Campaign Steering Committee, Progress and Priorities Report 2016* (2016), 22, available at https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf; Productivity Commission, *Overcoming Indigenous Disadvantage* (2016), 5.23, available at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf#nameddest=842>.

⁵¹ Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012-13* (2013) as cited in *Close the Gap Campaign Steering Committee, Progress and Priorities Report 2016* (2016), 22, available at https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf.

⁵² Productivity Commission, *Overcoming Indigenous Disadvantage* (2016), [5.4], available at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf#nameddest=842>; AIHW, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples* (2015), 77.

⁵³ Beyondblue, *Stop, Think, Respect: Racial Discrimination and Mental Health* (2014), available at https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0249_bl1328_stop_think_respect.pdf?sfvrsn=4; Angeline Ferdinand, Yin Paradies & Margaret Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: the Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, The Lowitja Institute (2013), available at https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf.

⁵⁴ Naomi Priest et al, “Experiences of racism, racial/ethnic attitudes, motivated fairness and mental health outcomes among primary and secondary school students”, (2014) 43(10) *Journal of Youth and Adolescence* 1672-87, available at <https://www.ncbi.nlm.nih.gov/pubmed/24903675#>.

development of symptoms of depression in children.⁵⁵ For Aboriginal and Torres Strait Islander children these high levels of stress lead to obesity, chronic disease, and, distressingly, self-harm.⁵⁶

- 7.4 The Australian Reconciliation Barometer findings reveal that the majority of Australians maintain positive attitudes towards reconciliation. However, disappointingly, there is significant evidence that these positive attitudes have yet to translate into improved behaviours across a wide range of sectors in Australian society, including the workplace, law-enforcement agencies, and the education and community sectors.⁵⁷
- 7.5 It has been 10 years since the Australian Government set Closing the Gap targets to eliminate the stark disparity between Indigenous and non-Indigenous people in Australia in life expectancy, health, education and employment indicators.⁵⁸ While some important gains have been made in this time in areas of Indigenous health and education, Amnesty International maintains that successive governments have failed to effectively ameliorate past discrimination, or address existing inequalities, disadvantage and discrimination suffered by Aboriginal and Torres Strait Islander peoples.
- 7.6 Aboriginal and Torres Strait Islander people still face discrimination in areas such as access to adequate housing, education, health care and in the criminal justice system.
- 7.7 Australia became a signatory to the *Declaration on the Rights of Indigenous Peoples*⁵⁹ in 2009. The Declaration gives effect to many existing human rights as they specifically relate to Indigenous peoples including the right to live free from racial discrimination and hatred. At the World Conference on the Rights of Indigenous Peoples in 2014, a key recommendation was for each nation to develop a National Action Plan to implement the Declaration.⁶⁰ Although Australia has stated in its pledges relating to its bid to become a member of the Human Rights Council that, “Australia will continue to give practical effect to the United Nations Declaration on the Rights of Indigenous Peoples and the World Conference on Indigenous Peoples Outcome Document”,⁶¹ in reality little has been done within Australia to move towards a plan of action.

⁵⁵ Australian Government, Aboriginal and Torres Strait Islander Health Performance Framework (2014) 8, available at https://www.dpmc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf.

⁵⁶ Australian Government, Aboriginal and Torres Strait Islander Health Performance Framework (2014) 15, available at https://www.dpmc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf; Naomi Priest et al, ‘Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth’ (2011) 194(10) *Medical Journal of Australia* 546-550.

⁵⁷ Reconciliation Australia, 2016, *2016 Australian Reconciliation Barometer*, available at https://www.reconciliation.org.au/wp-content/uploads/2017/02/RA_ARB-2016_Overview-brochure_web.pdf.

⁵⁸ Council of Australian Governments, *Closing the Gap on Indigenous Disadvantage*, available at http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage.

⁵⁹ *United Nations Declaration on the Rights of Indigenous People*, adopted 13 September 2007, UN Doc A/61/L.67 and Add.1 available at https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁶⁰ *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, 69th sess, Agenda Item 66, UN Doc A/69/L.1 (15 September 2014) available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/L.1.

