
Submission to the Second Universal Periodic Review of Australia

**Office of the High Commissioner for Human
Rights**

23 March 2015

The Law Council of Australia represents state and territory law societies, bar associations and the Large Law Firm Group. Through this representation, it acts on behalf of over 60,000 lawyers. Its submission focuses on what it considers are the most pertinent current rule of law issues in Australia.

A. EQUALITY

I. *Equality and discrimination*

1. Commonwealth legislation prohibits discrimination on the grounds of race; national or ethnic origin; sex; marital status; pregnancy; family responsibilities; sexual orientation, disability and age.¹ Following extensive consultation with civil society in 2011 and 2012, the former Government introduced an Exposure Draft Bill for the consolidation of Commonwealth anti-discrimination laws; however, the Government did not proceed with the Bill on the basis that further consideration was required on policy, definitional and technical points. The consolidation of anti-discrimination laws is not one of the priority issues for the current Government.

In accordance with its commitment under the previous UPR, Australia should renew efforts to harmonise and consolidate Commonwealth anti-discrimination laws.²

2. In 2014, the Government sought civil society feedback on an Exposure Draft to amend certain provisions relating to the prohibition of offensive behaviour based on racial hatred in the *Racial Discrimination Act 1975 (Cth) (RDA)*,³ which the majority of submitters, including minority groups, considered to be inconsistent with the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*. The Government's consultation on the RDA highlighted the need for better protections for religious minorities in Australia
3. The current Government opposes same-sex marriage and has to date ruled out a Parliamentary conscience vote, however, there is some indication that this position may change. In 2011, the Labor Party changed its policy to support same-sex marriage but will allow its members a conscience vote. There are currently three same-sex marriage Bills before Parliament.⁴
4. The Law Council welcomes positive steps, such as the retention of the Government's Workplace Gender Equality Agency, however **in accordance with previous recommendations Australia should: (a) withdraw its reservations to international conventions to which it is party;⁵ and (b) take measures – including corrective measures – to ensure equality, including in relation to indigenous persons,⁶ sexual orientation,⁷ gender discrimination,⁸ same sex marriage⁹ and racial discrimination.¹⁰ For example, past convictions for the historical offence of practicing homosexual acts should be removed from criminal records.**

II. *Rights of indigenous peoples*

5. Some indigenous children are removed and placed in the care and protection system where removal may not be warranted. Concerns have been raised in New South Wales that upon the removal of their child, parents may be served with documents and given an insufficient amount of time to respond, may not be able to access legal advice to challenge this removal and there may be inadequate support for kinship placements.

In respect of care and protection matters, Australia should ensure that: (a) the Federal Government provides adequate levels of legal assistance funding; (b) State Departments observe procedural fairness requirements; (c) care plans include court-ordered cultural contact plans; and (d) State Departments engage with parents on pathways to restoration.

6. Funding cuts to Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the National Family Violence Prevention Legal Service have had deleterious effects on access to justice, and the continued interpreting services.¹¹

In accordance with its commitment under the previous UPR, Australia should ensure that all indigenous peoples have access to legal advice and assistance¹² and interpreting services.

7. Recently, Federal Government funding to State Governments to support Aboriginal Homelands programs have been substantially cut or removed. Some State Governments have advised that some remote and regional Aboriginal communities may be 'closed' unless Australian Government funding is reinstated. Closure of communities would almost certainly result in substantial rural-urban migration of Aboriginal people from their traditional lands.

All levels of Government should guarantee the ongoing provision of funding and services to ensure Aboriginal people can remain on their traditional lands.

8. Measures of indigenous Australians' health and welfare reflect a failure to comply with international obligations.¹³ The 7th annual *Closing the Gap* report shows that indigenous Australians are more likely to die at younger ages, experience disability and report their health as fair to poor. These health differences start at birth and continue throughout life. The gap in school attendance rates between indigenous and non-indigenous students widens as children age and is greater in remote areas. Unemployment rates are also higher amongst indigenous Australians; there are lower rates of home ownership; and higher rates of homelessness.

