New South Wales
Council for Civil Liberties

NSW Council for Civil Liberties

Submission to the Australian Human Rights Commission's *Free and Equal: An Australian conversation on human rights* project

3 July 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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A. Introduction

1. The New South Wales Council for Civil Liberties (CCL) thanks the Australian Human Rights Commission for the opportunity to make a submission to this Inquiry. This submission intends to address the following questions from the Issues Paper:

    2. How should human rights be protected in Australia?

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

B. Recommendations

Recommendation 1: Develop a national strategy for implementing the outstanding recommendations of the Bringing them Home report.

Recommendation 2: Prohibit racial discrimination in the Constitution. Provide for a special measures exception, on the basis that any special measures conform with the United Nations Committee on the Elimination of Racial Discrimination's General Recommendation No 32 (2009).

Recommendation 3: Repeal section 25 of the Constitution.

Recommendation 4: Progress the Uluru Statement from the Heart recommendation on a constitutionally enshrined Voice, through the co-design process recommended by the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.

Recommendation 5: Implement the Uluru Statement from the Heart recommendation on a Makarrata Commission to supervise a process of agreement making between government and First Nations, and truth-telling about our history.

Recommendation 6: Enact Federal human rights legislation to give effect to all of the rights of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This legislation should:

a) establish a mechanism to ensure Australian laws comply with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,
b) Provide effective judicial remedies to protect those rights,
c) train the judiciary, lawyers, prosecutors, law enforcement officers, public servants and federal immigration staff on protecting rights.

Recommendation 7: Human rights legislation should include the economic, cultural and social rights enshrined in the International Covenant on Economic, Social and Cultural Rights, and be modelled on the Bill of Rights in the South African Constitution.

Recommendation 8: If a Member of Parliament or Attorney-General, in their statement of compatibility, finds that a Bill is inconsistent with human rights, the Bill should be withdrawn. If a parliamentary Committee, engaging in mandated legislative scrutiny, finds that a Bill is inconsistent with human rights, the Bill should be withdrawn.

Recommendation 9: Override declarations should not be included in future human rights legislation. Override declaration provisions should be removed from the *Human Rights Act 2019* (Qld), and the *Charter of Human Rights and Responsibilities 2006* (Vic).

Recommendation 10: Existing and future human rights legislation should provide that all laws must be interpreted in a way that is compatible with human rights, irrespective of their purpose.

Recommendation 11: Seeking a declaration of incompatibility from the Supreme Court should not require referral from a court or tribunal.

Recommendation 12: Under a future federal human rights act, a declaration of incompatibility should affect the validity, operation or enforcement of impugned legislation or statutory provisions. Under existing and future state and territory based human rights acts, declarations of incompatibility should affect the validity, operation or enforcement of impugned legislation or statutory provisions, unless they are federal legislation or subordinate legislation.

Recommendation 13: Under existing and future human rights legislation, members of the public should be able to initiate legal proceedings where they allege that a public authority has acted inconsistently with their human rights. Doing so should not require an existing tribunal or court proceeding.

Recommendation 14: Pass human rights legislation in the remaining State and Territory jurisdictions in Australia that do not have existing human rights Acts.

Recommendation 15: Fully fund the National Congress of Australia's First Peoples, and commit to bipartisan entrenchment of its budget on an ongoing basis.

Recommendation 16: Government funding agreements for Aboriginal and Torres Strait Islander organisations should not impose advocacy restrictions. There should be a political norm, and legal requirement, that funding of Aboriginal and Torres Strait Islander organisations cannot be connected directly or indirectly to their political advocacy.

Recommendation 17: Implement the Redfern Statement.

C. Executive Summary

2. The statement that human rights need protecting in Australia rests on an underlying premise that human rights are not already protected in Australia. This submission argues that human rights have not been respected in Australia, are not protected, and suggests some methods to improve human rights in Australia.
3. Australian history, and ongoing policies indicate a failure to uphold the rights of First Nations peoples. These failures continue to the present day. For example, under international law, the right to be free from racial discrimination is an overriding and fundamental right, which is not subject to derogation. In Australia, this principle has not been upheld in relation to Aboriginal

and Torres Strait Islander peoples. One aspect of remedying these issues is to constitutionally prohibit racial discrimination, to entrench the norm of non-discrimination as non-negotiable. Another aspect is to progress and implement the Uluru Statement from the Heart.

4. Constitutional reform has faced considerable challenges in Australia. This is due to the difficulty of successfully winning a referendum campaign, which traditionally requires bipartisan support. Achieving such political support has been a barrier to the kinds of reform that would entrench human rights in Australia.
5. Due to these issues of political feasibility, it may be ideal in the shorter term to focus on achieving legislative protections of human rights. Those rights should cover the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. For such legislation to comply with international standards, it should establish a mechanism for ensuring that Australian legislation complies with those Covenants, provide effective judicial remedies for protecting those rights, and train relevant officials on protecting those rights.
6. Due to Constitutional issues, it is preferable for human rights legislation to be enacted federally. However, there are already two state based and one territory based human rights Act. These human rights instruments can be improved, so that they protect more of the rights Australia has signed up to protect under international law, and also to ensure that those rights can be more effectively protected and enforced.
7. Aside from legislatively protecting the rights of First Nations peoples, it is worth considering other means for advancing their rights, particularly the right of self-determination. Such methods should include properly funding the national representative body, the National Congress of Australia's First Peoples. The Federal government should also cease imposing political advocacy restrictions through funding agreements and other forms of pressure. Promoting self-determination for Aboriginal and Torres Strait Islander peoples should also mean meaningfully engaging with the policy calls of peak First Nations organisations, such as implementing the Redfern Statement.

D. Have human rights been respected in Australia?

8. To consider whether human rights need protecting in Australia requires first an examination of Australia’s existing record of protecting human rights. If Australia’s record on human rights is admirable, then it may be conceded that there is no need to fix what is not broken. If Australia’s record on human rights may properly be regarded as broken in significant respects, then change

may properly be regarded as appropriate. A demonstration of this sort would establish the key issue of whether human rights need protection.