⁶¹ Australia’s candidacy for the United Nations Human Rights Council 2018-2020, available at <http://dfat.gov.au/international-relations/international-organisations/Pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>.

Recommendation: The Federal Government develop, in consultation with Aboriginal and Torres Strait Islander peak organisations, a national action plan to implement the Declaration on the Rights of Indigenous Peoples.

Racial Discrimination of Indigenous People in the criminal justice system

- 7.8 Amnesty International contends that racial discrimination and vilification of Indigenous people in Australia is a contributing factor to the significant over-representation and abuse of Aboriginal and Torres Strait Islander children in the justice system.
- 7.9 This section draws on Amnesty International research, since 2013, on the over-representation of Aboriginal and Torres Strait Islander children in the Australian justice system. Our research has focussed on the jurisdictions where over-representation of Aboriginal children in the justice system is most stark - Western Australia, Queensland and the Northern Territory.
- 7.10 Amnesty International published a National Overview of this issue, *A brighter tomorrow*,⁶² and a research report on the youth justice system in Western Australia, *There is always a brighter future*, in June 2015.⁶³ In this report it was noted that Aboriginal young people in Western Australia were cautioned at a significantly lower rate to non-Aboriginal young people,⁶⁴ and that Aboriginal young people were much more likely to have contact with the criminal justice system and be in custody.⁶⁵ Amnesty International recommended that the Western Australian Government conduct an investigation into the lower rate of cautions to Aboriginal children and that the police manual be amended to require police to document why cautions were not given, but these recommendations have not been adopted.
- 7.11 In September 2016, Amnesty International released *Heads Held High: Keeping Queensland kids out of detention, strong in culture and community*,⁶⁶ which raised serious concerns about the treatment of children in Queensland detention centres and prisons.
- 7.12 These three reports include recommendations for developing policies at a national, state and territory levels to reduce and ultimately end the over-representation of Aboriginal children in the criminal justice system, and to improve youth justice policies Australia-wide.
- 7.13 Indigenous people continue to be significantly overrepresented in Australia's criminal justice system, comprising 27.4 per cent of adults in prisons and 57.2 percent of juveniles in detention, despite accounting for just 2.3 per cent of all adults and 5.5 percent of youth in the general population.⁶⁷ The most recent data, from 2013–14, shows that Indigenous young people are 26 times more likely to be in detention than non-Indigenous young people.⁶⁸

⁶² Amnesty International Australia, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia* (2015) available at

https://static.amnesty.org.au/wp-content/uploads/2016/09/A_brighter_future_National_report.pdf?x85233.

⁶³ Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, (2015) available at

https://static.amnesty.org.au/wp-content/uploads/2016/02/CIE_WA-Report_low-res.pdf?x66249.

⁶⁴ Ibid p.26.

⁶⁵ Ibid p.27.

⁶⁶ Amnesty International Australia, *Heads held high: Keeping Queensland kids out of detention, strong in culture and community* (2016) available at

https://static.amnesty.org.au/wp-content/uploads/2016/12/Heads_Held_High_-_Queensland_report_by_Amnesty_International.pdf?x85233.

⁶⁷ Amnesty International Australia, *A brighter tomorrow: keeping Indigenous kids in the community and out of detention in Australia* (2015) available at

http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf.

⁶⁸ Ibid p.5

Aboriginal and Torres Strait Islander young people make up just over 6 percent of the Australian population of 10–17 year-olds but more than half (54 per cent) of those in detention. The situation is bleaker still among the youngest Indigenous children, who made up more than 60 per cent of all 10-year-olds and 11-year-olds in detention in Australia in 2012–13.⁶⁹

7.14 In August, the Special Rapporteur on the Rights of Indigenous Peoples (the ‘Special Rapporteur’) delivered the second country report on Australia and “found the routine detention of young indigenous children the most distressing aspect of her visit.”