Australia should take measures to address the issues raised in the *Closing the Gap* report and consult on related initiatives.¹⁴ Further, in accordance with previous recommendations Australia should: (a) implement recommendations of treaty bodies and special procedures concerning indigenous peoples¹⁵ and fully implement the Declaration;¹⁶ (b) continue to move towards Constitutional recognition¹⁷ and make available sustainable and diverse funding for a broad national awareness campaign to help achieve this end; and (c) ensure that it continues to reform the *Native Title Act 1993 (Cth)* insofar as it prevents access and control of traditional lands and cultural life.¹⁸

III. Rights of children

9. The Royal Commission into Institutional Responses to Child Sexual Abuse was announced on 12 November 2012 and the Law Council welcomes the continued Federal Government funding for an extension of its work and reporting date. The Victorian Government also held an Inquiry into the Handling of Child Abuse by Religious and Other Organisations.

Australia should improve the administration of justice with respect to the abuse of children and consider the establishment of a national compensation scheme for victims, including victims of the Stolen Generations.¹⁹

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10. On 29 April 2012, the Government announced the establishment of a National Children's Commissioner, who will focus on promoting the rights, development and well being of children in Australia.²⁰ While the role ensures that Australia is now better equipped to comply with the *Convention on the Rights of the Child*, **legislation should require the Commissioner pay regard to all of Australia's international obligations.**
 11. Further, and **in accordance with its commitment under the previous UPR, Australia should ensure that its actions are reflective of the best interests of the child in regard to sterilization of a child with a disability.**²¹
 12. Some jurisdictions treat minors as adults in the criminal justice system and do not accord with principles of rehabilitative justice.²² Further, there are legislative measures that prevent children from attending school where they are charged with an offence which is unrelated to their schooling.²³

Australia should ensure that criminal systems are reflective of the best interests of the child, including a right to education.

IV. Minorities and police

13. Victoria Police has implemented a best practice model for engaging with minorities by including human rights throughout its strategic planning, policies and procedures.

Other jurisdictions should consider following the Victorian model.

Further, **in accordance with its commitment under the previous UPR, the Federal Government should ensure that it effectively engages with States and Territories through monitoring and education of racially motivated violence²⁴ and continues to strengthen national measures to combat discrimination against minorities.**²⁵

B. FREEDOM FROM ARBITRARY DETENTION (LIBERTY)

I. Asylum seekers

14. Various parliamentary and independent inquiries²⁶ have recommended that the Minister for Immigration and Border Protection cease to exercise a role as Guardian of unaccompanied minors on the basis of conflicting interests between acting in the best interests of the child whilst also detaining them and assessing their visa applications.²⁷ Instead, **legislation should be amended such that an independent statutory officer is appointed guardian for unaccompanied minors.**
15. On 6 January 2015, 10 refugees were released from indefinite detention where they had been held since 2010 on the basis of adverse security assessments. Thirty-four refugees remain indefinitely detained, deemed ineligible for protection visa because of this status despite the 2013 findings of the Human Rights Committee. No other country will accept them. Further, at 31 December 2014, 8% of asylum seekers had been detained *onshore* for over 730 days. The majority (49%) had been detained between 366-547 days. Some asylum seekers in offshore processing have been detained since 19 July 2013.

In accordance with its commitment under the previous UPR, Australia should ensure the processing of claims in accordance with the *Convention relating to the Status of Refugees* and that detention only occurs when strictly necessary

for the shortest possible time.²⁸ Children should only be detained only as a matter of last resort.

16. There are insufficient legislative safeguards to protect asylum seekers (a) from transfer to offshore processing centres that the United Nations High Commissioner for Refugees has deemed unsuitable,²⁹ and (b) during the refugee status determination process.

In accordance with its commitment under the previous UPR, Australia should ensure that special protection and assistance is provided to unaccompanied minors and asylum seekers.³⁰

II. Counter-terrorism

17. In 2014, Australia enacted new national security laws.³¹ Elements of these and previous counter-terrorism laws relating particularly to control orders, preventative detention orders, questioning and detention warrants by the Australian Security Intelligence Organisation (ASIO), bail and non-parole restrictions may infringe upon human rights in a manner disproportionate to the legitimate aim of protecting the public.³²