9. It may be conceded that most Australians have a relatively high standard of living. Yet human rights violations are often not levelled at the majority of the population, but at vulnerable minorities. This submission will discuss relevant issues in relation to First Nations peoples, as an illustrative example of how human rights have not been properly respected in Australia.
10. Australia was founded on the dispossession of the Indigenous populations. This has been affirmed in the High Court, which noted that the early stages of the 'conflagration of oppression and conflict' between Aboriginal people and European colonisers was to 'spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.'[1]
11. Likewise, the Royal Commission into Aboriginal Deaths in Custody observed that 'Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation'. There was also

> brutality and bloodshed… involved in enforcing on the ground what was pronounced by the law. Aboriginal people were deprived of their land and if they showed resistance they were summarily dealt with. The loss of land meant the destruction of the Aboriginal economy which everywhere was based upon hunting and foraging. And the land use adopted by the settlers drastically reduced the population of animals to be hunted and plants to be foraged. And the loss of the land threatened the Aboriginal culture which all over Australia was based upon land and relationship to the land.[2]

12. This was then followed by a policy of protection, where

> Aboriginal people were swept up into reserves and missions where they were supervised as to every detail of their lives and there was a deliberate policy of undermining and destroying their spiritual and cultural beliefs. The other aspect of that policy as it developed was that Aboriginal children of mixed race descent--usually Aboriginal mother and non-Aboriginal father--were removed from their family and the land, placed in institutions and trained to grow up as good European labourers or domestics…
>
> Naturally, legislation varied from place to place and time to time but the effect was the same control over the lives of the people. A person could not live on a reserve without permission, or leave or return after leaving without permission, or have a relative to live with them without permission, or work except under supervision... On the reserves and the missions the supervisors and missionaries had all power.[3]

[1] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) at [50] (Deane and Gaudron, JJ).
[2] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 1 [1.4.2).
[3] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 1 [1.4.3).

13. This was done so that 'full blood' Aboriginal people would 'die out', and 'mixed blood' people 'would be bred out'. When this failed, 'another policy was tried, that of assimilation'. In the Northern Territory,

> Aboriginal people remained wards of the State, in the States the Protectorate and the Boards remained in place with all their powers, children continued to be removed but the whole aim was now to assimilate the Aboriginal people by encouraging them to accept the Western culture and lifestyle, give up their culture, become culturally absorbed and indistinguishable, other than physically, from the dominant group. For a short time, integration replaced assimilation as the policy option with little change in any practical way. And that was the practice in 1967 when the Referendum was carried which gave power to the Commonwealth to make laws relating to Aboriginal people.[4]

14. In 1997, the Human Rights and Equal Opportunity Commission released *Bringing Them Home,* its report into the removal of Aboriginal children from their families. It found

> the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture. In other words, the objective was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of' Indigenous peoples (Lemkin 1944 page 79). Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention [on the Prevention and Punishment of the Crime of Genocide] is concerned to preserve.[5]

15. Removals meant that the child's 'entire community lost, often permanently, its chance to perpetuate itself in that child.; The report also observed that the

> The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.[6]

16. Though the Commission found that the removals were a 'crime against humanity', according to 'accepted legal principle imported into Australia as British common law', the report notes that removals continued for decades after Australia signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide.[7] Thus, Australian signatures on

[4] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 1 [1.4.4).
[5] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home (1997)* 237.
[6] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home (1997)* 231
[7] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home (1997)* 239.

conventions of international law upholding human rights were not a panacea in relation to Australian human rights violations, even where they may have constituted genocide.

17. The report documented the disturbingly high rates of removal of Indigenous children from their families in Part 6 of the report, 'Contemporary Separations'. It began by quoting an Aboriginal Legal Service, which commented that 'Aboriginal children are still being removed from their families at an unacceptable rate, whether by the child welfare or the juvenile justice systems, or both.' The Commission observed that

> A high proportion of people affected by the past laws, practices and policies of forcible removal have had their own children taken from them in turn. The ALSWA survey of 483 clients who were removed in childhood revealed that more than one-third (35.2%) had had their children removed (submission 127 page 44). A process of second (or subsequent) generation removal occurred in more than one in three cases.[8]

18. The Commission observed that

> Indigenous children throughout Australia remain very significantly over-represented "in care" and in contact with welfare authorities. Their over-representation increases as the intervention becomes more coercive, with the greatest over-representation being in out-of-home care.[9]

19. It found that 'On average Indigenous children were seven times more likely to be in substitute care than their population share would indicate. Indigenous children comprise only 2.7% of Australian children but they were 20% of children in care in 1993.' Furthermore, 'Indigenous children are much more likely than others to be 'notified' to a welfare department on the ground of abuse or neglect.' Though there was agreement it was best that removed Indigenous children be placed within an Indigenous cultural environment, 'Indigenous children continue to be removed from their families at a disproportionate rate and continue to be placed into non-Indigenous environments including group homes and foster families.'[10]

20. The Commission argued that the

> underlying causes of the over-representation of Indigenous children in welfare systems include the inter-generational effects of previous separations from family and culture, poor socio-economic status and systemic racism in the broader society.[11]

21. They further observed that

[8] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home (1997)* 368.
[9] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home (1997)* 372.
[10] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home* (1997) 372-4.
[11] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home* (1997) 374.

> Indigenous families were historically characterised by their Aboriginality as morally deficient. There is evidence that this attitude persists. A focus on child-saving facilitates blaming the family and viewing "the problem" as a product of "pathology" or "dysfunction" among members rather than a product of structural circumstances…[12]

22. The National Sorry Day Committee reviewed the *Bringing them Home* Report in 2015. It found that the recommendations were 'as relevant today' as they were in 1997. Yet of the 54 recommendations, only 13 were implemented. Only two of those implemented related to the current generation of Aboriginal and Torres Strait Islander children. The National Sorry Day Committee recommended that the Australian government address as a matter of urgency developing a national strategy to implement outstanding recommendations from the *Bringing them Home* report.[13]
23. This record demonstrates significant failures to protect human rights in Australia. These human rights issues indicate the need for human rights protections, to ensure that such abuses cannot take place in future.

E. Does Australia protect human rights?

24. Whilst the previous section reviewed evidence of significant human rights issues in the past, many of these issues remain unresolved. The failure to adequately respond to those issues has manifested in a continuing failure to protect the human rights of Aboriginal and Torres Strait Islander families.
25. Since the *Bringing Them Home Report*, the rate of removals of Aboriginal and Torres Strait Islander children has increased. Professor Larissa Behrendt observed that there was a '436% increase in care and protection orders issued for Aboriginal and Torres Strait Islander children between 2004-2013'. Aboriginal and Torres Strait Islander Children made up 4.6 percent of the population, but were 35 per cent of the children in out of home care. Behrendt observed in 2015 that the figure increased by 65 percent since Prime Minister Kevin Rudd spoke in Parliament to apologise for the Stolen Generation.[14]
26. In January 2018, figures from the Productivity Commission showed that the rate of Aboriginal and Torres Strait Islander children in out of home care had doubled since 2008. There were

[12] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal, Torres Strait Islander Children from Their Families, *Bringing them Home* (1997) 376.
[13] National Sorry Day Committee Inc, *Bringing them Home: Scorecard Report 2015* (2015) 6. <https://apo.org.au/sites/default/files/resource-files/2015/02/apo-nid54628-1216806.pdf> at 7 June 2019.
[14] Larissa Behrendt, 'Seven years later, have Kevin Rudd's promises in the Apology been forgotten?', 13 February 2015, *The Guardian*, <https://www.theguardian.com/commentisfree/2015/feb/13/seven-years-later-have-kevin-rudds-promises-in-the-apology-been-forgotten>.