7.15 As noted in the report of the Special Rapporteur:

“Several sources, including judges, informed the Special Rapporteur that, in the majority of instances, the initial offences committed by children were minor and nonviolent. In such cases, it is wholly inappropriate to detain children in punitive rather than rehabilitative, conditions. Aboriginal and Torres Strait Islander children are essentially being punished for being poor and, in most cases, prison will only perpetuate the cycle of violence, intergenerational trauma, poverty and crime. The Special Rapporteur was alarmed that several of the young children she spoke to detention did not see any future prospects for themselves.”⁷⁰

7.16 As noted in the end of the mission statement of the Special Rapporteur’s visit, the offences Aboriginal and Torres Strait Islander children are imprisoned for are ‘relatively minor...and in the majority of instances the initial offence [for imprisonment] were non-violent’.⁷¹ The Special Rapporteur concluded that Aboriginal and Torres Strait Islander children in the criminal justice system ‘are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime.’⁷²

7.17 The Special Rapporteur’s report outlines a number of ways the Australian Government can address this crisis.

Recommendation: The Federal Government:

- table the report of the Special Rapporteur on the Rights of Indigenous Peoples on the situation of Australia in Federal Parliament;
- provide an official response to the report of the Special Rapporteur on the Rights of Indigenous Peoples; and
- refer the report of the Special Rapporteur on the Rights of Indigenous Peoples to the Parliamentary Joint Committee on Human Rights for further investigation.

⁶⁹ *Ibid.*, p.5

⁷⁰ United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, p.13.

⁷¹ United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, p.10.

⁷² United Nations Human Rights, Office of the High Commissioner, End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz of her visit to Australia, 3 April 2017, p.10.

8. Freedom of Association

- 8.1 Freedom of association is the right of all individuals to form and join clubs, societies, trade unions or political parties with anyone they choose.⁷³ This is closely connected with the freedom of peaceful assembly which is the right to take part in a peaceful demonstration or public meeting. These freedoms are particularly important for those whose interests are often ignored by our formal political system.⁷⁴
- 8.2 However, these freedoms can come under attack by governments that want to stifle criticism or dissent. Issues relating to protecting these freedoms have been live all around the world.
- 8.3 In particular, 2019 has seen large climate protests around the globe. Australia appears to be curtailing this kind of activism more and more. The Australian Government has been able to do this under piecemeal laws which relate to penalties, police powers and broad offences. Civil Liberties Australia chief executive Bill Rowlings has expressed the need to reform these laws:
- “One law has been dolloped on top of another law on top of another law...It’s time we had a major review of all those laws...some of them are excessive.”⁷⁵*
- 8.4 Amnesty International believes that an overarching Human Human Rights Act is necessary for consolidating and balancing the various laws that limit freedom of association and peaceful assembly to ensure that Australia is compliant with our international obligations under *ICCPR* and *ICESCR*.

Case study: Police arrested dozens of climate protestors including elderly activists who were dragged away by force⁷⁶

On 7 October 2019, Extinction Rebellion held a climate protest in Sydney which saw 38 arrests. Hundreds took part in the Sydney demonstration which began at Belmore Park near Central and then moved to Central Park. Several elderly protesters were led away, including one woman who was placed in handcuffs and had her arms pulled over her head by officers. An elderly woman screamed, "You're hurting me, please stop this," as police dragged her away, after she refused to leave the road.

Australia passed a defence amendment in 2018 which allows the military to break up protests. Meanwhile, the Labor Government in Queensland is fast-tracking a law to add new fines for protesters who use locking defences to prevent their removal.

⁷³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, art 21-22.

⁷⁴ Hugh de Kretser, 'Australia has a long history of protests. Our rights should be better protected', *The Guardian*, 15 March 2019, available at <https://www.theguardian.com/commentisfree/2019/mar/15/australia-has-a-long-history-of-protests-our-rights-should-be-better-protected>.

⁷⁵ Caitlin Fitzsimmons, 'Calls to review 'excessive' protest laws in wake of Extinction Rebellion arrests', *The Sydney Morning Herald*, 13 October 2019, available at <https://www.smh.com.au/national/nsw/calls-to-review-excessive-protest-laws-in-wake-of-extinction-rebellion-arrests-20191010-p52zhq.html>.

⁷⁶ Selby Stewart, 'Extinction Rebellion rallies marred by arrests as protesters block roads, chain themselves to water tank', *ABC News*, 8 October 2019, available at <https://www.abc.net.au/news/2019-10-07/sydney-protests-extinction-rebellion-marred-by-arrests/11580058>.