Accordingly, Australia should review the compatibility of its legislative framework to combat terrorism with its international obligations and remedy any possible gaps, including: (a) responding to the reports of the Independent National Security Legislation Monitor, in building upon its commitment under the previous UPR to review counter-terrorism legislation;³³ (b) amending counter-terrorism laws and practices to respond to past recommendations of UN treaty bodies and special procedures, and to ensure full conformity with international obligations; and (c) ensuring that it investigates allegations of torture, give publicity to the findings, bring perpetrators to justice and provide reparation to the victims, in accordance with its commitment under the previous UPR.³⁴

III. Rights of indigenous peoples

18. Nationally, indigenous peoples are now around imprisoned at 15 times the rate of non-indigenous people. Indigenous juveniles are 34 times more likely to be in detention than non-indigenous juveniles. The imprisonment rate for indigenous females increased by around 74 per cent since 2004.

In accordance with its commitment under the previous UPR, Australia should implement measures to address factors leading to overrepresentation of Aboriginal and Torres Strait Islanders in prison,³⁵ including championing justice reinvestment strategies through the Council of Australian Government to address the factors leading to the overrepresentation. Further, prison systems must take into consideration the specific needs of Aboriginal and Torres Strait Islander people during the assessment process for rehabilitation. These processes must be undertaken by specially trained personnel and must be culturally sensitive. Australia must also do more to provide for specific housing and services for Aboriginal and Torres Strait Islander prisoners upon their release.

IV. Mandatory sentencing

19. Detention must not only be lawful, but reasonable and necessary in all the circumstances. Mandatory sentencing exists in most Australian jurisdictions and legislation continues to be enacted requiring mandatory minimum sentences to apply to certain offences.³⁶ It may amount to arbitrary detention because the sentence

imposed can be disproportionate as judges are inhibited from handing down punishments that fit the particular circumstances of the case. Mandatory sentencing can reduce the independence of the judiciary. Mandatory sentencing disproportionately affects indigenous Australians and contributes to their higher imprisonment rates.

Australia should remove all mandatory sentencing, and rather: (a) permit judicial discretion to determine the most appropriate punishment; (b) focus on alternatives to imprisonment such as justice reinvestment or community service orders; and (c) consider increasing maximum penalties for particular offences to reflect community concern.³⁷

V. Continued detention of prisoners

20. A person deemed unfit to stand trial (for example, due to mental illness) can be detained in a prison in certain circumstances (including where there are no treatment options at a hospital) for a period not exceeding the *maximum* period of imprisonment that could have been imposed if the person had been convicted of the offence charged.³⁸ This can result in an overrepresentation of people with intellectual disabilities in the prison system.³⁹

The period of detention should not exceed the period for which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual.⁴⁰ Further, in accordance with its commitment under the previous UPR, Australia should ensure that its treatment of prisoners accords with the UN Standard Minimum Rules for the Treatment of Prisoners.⁴¹

C. FAIR HEARING RIGHTS

I. Asylum seekers

21. There is limited merits and judicial review of decisions made by the Minister for Immigration and Border Protection, including the failure to consider international obligations when exercising maritime powers outside of Australia's territorial waters, and decisions to exclude asylum seekers from a truncated refugee status determination process that itself only allows for limited merits and judicial review.⁴² Access to legal advice and assistance for asylum seekers arriving by boat has also been restricted⁴³ and will be available only to vulnerable asylum seekers.⁴⁴

In accordance with its commitment under the previous UPR, Australia should ensure that it honours its obligations under Articles 31 and 33 of the Refugee Convention and ensure that the rights of all refugees and asylum-seekers are respected, providing them access to Australian refugee law.⁴⁵

22. Recent changes in the Refugee Review Tribunal (RRT) without notice to the profession have the potential to compromise an applicant's right to a fair hearing. Concerns with the changes include reductions in liaison with the profession and an emphasis of efficiency over fairness and oral decision-making.

The Government should consult with the legal profession about changes to the RRT.

II. Counter-terrorism

23. Several elements of counter-terrorism laws may infringe upon a person's right to a fair trial under Article 14 of the ICCPR. For example, section 34AA of the *Australian*

Security Intelligence Organisation Act 1979 (Cth) may unduly prevent a defendant from testing evidence against him or her in relation to a criminal charge. ASIO's questioning and detention powers under Part III of Division 3 of the Act also requires people to keep certain information secret, have limited opportunities to contact lawyers, or challenge detention. Subsection 31(8) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) may unduly restrict the court's discretion to determine how and when certain information may be disclosed.