'17,664 Aboriginal and Torres Strait Islander children in out-of-home care in 2016-17, compared with 9,070 in 2007-08.' The rate of removals increased by 80 per cent, from 32.7 per 1000 in 2007-8, to 58.7 per 1000 in 2016-7. Furthermore, the rate by which those children were placed with other Aboriginal and Torres Strait Islander people declined, from 74 per cent to 67.6 per cent.[15]

27. Concerns about the large-scale removal of Aboriginal and Torres Strait Islander children from their families was escalated by the successful passage of the Children and Young Persons (Care and Protection) Amendment Bill 2018 (NSW). As noted by Longbottom, McGlade, Langton and Clapham in the *Lancet*, it imposes

> an arbitrary 24 months for children in out-of-home care to be reunited with their families, before adoption can become permanent. The new laws enable a 2 year limit on the creation of permanent arrangements for a child, guardianship orders that can be arranged without parental consent, amendments to the application process of family restoration, and removal of parental consent for adoption on permanent orders.[16]

28. The authors observe that the new law 'risks permanently separating another generation from their families.' The legislation 'commits the state to effectively perpetuating the legacy of previous removal policies, harming families, and increasing the risk of further harm and community dislocation to Indigenous children.'[17]

29. The continued large-scale removal of Aboriginal and Torres Strait Islander children from their families was noted with concern in a report by the current United Nations Special Rapporteur on the rights of Indigenous Peoples, Victoria Tauli-Corpuz.[18] She wrote that

> Indigenous children are removed from their families at increasingly high rates. The prolonged impacts of intergenerational trauma from the Stolen Generations, disempowerment and entrenched poverty continue to inform Aboriginal and Torres Strait Islanders' experiences of child protection interventions. The Special Rapporteur was told of the grief and helplessness felt by parents and children owing to their separation, and the link this has to high rates of mental illness and substance abuse.[19]

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[15] Calla Wahlquist, 'Indigenous children in care doubled since stolen generations apology', 25 January 2018, *The Guardian*, <https://www.theguardian.com/australia-news/2018/jan/25/indigenous-children-in-care-doubled-since-stolen-generations-apology>.

[16] Marlene Longbottom, Hannah McGlade, Marcia Langton, Kathleen Clapham, 'Indigenous Australian children and the impact of adoption legislation in New South Wales' (2019) 393 (10180) *The Lancet* 1499.

[17] Marlene Longbottom, Hannah McGlade, Marcia Langton, Kathleen Clapham, 'Indigenous Australian children and the impact of adoption legislation in New South Wales' (2019) 393 (10180) *The Lancet* 1499, 1500.

[18] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 15.

[19] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 15.

30. Cruz warned that 'the incidence of indigenous children in out-of-home care is increasing rapidly and has reached critical levels.' In 2016, on average, only 66 per cent of Aboriginal and Torres Strait Islander children for whom child protection measures were ordered were placed within their family, kin and community'. Cruz recommends

> Greater engagement with the Aboriginal and Torres Strait Islander family and community in decision-making processes around child protection is crucial. Community-led early intervention programmes that invest in families would prevent children from being in contact with the child protection system in the first place. The number of Aboriginal and Torres Strait Islander children in out-of-home care is predicted to almost triple by 2035.[20]

31. The Committee on the Elimination of Racial Discrimination also expressed concern

> that indigenous children face a higher risk of being removed from their families and placed in alternative care facilities, many of which are not culturally appropriate and in which, too often, they also face abuse.[21]

32. The Committee on the Elimination of Racial Discrimination recommended that the Australian government

> Effectively address the overrepresentation of indigenous children in alternative care, including by developing and implementing a well-resourced national strategy in partnership with indigenous peoples, increase investment for family support services at state and territory levels, and ensure that well-resourced community-led organizations can provide child and family support services with a view to reducing child removal rates...[22]

33. The Committee on the Rights of the Child was 'concerned at the large numbers of Aboriginal and Torres Strait Islander children being separated from their homes and communities and placed into care'. Such care, 'inter alia, does not adequately facilitate the preservation of their cultural and linguistic identity'. The Committee on the Rights of the Child recommended

> that the State party review its progress in the implementation of the recommendations of its "Bringing Them Home Report", including as recommended by the United Nations Human Rights Committee and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to ensure full respect for the rights of Aboriginal and Torres Strait Islander children to their identity, name, culture, language and family relationships.[23]

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[20] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 15.
[21] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 6.
[22] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 6.
[23] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012).

Recommendation 1: develop a national strategy for implementing the outstanding recommendations of the *Bringing them Home* report.

34. Human rights issues in relation to Australia's treatment of First Nations peoples remain unresolved. The continued over-representation of First Nations children in out of home care has received concern and critical comment from international human rights bodies. Yet this has not led to any reverse in the escalating rate of removal of Aboriginal and Torres Strait Islander children from their families, nor did it prevent the passage of the Children and Young Persons (Care and Protection) Amendment Bill 2018 (NSW). Australia needs to implement human rights protections that can both address these issues, and prevent them from arising in future.

35. There is compelling research documenting the significant negative impacts on children who have lived in out of home care. Some of the impacts include:

Mental health

- The James Wood 'Report of the Special Commission of Inquiry into Child Protection Services in NSW' found that disruption in attachment is often experienced, which can have major short term and long term consequences such as cognitive problems, psychological and behavioural problems, and delays in development.[24]

- Over half the boys and girls in the study were reported as having 'clinically significant mental health difficulties', presenting 'with complex disturbances, including multiple presentation of conduct problems and defiance, attachment disturbance, attention-deficit/hyperactivity and trauma related anxiety'.[25]

Education

- Those in care are less likely than their peers to continue their education beyond the minimum school leaving age. They are likely to attend a large number of different schools and to experience substantial periods of absence from school.[26]

[24] James Wood, 'Report of the Special Commission of Inquiry into Child Protection Services in NSW' (State of NSW through the Special Commission of Inquiry into Child Protection Services in NSW, November 2008) 618 [[16.105].] ('*NSW Special Commission of Inquiry*') <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Child-Protection-Services-in-New-South-Wales-listing-438/ffdd315161/Volume-2-Special-Commission-of-Inquiry-into-Child-Protection-Services-in-NSW.pdf
[25] Wood, *NSW Special Commission of Inquiry* 620 [16.129]
[26] Wood, *NSW Special Commission of Inquiry* 620 [16.135].