9. Overarching Rights Protection in Australia

9.1 Amnesty International believes that a national Human Rights Act should be based on the dialogue model adopted in the UK, NZ, Victoria and ACT. This model will create a fair, just and equal society for everyone and protect rights recognised under international human rights treaties in which Australia is a party.

Advantages of a Human Rights Act based on a dialogue model

9.2 The Human Rights act should protect all people within Australia's territory, and ensure consistent treatment of rights and freedoms between jurisdictions.

9.3 This model preserves Parliamentary supremacy and requires government to consider human rights at the early stages of the development of law and policy.⁷⁷ Parliament would have an obligation to take positive action to express its view on how human rights should be protected, and to create the system it believes would achieve that purpose. New legislation will also be scrutinised to ensure that it is compatible with human rights.

9.4 A Human Rights Act will enable the judiciary to interpret the compatibility of legislation with human rights and issue a declaration of incompatibility for any inconsistencies.⁷⁸

9.5 This model would embed human rights considerations into all stages – including very early stages – of public decision-making.⁷⁹ Public authorities would be required to act in a way that is compatible with human rights and to give proper consideration to human rights in decision-making.

9.6 An overarching Human Rights Act would allow rights to be limited (except for absolute rights) and balanced in accordance with strict criteria. These criteria will guide public authorities, courts and the Parliament when making decisions. As an example, section 7(2) of the Victorian Charter provides:

“A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

9.7 Currently, a significant number of crucial human rights are not protected in Australian law and consequently face the danger of being eroded. Explicit protection of rights in a single codified document will mitigate this risk.

9.8 A Human Rights Act would provide a range of enforceable remedies for breaches of human rights and enable everyone to seek justice if their rights have been violated. This will protect all individuals, including those from minority demographics.

⁷⁷ Australian Human Rights Commission, Submission to National Human Rights Consultation, Parliament of Australia, *National Human Rights Consultation* (June 2009) para.234.

⁷⁸ Ibid para.391.

⁷⁹ Ibid para.242.

- 9.9 A Human Rights Act would also be educational as it clearly states all rights in one document. By requiring public authorities, courts and Parliament to refer to the Act, greater public awareness is drawn to the rights and freedoms that all individuals and organisations are entitled to.

Case study: UK Human Rights Act reunites a couple who had been separated after 65 years together⁸⁰

Mr and Mrs Driscoll had lived together for over 65 years. Unable to walk unaided, Mr Driscoll relied on his wife to help him move around. She was blind and relied on her husband as her eyes. When Mr Driscoll was moved into a residential care home, Mrs Driscoll wanted to move to the home with her husband but was told she didn't meet the criteria.

'We have never been separated in all our years and for it to happen now, when we need each other so much, is so upsetting. I am lost without him – we were a partnership' - Mrs Driscoll

This was a clear breach of the couple's right to a family life as protected by the Human Rights Act, and a public campaign was launched to encourage social services to think again. As a result, Mrs Driscoll's needs were reassessed and the couple were reunited – setting a precedent for elderly couples to be kept together in the same care home. The Human Rights Act places public authorities in the UK, including hospitals and social services, under an obligation to treat everyone with fairness, equality and dignity.

Case study: UK Human Rights Act protects children's best interests in a deportation case⁸¹

The mother of two British children, aged 9 and 12, was a Tanzanian national who had arrived in the UK in 1995. She made three unsuccessful claims for asylum. Their father was British. The parents separated in 2005 and the mother's further claims for asylum all failed, so it was decided that she would be deported back to Tanzania. However, the father had contracted HIV, so was unable to look after the children. This posed a difficult question: would it be in the best interests of the children to be deported with their mother, even though they were British citizens and had grown up in the UK?

The Supreme Court decided that the best interests of the children should be considered first. Their importance couldn't be minimised. Here, it was not in the children's best interests to be moved to a country they did not know, where they do not speak the language. They have lived in the UK all their lives and would be separated from a parent.

The judges gave weight to the wishes of the children and this meant that neither the mother nor the children were deported.