In addition to the above recommendations, paragraph (dac) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) may also exclude from judicial review, decisions about preventative detention. In accordance with international obligations, Australia should consider repealing this paragraph.

III. *Fitness to plea*

24. Existing legislation in certain jurisdictions⁴⁶ contain provisions that may limit the ability of people with a disability to understand court proceedings and expose them to indefinite detention.

Australia should ensure that people with a disability are afforded the right to a fair hearing and do not serve a longer period in detention than a person fit to plead and convicted of the crime charged.

D. DEMOCRATIC RIGHTS AND FREEDOMS

I. *Restrictions on advocacy*

25. The Federal Government has removed funding for law reform, policy and advocacy work by Community Legal Centres (CLCs) and (ATSILS as well as the National Congress of Australia's First Peoples). This reduction in funding results in less capacity to engage in policy formulation, political and legislative processes or governance.

Australia should reinstate funding for CLCs and ATSILS.

Further, and in accordance with its commitment under the previous UPR,⁴⁷ Australia should ensure it consults with indigenous peoples in accordance with the *Declaration on the Rights of Indigenous Peoples* and Guidelines issued by the Australian Human Rights Commission on issues that concern them, including the operation, future suspension and proposed amendments to the RDA.⁴⁸ There should be a statutory process for consultation.

II. *Anti-association laws*

26. A number of States and Territories around Australia have introduced anti-association laws.⁴⁹ These laws generally designate criminal organisations and restrict members of those organisations from associating with others. Their primary aim is to disrupt organised crime, but many have more far-reaching impacts.

Australia should ensure that its anti-association laws comply with rule of law principles.

III. *Anti-protest laws*

27. Certain jurisdictions have introduced or passed anti-protest laws which limit the ability of members of the public to protest.⁵⁰

Australia should ensure that its anti-protest laws comply with rule of law principles.

IV. *Data Retention Laws*

28. New data retention laws have been introduced with the object of preventing terrorism. However, there already exist significant powers under existing legislation to engage in a targeted approach to serious crime and counter-terrorism. The effectiveness of the proposed scheme remains unproven.

Australia should ensure that the data retention laws that have been introduced are necessary and proportionate.

ENDNOTES

¹ The *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), and the *Age Discrimination Act 2004* (Cth). More limited protections against discrimination on other grounds are also provided under the *Australian Human Rights Commission Act 1986* (Cth). On 21 March 2013, the former Labor Government introduced the Sex Discrimination Act Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (the SDA Bill) into the House of Representatives. The SDA Bill amended the *Sex Discrimination Act 1984* to extend protection from discrimination to the new grounds of sexual orientation, gender identity and intersex status. The SDA Bill also extended the existing ground of 'marital status' to 'marital or relationship status' to provide discrimination protection for same-sex de facto couples. There was a Senate Inquiry into the SDA Bill, inviting submissions by civil society. The SDA Bill was passed on 25 June 2013. There are also State and Territory equivalents of anti-discrimination legislation.

² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, A/HRC/17/10 (24 March 2011) ('HRC Report'). See Recommendations 86.42-44 and 86.48.

³ At Part IIA of the *Racial Discrimination Act 1975* (Cth).

⁴ The Australian Greens introduced the Marriage Equality Amendment Bill 2013 on 12 December 2013 and the Recognition of Foreign Marriages Bill 2014 on 15 May 2014. Liberal Democrat senator David Leyonhjelm introduced the Freedom to Marry Bill 2014 on 26 November 2014.

⁵ HRC Report. See Recommendations 86.13-16.

⁶ Ibid. See Recommendation 86.24.

⁷ Ibid. See Recommendation 86.66.

⁸ Ibid. See Recommendations 86.51-6, 86.99.

⁹ Ibid. See Recommendation 86.70.

¹⁰ Ibid. See Recommendation 86.98.

¹¹ The Western Australian Government has given no assurance to fund the Kimberley Interpreting Service beyond June 2015.

¹² HRC Report. See Recommendation 86.92

¹³ For example, arts 6, 11, 12 and 13 of the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All forms of Racial Discrimination* and the *Declaration on the Rights of Indigenous Peoples*.

¹⁴ HRC Report. See Recommendation 86.113.