Homelessness

- The Human Rights and Equal Opportunity report 'Our Homeless Children: Report of the National Inquiry into Homeless Children' found that 'a period of time spent in a child welfare or juvenile justice institution, or otherwise detached by the welfare system from the natural family, seems to increase significantly a child's chances of becoming homeless'.[27]

Links to criminal justice

- The Aboriginal and Torres Strait Islander Social Justice Commissioner stated that, 'the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today.[28] The number of Aboriginal and Torres Strait Islander children in OOHC has risen from 48.2 per 1,000 children in 2013 to 58.7 per 1,000 in 2017.[29] These statistics are 7 times the rate for non-Indigenous children. Of the 47,915 children in out of home care nationwide in 2017, 17,664 were of Aboriginal and Torres Strait Islander descent.[30]

- Research consistently reports the link between children and young people involved in the out of home care system and juvenile offending.[31]

- The Community Affairs Reference Committee report Forgotten Australians found that 'The cycle is perpetuated as many children of women prisoners are made wards of the state while their mothers are imprisoned. 70 per cent of women in Victorian prisons are mothers and largely the sole-carer. A study of risk factors for the juvenile justice system found that '91 per cent of the juveniles who had been subject to a care and protection order, as well as a supervised justice order, had progressed to the adult corrections system with 67 per cent having served at least one term of imprisonment'.[32]

[27] Human Rights and Equal Opportunity Commission (HREOC), 'Our Homeless Children: Report of the National Inquiry into Homeless Children' (HREOC, 10 February 1989) 109 [10.4] <https://www.humanrights.gov.au/sites/default/files/Chapter%2010.pdf>.
[28] Australia Human Rights Commission Social Justice and Native Title Report 2015 p.138.
[29] Same report
[30] Same report
[31] Wood, *NSW Special Commission of Inquiry* 556 [15.2]; Australian Institute of Health and Welfare (AIHW), 'Young people in child protection and under youth justice supervision 2014–15' (Data Linkage Series No 22. Cat. no. CSI 24., AIHW, 2016) 11 ('*Young People in Child Protection*') <https://www.aihw.gov.au/reports/youth-justice/young-people-in-youth-justice-supervision-2015-16/contents/table-of-contents>; McFarlane, *Care-Criminalisation* 75; *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) 485 [15.1] ('*Pathways to Justice*')
[32] Community Affairs Reference Committee, *Forgotten Australians* 168 [6.6]

- The Australian Law Reform Commission reported that out of home care experience and juvenile detention are also 'key drivers of adult incarceration'[33]

F. Barriers to protecting human rights: inadequate legal protections of human rights

The right to be free from racial discrimination

36. The right to be free from racial discrimination is enshrined in international human rights law.
37. For example, the International Covenant on Civil and Political Rights provides in article 26:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [34]

38. Likewise, the International Convention on the Elimination of All Forms of Racial Discrimination provides in article 2 that

> 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
>
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization…[35]

[33] ALRC, *Pathways to Justice* 485 [15.1].
[34] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, 174, 179 (entered into force 3 January 1976).
[35] *International Covenant on the Elimination of All forms of Racial Discrimination*, opened for signature 7 March 1966, 600 UNTS 195, 216-8 (entered into force 4 January 1969)

39. However, despite signing these international human rights instruments, Australia has failed to substantively address racial discrimination against Aboriginal and Torres Strait Islander people domestically, as the section below details.

Existing legislative human rights protections

40. One barrier to protecting human rights in Australia is the inadequacy of legislative protections of human rights. To consider the case of First Nations people, they have the same general rights as other Australians under common law, relevant provisions in the Constitution, and protections under the *Racial Discrimination Act 1975* (Cth). The challenge for these human rights protections is whether they protect human rights substantively, and if they are sufficiently entrenched that they can withstand political controversies of the day. If a human rights protection can be swept aside in response to political exigencies, then those protections are inadequate. As seen, the currently existing human rights protections have failed to protect the rights of First Nations families. These protections can further be examined in terms of the right to be free from racial discrimination.
41. The *Racial Discrimination Act 1975* (Cth) has been suspended on three occasions. On all of those occasions, it has been suspended to take away rights from Aboriginal and Torres Strait Islander peoples. The three instances are amending the *Native Title Act 1993* (Cth), the Hindmarsh Island Bridge affair, and the Northern Territory Emergency Response.[36]
42. Aboriginal people attempted to challenge the latter in the High Court of Australia. In his dissenting judgment, Kirby J observed that the

> legislative provisions in question here are applied to Aboriginal Australians by specific reference to their race. The Emergency Response Act expressly removes itself from the protections in the *Racial Discrimination Act 1975* (Cth) and hence, from the requirement that Australia, in its domestic law, adhere to the universal standards expressed in the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia is a party.[37]

43. Though the legislation in question was applied to Aboriginal people, with specific reference to their race, the High Court declined to substantively hear the merits of the case. Justice Kirby observed that

> If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise

[36] This observation is made in numerous places, including Australian Human Rights Commission, Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act, *National Consultation Report* (2015) 49. Larisa Behrendt, 'You do not inherit; you hold on trust', (2010) *Future Justice 53, 63.*
[37] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009) at [213] (Kirby J).

> intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" had been "acquired". Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face.[38]

44. That is, racially discriminatory laws were applied to Aboriginal people, 'selected by reference to their race'. Their procedural rights under the *Racial Discrimination Act* were suspended, so that they could not legally challenge these laws. When they sought alternative grounds to challenge those laws, the doors of the courts were indeed slammed in their face, despite Kirby J's dissent. This illustrates the failure of existing legislation to withstand political exigencies to protect the rights of Aboriginal and Torres Strait Islander peoples.
45. The inability of the *Racial Discrimination Act* to override racially discriminatory legislation received censure from international human rights organisations. The Committee on the Elimination of Racial Discrimination stated it was

> concerned that protection against racial discrimination is still not guaranteed by the Constitution, in accordance with article 4 of the Convention, and that sections 25 and 51 (xxvi) of the Constitution in themselves raise issues of racial discrimination... Furthermore, it is concerned that the *Racial Discrimination Act 1975* (Cth) does not have primacy over other legislation and includes a provision on special measures that is not in compliance with article 2 (2) of the Convention.[39]

46. These concerns warrant particular note, in light of the Northern Territory Emergency Response. The Committee on the Elimination of Racial Discrimination observed in 2010

> The Committee expresses its concern that the package of legislation under the Northern Territory Emergency Response (NTER) continues to discriminate on the basis of race including through the use of so-called "special measures" by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities, including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work and remedies. While noting that the State party will complete the reinstatement of the *Racial Discrimination Act* in December 2010, the Committee is concerned by the continuing difficulties in using the Act to challenge and provide remedies for racially discriminatory NTER measures (arts. 1, 2 and 5).
>
> The Committee urges the State party to guarantee that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee's general recommendation No. 32 (2009) on the meaning and scope of special measures. It encourages the

[38] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009) at [214] (Kirby J).
[39] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 2.