⁸⁰ Amnesty International, 'Eight reasons why the UK Human Rights Act makes the UK a better place (Webpage, 08 Oct 2018) available at <<https://www.amnesty.org.uk/eight-reasons-why-human-rights-act-has-made-uk-better-place-british-bill-of-rights>>.

⁸¹ Rights Info, 'Child, I Know What's Best For You' (Webpage) available at <<https://rightsinfo.org/stories/child-i-know-whats-best-for-you/>>.

Case study: UK Human Rights Act enabled journalists to interview prisoners⁸²

Ian Simms and Michael O'Brien were convicted of separate murders. They persistently protested their innocence. They ran out of options in the courts and decided to try and get a journalist to investigate, so they could tell their side of the story. However, the prison refused to let them speak to a journalist.

Simms and O'Brien took the prison to court, saying that the ability of the prison to refuse to allow journalists to visit and interview prisoners was in breach of their freedom of speech. The court agreed with them, saying that journalists should be able to interview prisoners as a way of making sure there were no miscarriages of justice. The judge said that freedom of speech was necessary in the 'exposure of errors' of the criminal justice system. The case is famous because the court said that if the state wants to interfere with fundamental rights, like free speech, it has to do so clearly and explicitly. "Fundamental rights", said Lord Hoffmann, "cannot be overridden by general or ambiguous words".

After this case, prison policy in the UK was changed. Journalists are now allowed to interview prisoners so that they can help them investigate and challenge any miscarriages of justice. Meanwhile, O'Brien was released and exonerated of murder. Simms, however, was not. He remains in prison.

10. Parliamentary Scrutiny of Human Rights

10.1 The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act* 2011. The Committee's main function is to examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings.⁸³ Human rights considered by the Parliamentary Joint Committee on Human Rights are defined as the seven core human rights treaties to which Australia is a party⁸⁴:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

The right to freedom of religion, and associated rights as outlined in Section 2, are therefore within the scope for scrutiny by the Committee.

⁸² Rights Info, 'Screaming To An Empty Room' (Webpage) available at <<https://rightsinfo.org/stories/screaming-to-an-empty-room/>>.

⁸³ Human Rights (Parliamentary Scrutiny) Act 2011, s7.

⁸⁴ Human Rights (Parliamentary Scrutiny) Act 2011, s3(1).

- 10.2 The Committee seeks to determine ‘whether any identified limitation of a human right is justifiable’ by considering whether there are less restrictive ways to achieve the policy objective, whether there are effective safeguards and controls over the measure, and the extent of the interference with a right.⁸⁵
- 10.3 Members of Parliament who proposes to introduce a bill into Parliament must prepare a ‘statement of compatibility’⁸⁶, which includes an assessment of whether the bill is compatible with human rights.⁸⁷
- 10.4 If the Committee is not satisfied with the human rights compatibility of a bill, it will write to the relevant Minister seeking further detail. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and call for witnesses.⁸⁸
- 10.5 Since January 2013, the Committee has identified over 80 statements of compatibility that did not meet its expectations.⁸⁹
- 10.6 The Committee has emphasised the need to include, in statements of compatibility, a detailed and evidence-based assessment of proposed provisions that interfere with rights.⁹⁰

Recommendation: The Australian Government amend the *Human Rights (Parliamentary Scrutiny) Act 2011* to stipulate what must be included in statements of compatibility including a detailed and evidence-based assessment of proposed provisions that interfere with rights.

- 10.7 Statements of compatibility are also required in New Zealand, the UK, ACT and Victoria. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility. In Victoria and the United Kingdom, as in the Commonwealth, it is the Minister or the sponsor of the bill who prepares the statement of compatibility.⁹¹ The Law Council of Australia suggests a centralised, independent statutory body, such as the Australian Human Rights Council, should prepare the statements.⁹²

Recommendation: The Australian Government reconsiders Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in respect to who, or what agency, has responsibility for drafting statements of compatibility, with the purpose of improving the quality of the statements.

- 10.8 A failure to submit a statement of compatibility with human rights does not affect the validity, operation or enforcement of the Act.⁹³

⁸⁵ Parliamentary Joint Committee on Human Rights, ‘Drafting Statements of Compatibility’ (Guidance Note No 1, Parliament of Australia, 2014) pp 2–3.