¹⁵ Ibid. See Recommendation 86.36.

¹⁶ Ibid. See Recommendation 86.106.

¹⁷ Ibid. See Recommendations 86.104-6.

¹⁸ Ibid. See Recommendation 86.102.

¹⁹ Ibid. See Recommendation 86.97. See also: <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen>.

²⁰ Legislation was introduced to give effect to this announcement on 23 May 2012, see: *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth).

²¹ HRC Report. See Recommendation 86.39.

²² In Queensland, 17-year olds are treated as adults in the criminal justice system, in contravention of the *Conventions on the Rights of the Child*. The *Youth Justice and Other Legislation Amendment Act 2014* (Qld) has also introduced further measures that do not accord with Australia's international obligations. In Victoria, some young people are transferred to adult prisons and subject to solitary confinement.

²³ See: *Education and Other Legislation Amendment Bill 2014* (Qld).

²⁴ HRC Report. See Recommendation 86.57.

²⁵ Ibid. See Recommendation 86.59.

²⁶ For example, see: Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, *Final Report* (March 2012), xxi: Recommendation 19: The Committee recommends that relevant legislation be amended to replace the Minister for Immigration as the legal guardian of unaccompanied minors in the immigration detention system. See also: Australian Human Rights Commission, *A last resort?* (April 2004), Recommendation 3.

²⁷ Pursuant to the *Migration Act 1958* (Cth).

²⁸ HRC Report. See Recommendations 86.123, 86.127.

²⁹ See: United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 23 to 25 October 2013* (26 November 2013) and United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to the Republic of Nauru 7 to 9 October 2013* (26 November 2013).

³⁰ HRC Report. See Recommendation 86.129.

³¹ The *National Security Legislation Amendment Act 2014* (Cth); the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth).

³² The Law Council has further outlined these elements in its submissions to parliamentary inquiries examining the legislation. These submissions are available at: <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/submissions>.

³³ HRC Report. See Recommendations 86.137-40.

³⁴ Ibid. See Recommendation 86.136.

³⁵ HRC Report. See Recommendation 86.93.

³⁶ See: Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014), 48-55, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf. Mandatory sentencing exists in the Commonwealth, as well as in the following States and Territories: Western Australia, Northern Territory, New South Wales, South Australia, Queensland and Victoria.

³⁷ See: Law Council of Australia, *Mandatory Sentencing Fact Sheet* (2014) available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Factsheet.pdf. See also: Law Council of Australia, *Mandatory Sentencing Policy* (May 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Policy_Position.pdf.

³⁸ Pursuant to s 20BC(2)(b) of the *Crimes Act 1914* (Cth).

³⁹ For example, under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), if found unfit to plea two options are available for people with intellectual disabilities: unconditional release or indefinite detention. This has resulted in individuals being detained for longer than they ordinarily would have been had they had a trial and been convicted.

⁴⁰ See: Law Council of Australia, Submission to Australian Law Reform Commission, Inquiry into Legal Barriers For People With Disability, 11 August 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2874_-_ALRC_Inquiry_into_Legal_Barriers_for_People_with_Disability.pdf.

⁴¹ See Recommendation 86.71.

⁴² See: *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) at Schedules 1 and 4.

⁴³ See, for example: Law Council of Australia, *Law Council concerned by removal of IAAAS Funding* (Media Release, 2 April 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_-_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf.

⁴⁴ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (Media Release, 31 March 2014).

⁴⁵ HRC Report. See Recommendation 86.122.

⁴⁶ For example, the *Crimes (Mental Impairment and Unfitness to be Tried Act 1997* (Vic)

⁴⁷ HRC Report. See Recommendations 86.26, 86.109-112.

⁴⁸ Ibid. See Recommendation 86.113.

⁴⁹ See for example: *Criminal Organisations Control Act 2012* (Vic).

⁵⁰ Namely, Victoria, Queensland and Tasmania. The new Victorian government has introduced the Summary Offences Amendment (Move-On Laws) Bill 2015, which will restore the former laws regulating protests and has been welcomed by the LIV. See: Law Institute of Victoria, submissions and media release available at: <http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Administrative-Law-Human-Rights/Submissions/Summary-Offences-Amendment-Move-On-Laws-Bill-2015.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0>.