> State party to strengthen its efforts to implement the NTER Review Board recommendations, namely that: it continue to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory; that it reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership; and that Government actions affecting the Aboriginal communities respect Australia's human rights obligations and conform with the Racial Discrimination Act.[40]

47. The Human Rights Committee also expressed concern that the Northern Territory Emergency Response was inconsistent with the International Covenant on Civil and Political Rights:

> The Committee notes with concern that certain of the Northern Territory Emergency Response (NTER) measures adopted by the State party to respond to the findings of the report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in the Northern Territory ("Little Children are Sacred" of 2007) are inconsistent with the State party's obligations under the Covenant. It is particularly concerned at the negative impact of the NTER measures on the enjoyment of the rights of indigenous peoples and at the fact that they suspend the operation of the Racial Discrimination Act 1975 and were adopted without adequate consultation with the indigenous peoples. (arts. 2, 24, 26 and 27)
>
> The State party should redesign NTER measures in direct consultation with the indigenous peoples concerned, in order to ensure that they are consistent with the 1995 (sic) Racial Discrimination Act and the Covenant.[41]

48. The Special Rapporteur on the rights of Indigenous Peoples James Anaya similarly expressed concern about the Northern Territory Emergency Response in 2010. He wrote

> the differential treatment of indigenous peoples in the Northern Territory involves impairment of the enjoyment of various human rights, including rights of collective self-determination, individual autonomy in regard to family and other matters, privacy, due process, land tenure and property, and cultural integrity. These rights are recognized, inter alia, in the International Covenant on Civil and Political Rights (ICCPR) (especially arts. 1, 14, 17, 27) and in the United Declaration on the Rights of Indigenous Peoples (especially arts. 3, 5, 7, 8, 11, 15, 18, 19, 20, 23, 26, 32). The Declaration places special emphasis on the right of indigenous peoples to self-determination and self-government (arts. 3, 4), to be actively involved in the design and implementation of development initiatives in their communities (art. 23), to control the disposition of their lands and territories (arts. 26, 32), and to be consulted for "legislative or administrative decisions that may

[40] Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia*. UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) 4.
[41] Human Rights Committee, *Concluding Observations of the Human Rights Committee, Australia,* UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 3-4.

> affect them" (art. 19). Significantly, by all accounts, the NTER was initiated without any consultation with the affected indigenous communities. Additionally, especially in its income management regime, the NTER imposes discriminatory treatment of indigenous peoples in relation to their right to social security, which is protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) (art. 9)…
>
> Under the Convention to Eliminate Discrimination (art. 2.1), and various other human rights instruments, including the ICCPR (art. 2.1) and the ICESCR (art. 3), States are obligated to avoid and prevent discriminatory treatment on the basis of race that impairs the enjoyment of human rights. The proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis. Under article 4 (1) of the ICCPR, "[i]n time of public emergency which threatens the life of the nation" a State party may derogate certain rights of the Covenant "to the extent strictly required by the exigencies of the situation" and only "provided that such measures ... do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Similarly, the Declaration states in article 46 that "[a]ny such limitations [on the rights contained therein] shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society".[42]

49. As noted by Anaya, the 'proscription against racial discrimination is a norm of the highest order in the international human rights system'. Where other human rights may be derogated in 'exigent circumstances', they may not be done so on a racially discriminatory basis, according to article 4(1) of the International Covenant on Civil and Political Rights.[43] Whilst under international law, prohibition of racial discrimination is enshrined as an overriding norm, in Australia the *Racial Discrimination Act 1975* (Cth) has been repeatedly overridden.
50. The overriding norm of opposing racial discrimination has not been legally enshrined as a principle in Australia. Whilst there is legislation that has existed for decades to protect some human rights, the lack of entrenchment has meant that it has been overridden for racially discriminatory legislation. As recommended by the Committee on the Elimination of Racial Discrimination, there is a need to properly entrench such protections to prevent them being derogated.

Human rights and the Constitution: the race power

[42] James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, *Situation of Indigenous peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010) 30.
[43] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, 174 (entered into force 3 January 1976).

51. Whilst legislation can be overridden – as the *Racial Discrimination Act 1975* (Cth) repeatedly has been, the *Constitution* is more entrenched. If human rights are to be protected, the *Constitution* provides the strongest institutional framework for ensuring that those rights cannot be discarded when politically expedient. Yet the Australian *Constitution* has the even more concerning 'race power', section 51 (xxvi).
52. The most substantive legal exploration of the 'race power', and whether it could be used to impose a disadvantage on Aboriginal people, was *Kartinyeri v Commonwealth* [1998] HCA 22. In that case, the High Court of Australia considered whether the *Hindmarsh Island Bridge Act 1997* (Cth) was legally valid, as it was made under s 51(xxvi) of the *Constitution*. The Constitutional provision provides that the federal government may make laws in relation to the 'people of any race, for whom it is deemed necessary to make special laws'. As this provision was amended as a result of the 1967 referendum, the plaintiffs argued that the Federal Government should not be able to make laws in relation to people selected by race that imposed a disadvantage on that group. The significance of the case was illustrated in this exchange between the Commonwealth's lawyer and Kirby J:

> KIRBY J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.
>
> MR GRIFFITH: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.[44]

53. The Commonwealth later advanced an argument that laws that committed a 'manifest abuse' – that is, laws that are 'extreme', 'outrageous' or 'completely unacceptable' would be properly rejected by the Court. Kirby J argued that such a test would fail in the cases of South Africa and Germany. For example, Kirby observed that the 'principle legislative manifestation of apartheid' in South Africa simply provided for the 'proclamation of "controlled areas"' in relation to specified groups. All groups were prohibited from acquiring land in certain areas. Kirby J argued that this may well have passed a 'manifest abuse' test. Likewise, Kirby observed that Nazi Germany laws against Jewish people began with 'apparently innocuous provisions', laying 'the

[44] Transcript of Proceedings, *Kartinyeri and ANOR v The Commonwealth of Australia A29/1997* [1998] HCATrans 13 (5 February 1998).

ground for worse to follow'. Those laws 'would, now, be expressly forbidden by the constitutions of both Germany and South Africa'. Yet

> Australia, if s 51(xxvi) of the Constitution permits all discriminatory legislation on the grounds of race excepting that which amounts to a "manifest abuse", many of the provisions which would be universally condemned as intolerably racist in character would be perfectly valid under the Commonwealth's propositions.[45]

54. That is, by 'the time a stage of "manifest abuse" and "outrage" is reached, courts have generally lost the capacity to influence or check such laws'.[46] Justice Kirby's point is that if Australia is going to protect human rights, it must entrench those protections *before* the most abhorrent and discriminatory laws are passed. Yet *Kartinyeri v Commonwealth* [1998] HCA 22 established that the race power could be used to pass laws that negatively affect a group in Australia, targeted on the basis of their race.
55. The race power was considered in a review essay by Robert French, before he became Chief Justice of the High Court of Australia. His analysis was adopted by the Expert Panel on constitutional reform in 2012. In their rendering, French

> commented that, as construed by a now substantial body of High Court jurisprudence, there is nothing in section51(xxvi), 'other than the possibility of a limiting principle of uncertain scope, to prevent its adverse application to Australian citizens simply on the basis of their race'. It followed that there is 'little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race'.[47]