⁸⁶ Human Rights (Parliamentary Scrutiny) Act 2011, s8(1).

⁸⁷ Human Rights (Parliamentary Scrutiny) Act 2011, s8(3).

⁸⁸ Commonwealth, Parliamentary Debates, House of Representatives, 20 June 2012, 7177 (Harry Jenkins).

⁸⁹ Australian Law Reform Commission, Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, 3. Scrutiny Mechanisms, 3.69, available at: https://www.alrc.gov.au/publications/efficacy-scrutiny-and-review-mechanisms-0#_ftn107.

⁹⁰ Parliamentary Joint Committee on Human Rights, ‘Drafting Statements of Compatibility’ (Guidance Note No 1, Parliament of Australia, 2014), 1.

⁹¹ Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, 3. Scrutiny Mechanisms, 3.74.

⁹² Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, 3. Scrutiny Mechanisms, 3.75.

⁹³ Human Rights (Parliamentary Scrutiny) Act 2011, s8(5).

10.9 Time constraints are a major barrier to effective human rights scrutiny of legislation. Parliamentarians have identified that ‘the main thing that would make parliamentary scrutiny more effective is more time’.⁹⁴

10.10 Bills may pass into legislation with little or no consideration of the committees’ reports. Since 2011, over fifty bills have passed before the Committee had completed its review.⁹⁵

Recommendation: The Australian Government consider amending parliamentary procedures to allow for more time for scrutiny of legislation, including by legislating that outside of a ‘clearly defined emergency’, a bill should not be passed unless the Committee has considered the bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any relevant report.

10.11 Professor George Williams noted that ‘there is little or no evidence that [the reports of the Human Rights Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights’.⁹⁶ A review of bills before the Commonwealth Parliament in the three year period from 2001 to 2003 found that, of the sixty-three Bills considered to burden human rights, forty-three (or approximately 68%) were enacted.⁹⁷

Recommendation: The Australian Government amend the Standing Orders of the House of Representatives and the Senate to require all bills that receive feedback from the Human Rights Committee that the bill, as it stands, interferes with human rights, be referred for review by a legislation or general purpose committee.

10.12 Only the Commonwealth, Victoria and Australian Capital Territory have human rights scrutiny committees active in their legislatures.

Recommendation: The New South Wales, Tasmanian, South Australian, Western Australian, Northern Territory and Queensland Governments begin a process to legislate the creation of parliamentary committees that scrutinise all bills and legislative instruments, for compatibility with human rights, in their respective jurisdictions.

⁹⁴ Carolyn Evans and Simon Evans, ‘Messages from the Front Line: Parliamentarians’ Perspectives of Rights Protection’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

⁹⁵ Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, 3. Scrutiny Mechanisms, 3.79.

⁹⁶ Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, 3. Scrutiny Mechanisms, 3.83.

⁹⁷ Carolyn Evans and Simon Evans, ‘Australian Parliaments and the Protection of Human Rights’ in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006–2007* (Department of the Senate, 2007) figure 1.

11. Conclusion

- 11.1 Freedom of religion, press freedom, rights of asylum seekers, rights of the child and Indigenous rights are all inadequately protected in Australia due to numerous laws across a number of Australian jurisdictions. These rights and freedoms may be in competition with each other from time to time and the piecemeal nature of rights protection can mean that balancing them becomes problematic and inconsistent.
- 11.2 Amnesty International argues that a national Human Rights Act based on the UK dialogue model would address all crucial rights and freedoms in one document and ensure that a balance is struck between competing rights. The Act, as well as reform of the parliamentary scrutiny of the compatibility of legislation with human rights will better educate the community on their entitlements to rights and freedoms.

Recommendation: The Federal Government legislate a Human Rights Act for Australia, to ensure the rights to freedom of religion and other fundamental rights are protected and appropriately balanced. The objectives of a Human Rights Act should contain as a minimum: right to recognition and equality, right to life, right to freedom of movement, right to privacy and reputation, right to religion and belief, right to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practise religion and use their language), rights to education and the rights of children in the criminal process, and their access to health care.