56. The Expert Panel also analysed section 25 of the Constitution. They observed that 'section 25 is a racially discriminatory provision that contemplates the disqualification of all persons 'of any race' from voting in State elections.'[48]
57. Such provisions are deeply concerning. If the Constitution's human rights protections are so inadequate, and the race power is so broad, that Australia could validly enact legislation reminiscent of some of the most racist and oppressive countries in history, then the Constitution fails to protect the right to not be discriminated against on the basis of race.
58. This has received repeated notice from the Committee on the Elimination of Racial Discrimination. In 2017, they recommended that

> the State party take the necessary measures to ensure full incorporation of the Convention into its legal order. The Committee reiterates its previous recommendation that the State party take measures to ensure that the Racial Discrimination Act 1975 (Cth) prevail over all other legislation that may be discriminatory on the grounds set out in the Convention (see CERD/C/AUS/CO/15-17,

[45] *Kartinyeri v Commonwealth* [1998] HCA 22, at [162]-163] (Kirby J).
[46] *Kartinyeri v Commonwealth* [1998] HCA 22, at [163] (Kirby J).
[47] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) 38.
[48] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) 137.

para. 10) and that the definition and scope of special measures be brought into line with article 2 (2) of the Convention and its general recommendation No 32 (2009) on the meaning and scope of special measures in the Convention.[49]

59. This recommendation is consistent with earlier recommendations made by the Committee on the Elimination of Racial Discrimination. In 2010, they expressed concern at

> the absence of any entrenched protection against racial discrimination in the federal Constitution and that sections 25 and 51 (xxvi) of the Constitution in themselves raise issues of racial discrimination.[50]

60. The Committee on the Elimination of Racial Discrimination recommended

> that the State party take measures to ensure that the Racial Discrimination Act prevails over all other legislation which may be discriminatory on the grounds set out in the Convention. The Committee also recommends that the State party draft and adopt comprehensive legislation providing entrenched protection against racial discrimination.[51]

61. In 2005, their report

> reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth (Convention, art. 2). The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.[52]

62. In 2000, the Committee on the Elimination of Racial Discrimination wrote that it was

> concerned over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories. The Committee reiterates its recommendation that the Commonwealth Government should undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.[53]

63. Thus, under international law, it has long been well established that prohibition of racial discrimination is a fundamental norm. This prohibition should override other legal measures.

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[49] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 2.
[50] Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia*. UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) 2.
[51] Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, Australia*. UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) 2.
[52] Committee on the Elimination of Racial Discrimination*, Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination*: *Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005) 2.
[53] Committee on the Elimination of Racial Discrimination*, Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Australia,* UN Doc CERD/C/304/Add.101 (24 March 2000) 2.

Whilst some rights may be balanced, no balancing act is needed in relation to racial discrimination, which should not be tolerated. Yet racially discriminatory measures are constitutionally valid, 'as construed by a now substantial body of High Court jurisprudence'.[54]

G. How to protect human rights: Constitutional protection of human rights

64. The optimal way to protect human rights in Australia is through constitutional entrenchment. The practical difficulty of Constitutional reform makes this a political challenge, as will be reviewed in a later section in this submission, yet it also means that such protections would be difficult to abolish.
65. Such reform would be consistent with Australia's obligations under international law. For example, the prohibition of racial discrimination is an overriding norm under international law, yet such discrimination is constitutionally valid in Australia. Former Special Rapporteur on the rights of Indigenous peoples Anaya observed that

> Under the Convention to Eliminate Discrimination (art. 2.1), and various other human rights instruments, including the ICCPR (art. 2.1) and the ICESCR (art. 3), States are obligated to avoid and prevent discriminatory treatment on the basis of race that impairs the enjoyment of human rights. The proscription against racial discrimination is a norm of the highest order in the international human rights system. Even when some human rights are subject to derogation because of exigent circumstances, such derogation must be on a non-discriminatory basis.[55]

66. Likewise, the Committee on the Elimination of Racial Discrimination

> reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth (Convention, art. 2). The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.[56]

67. Complying with these UN recommendations would require a Constitutional prohibition of racial discrimination. If the Constitution is to allow for exceptions, or 'special measures', their 'definition and scope' must 'be brought into line with article 2 (2) of the Convention and its general recommendation No 32 (2009) on the meaning and scope of special measures in the Convention.'[57]

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[54] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) 38.
[55] James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, *Situation of Indigenous peoples in Australia,* UN Doc A/HRC/15/37/Add.4 (1 June 2010) 30.
[56] Committee on the Elimination of Racial Discrimination*, Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination*: *Australia*, UN Doc CERD/C/AUS/CO/14 (14 April 2005) 2.
[57] Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) 2.

68. As seen previously, the Northern Territory Emergency Response operated due in part to the suspension of the *Racial Discrimination Act 1975* (Cth). Constitutionally entrenched prohibition of racial discrimination would have meant that the Northern Territory Emergency Response could have been legally challenged. Due to the suspension of the *Racial Discrimination Act 1975* (Cth), the High Court 'slam[med] the doors of the courts in' the face of the Aboriginal parties.[58] Constitutional entrenchment would have improved their achieving a substantive hearing in court, and perhaps successfully challenging the Northern Territory Emergency Response.

Recommendation 2: Prohibit racial discrimination in the Constitution. Provide for a special measures exception, on the basis that these special measures conform with the Committee on the Elimination of Racial Discrimination's General Recommendation No 32 (2009).

H. Barrier to protecting human rights in Australia – the challenge of Constitutional reform

69. Constitutional reform is difficult to achieve, as it requires a referendum across Australia. Amending the Constitution requires the affirmative case for change receiving a majority of votes from both electors, and a majority of states. Of the 44 referendums from 1906 to 1999, only eight were successfully passed.[59] Thus, attempts to form the Constitution typically fail. One such unsuccessful attempt occurred in 1988, when the Hawke Government sought to reform the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government. This proposal was supported by less than 31 percent of the electorate.[60]
70. Constitutional law expert Professor George Williams has argued that for a referendum to succeed, the proposal must be based on five pillars: bipartisanship, popular ownership, popular education, a sound and sensible proposal, and a modern referendum process.[61] A paper by the Australian Human Rights Commission similarly found that successful Constitutional reform would

[58] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009) at [214] (Kirby J).
[59] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 217. 'Referendum dates and results', *Australian Electoral Commission*, 24 October 2012. <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm> at 6 June 2019.
[60] 'Referendum dates and results', *Australian Electoral Commission*, 24 October 2012. <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm> at 6 June 2019. Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9(1) *Australian Journal of Human Rights* 65.
[61] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 217.

require bipartisan support, popular ownership, and popular education.[62] The requirement for bipartisan support – or even the widespread perception among the political class of a requirement of bipartisan support – limits what kinds of constitutional changes are possible.

I. Barrier to protecting human rights in Australia – lack of political support

71. As will be reviewed, since 2010, there have been moves to reform the Constitution to support the aspirations of Aboriginal and Torres Strait Islander peoples. Yet these attempts have been shaped by the challenges of Constitutional reform. The reforms proposed have been shaped over multiple consultations and inquiries, yet have not yet led to any change, or to any commitment to a proposed road to Constitutional reform. Any meaningful reforms should attend to the commitments and priorities of First Nations peoples. Yet the process has been marked at least in part by consulting with those communities, and then ignoring, rejecting or moderating the recommendations that followed.

Summary of constitutional reform process, 2012-2018			
Organisation or event	**Date report issued**	**Consultations with Aboriginal and Torres Strait Islander people?**	**Major recommendations for changes**
Expert Panel	January 2012	250 consultations in 84 locations across Australia.[63]	Repealing sections 25 and 51(xxvi) of the Constitution, inserting recognition provisions of First Nations people and languages, providing Parliament with the power to make laws in relation to Aboriginal and Torres Strait Islander people, and prohibiting racial discrimination.[64]
Aboriginal and Torres Strait Islander Act of Recognition Review Panel	September 2014	Consultations with representatives of 14 Aboriginal and Torres Strait Islander organisations.[65]	Did not expressly recommend on what changes should be made. Favoured establishing a Referendum Council to progress wording on Constitutional change. Expressed support for repealing section 25 of the Constitution, reformulating section 51(xxvi), and a statement of recognition. Expressed reservations

[62] Australian Human Rights Commission, 'Constitutional reform: Fact Sheet - Historical Lessons for a Successful Referendum' <https://www.humanrights.gov.au/our-work/constitutional-reform-fact-sheet-historical-lessons-successful-referendum> at 6 June 2019.
[63] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 5-7.
[64] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) xxviii.
[65] John Anderson, Tanya Hosch, Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (19 September 2014) 36-7.

			about Constitutional prohibition of racial discrimination.[66]
Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples	June 2015	Public hearings in 15 cities, consultations with listed witnesses.[67]	Repeal section 25 of the Constitution, suggested three possible models of recognition and reformulating section 51(xxvi) of the Constitution. One of the models would prohibit racial discrimination, two would prohibit racial discrimination specifically against Aboriginal and Torres Strait Islander peoples.[68]
Meeting with the Prime Minister and Leader of the Opposition	July 2015	40 Aboriginal and Torres Strait Islander leaders.[69]	Stated that any Constitutional reform must involve substantive changes. A minimalist approach of preambular recognition, removing section 25 and moderating section 51(xxvi) would not be acceptable to First Nations peoples.[70]
Uluru Statement from the Heart	May 2017	Over 250 Aboriginal and Torres Strait Islander delegates attended.[71]	Urged establishment of a First Nations Voice enshrined in the Constitution, a Makarrata Commission to supervise a process of agreement making and truth-telling about First Nations history.[72]
Referendum Council	June 2017	12 First Nations Regional Dialogues, one information session, and the National Constitutional Convention at Uluru.[73]	Hold a referendum to establish an Aboriginal and Torres Strait Islander Voice to the Commonwealth Parliament. The functions of the body should be set out in legislation, and should include monitoring the Constitutional heads of power section 51(xxvi) and 122. Pass legislation in all Australian Parliaments to articulate a symbolic statement of recognition.[74]
Joint Select Committee on Constitutional Recognition relating to Aboriginal and	November 2018	Public hearings in 12 cities and towns across Australia. Consultations with listed witnesses.[75]	Australian government initiate a process of co-designing the Voice with Aboriginal and Torres Strait Islander peoples. Australian government to then consider options for establishing the Voice. Australian government should also support the process of truth-telling, and establish a National Resting Place for

[66] John Anderson, Tanya Hosch, Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (19 September 2014) 7-8.
[67] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) 119-128.
[68] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) xiii-xvi.
[69] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council* (2017) 4.
[70] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council* (2017) 4.
[71] Harry Hobbs, 'Explainer: why 300 Indigenous leaders are meeting at Uluru this week', *Conversation*, 23 May 2017. <https://theconversation.com/explainer-why-300-indigenous-leaders-are-meeting-at-uluru-this-week-77955> at 25 June 2019.
[72] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council* (2017) i.
[73] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council* (2017) 9.
[74] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council* (2017) 2.
[75] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2018) 223-242.

Torres Strait Islander Peoples			Aboriginal and Torres Strait Islander remains.[76]

72. The process of Constitutional reform began with the appointment of an Expert Panel in December 2010. It held consultations across Australia from May to October 2011. These included 250 consultations with Aboriginal and Torres Strait Islander communities, with over 4600 attendees.[77] In the consultations, 83 per cent of submissions received supported constitutional recognition of Indigenous peoples. Many Indigenous people supported recognition too, including over 90 per cent of respondents to questionnaires. However, many participants were opposed to 'merely symbolic' or 'tokenistic' recognition, insisting that it had to 'be accompanied by substantive change'.[78]
73. During consultations, discussion of sections 25 and 51(xxvi) of the Constitution 'featured prominently'. An 'overwhelming majority' supported removing section 25 of the Constitution. A majority also supported amending or removing the race power. Whilst some supported its abolition, others were concerned that if it were removed, it may affect legislation 'enacted in reliance on it'. Some favoured reforming the power so it could only be used for the 'benefit' of a racial group. Others suggested a requirement of 'free, prior and informed consent' for the power to be used. Some wanted the language of 'race' itself to be changed, regarding it as an outdated social construct that should not be used in the Constitution. Some 75 per cent of Indigenous questionnaire respondents wanted to change the race power, so that it could not be used to discriminate against Aboriginal and Torres Strait Islander peoples.[79]
74. The consultations also reviewed the possibility of introducing a racial non-discrimination clause into the Constitution. 84 per cent of Aboriginal and Torres Strait Islander people who responded to the questionnaire 'strongly agreed' with adding such a provision to the Constitution.[80] Other ideas for constitutional reform were also raised in consultations, such as parliamentary seats reserved for First Nations peoples.[81] Perhaps most significantly, at 'almost every consultation,

[76] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2018) xxvi-xxvii.
[77] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 5-7.
[78] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 67-70.
[79] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 82-4.
[80] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 89-90.
[81] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 4, 93.

Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished.'[82]

75. Based on consultations, it would seem one of the primary concerns of Aboriginal and Torres Strait Islander people consulted was the issue of sovereignty. Yet no recommendations were made in relation to addressing this question. In part, this may be attributed to the four guiding principles the Expert Panel decided on in relation to assessing proposals. The third principle stated that any proposal must 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. This is understandable, given the difficulty of Constitutional reform and the history of referenda. Yet this limited the types of proposals that were open to consideration. The Expert Panel's final substantive recommendations for Constitutional reform were repealing sections 25 and 51(xxvi) of the Constitution, inserting recognition provisions of First Nations people and languages, providing Parliament with the power to make laws in relation to Aboriginal and Torres Strait Islander people, and prohibiting racial discrimination.[83]
76. The federal government passed legislation to recognise Aboriginal and Torres Strait Islander people, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth). This established the Aboriginal and Torres Strait Islander Act of Recognition Review Panel, which reported on Constitutional reform in 2014.[84] Though the Aboriginal and Torres Strait Islander Act of Recognition Review Panel reviewed Constitutional recognition favourably, it did not endorse Constitutional prohibition of racial discrimination. It noted there was concern, particularly from constitutional conservatives, about changing the race power. Prohibiting racial discrimination

> raises the most polarising views. Public opinion research shows strong public support for a protection from racial discrimination. The key issue is whether the Constitution is the appropriate vehicle for such reflections. A broad prohibition from racial discrimination would not be supported by constitutional conservatives…[85]

77. This was followed by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' *Final Report* in 2015 on constitutional reform. It stated that 'the support of Aboriginal and Torres Strait Islander peoples is of critical importance', and that 'At all times, the committee has sought to hear the aspirations of Aboriginal and Torres Strait Islander peoples.' It adopted some of the Expert Panel's recommendations – repealing section 25, the

[82] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 97.
[83] Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) xviii.
[84] *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 4.
[85] John Anderson, Tanya Hosch, Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (19 September 2014) 19-20.

race power. However, it was more equivocal on the question of prohibiting racial discrimination. Rather than recommending the Constitution be reformed in that way, the Committee recommended three options for reform be 'considered for referendum'. Considering different models for prohibiting racial discrimination is not the same as recommending any of them, let alone one of them. The Committee recommended a series of constitutional conventions, and a referendum on recognising Aboriginal and Torres Strait Islander peoples in the Constitution.[86]

78. In 2015, 40 Aboriginal and Torres Strait Islander leaders met with the Prime Minister Tony Abbott, and leader of the Opposition Bill Shorten. They said that constitutional reform 'must involve substantive change'. If it merely meant preambular recognition, removing section 25 and moderating the race power, it would 'not be acceptable' to Aboriginal and Torres Strait Islander peoples.[87]
79. In December 2015, a new panel was appointed to consider the issue of Constitutional Reform, the Referendum Council. The Referendum Council published its report in June 2017. The report adopted the four principles of the Expert Panel, including that the proposal must be capable of gaining the support of an 'overwhelming majority' of Australians from 'across the political and social spectrums'.[88] Like earlier reports, this principle ensured that any proposal would be politically moderate. As will be reviewed, the Referendum Council wound up abandoning the recommendations of the Expert Panel, and making entirely different recommendations.
80. In a certain sense, there was a disconnect between the earlier process, and that of the Referendum Council. The Expert Panel began in 2010, it conducted widespread consultations, and made concrete recommendations. This was followed by the Joint Select Committee, which broadly adopted those recommendations. This was not followed by implementation, but by a new round of consultations, followed by completely different recommendations. This requires some explanation, given that both sets of recommendations were justified based on the consultations that they each held.
81. The campaign website for the Uluru Statement from the Heart discusses the developments to the 2017 Statement from the Heart. It notes that the earlier recommendations from the Expert Panel 'encountered political roadblocks', as the recommendation to constitutionally prohibit racial discrimination was 'contentious', and 'raised concerns for some commentators and political leaders'. These 'political roadblocks forced a shift in thinking around constitutional reform'.[89]

[86] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015) v, xiii-xvi.
[87] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 4-5.
[88] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 5.
[89] 'The road to Uluru', <https://www.1voiceuluru.org/the-road-to-uluru> at 5 June 2019.

82. These roadblocks were political opposition. For example, Prime Minister Tony Abbott expressed 'reservations about anything that might turn out to be a one-clause bill of rights'. Self-described constitutional conservative Greg Craven also publicly opposed the proposed clause prohibiting racial discrimination.[90]

83. This process of amending the proposals was discussed by Shireen Morris, a Senior Policy Adviser to the Cape York Institute. She describes herself as working with Noel Pearson for seven years on constitutional reform. The Expert Panel's call for constitutionally prohibiting racial discrimination 'was meeting concerted opposition from the conservative right'. This 'political and ideological divide' was met with 'an extraordinary process of negotiation and problem-solving', with 'Noel and me, two enthusiastic would-be constitutional reformers… politically blocked in our reform aspirations by these dedicated constitutional upholders'. They 'realised that the Expert Panel's proposals may have been too far to the left to be capable of winning the bipartisan consensus necessary for a referendum to change the Constitution.' Thus, 'As Noel advised me, we needed to move the proposal to the right and up, where it might have a chance at succeeding'. This process involved 'reasoned disagreement, argumentation and collaborative problem solving' with constitutional conservatives, or 'con cons'.[91]

84. Discussions with the constitutional conservatives (or 'con cons') and the Cape York Institute began in 2014.[92] According to Morris, in this process

> with the con cons, we co-designed the idea of a constitutionally guaranteed Indigenous advisory body to have non-binding, non-justiciable input into Indigenous affairs laws and policies. No High Court uncertainty. Complete respect for parliamentary supremacy. Yet a constitutionally guaranteed Indigenous voice…[93]

85. The Cape York Institute recommended in 2014 that Constitutional reforms consist of amending the language of the race power, removing section 25 of the Constitution, and 'establishing an Indigenous body to give Indigenous people a fair voice in Parliament's law making for Indigenous

[90] Michael Gordon, 'A pathway to consensus on Indigenous recognition', *Sydney Morning Herald*, 17 April 2015. <https://www.smh.com.au/national/a-pathway-to-consensus-on-indigenous-recognition-20150417-1mnb26.html> at 20 June 2019.
[91] Shireen Morris, 'The Radical Centre: Constitutional Conservatism and Indigenous Recognition', *ABC Religion*, 17 April 2018. <https://www.abc.net.au/religion/the-radical-centre-constitutional-conservatism-and-indigenous-re/10094802> at 5 June 2019.
[92] Cape York Institute, 'Response to Karen Middleton in *The Saturday Paper* "The Making of the Uluru Statement",' *Cape York Partnership*, 3 June 2017. <https://capeyorkpartnership.org.au/media-articles/response-to-karen-middleton-in-the-saturday-paper-the-making-of-the-uluru-statement-3-june-2017/> at 5 June 2019.
[93] Shireen Morris, 'The Radical Centre: Constitutional Conservatism and Indigenous Recognition', *ABC Religion*, 17 April 2018. <https://www.abc.net.au/religion/the-radical-centre-constitutional-conservatism-and-indigenous-re/10094802> at 5 June 2019.

affairs'.[94] The proposal from Pearson and the Cape York Institute was drafted with assistance from legal academic Anne Twomey.[95]

86. This recommendation won plaudits across the media, including from previous sceptics. For example, constitutional conservative Greg Craven, who opposed constitutional prohibition of racial discrimination, praised 'Noel Pearson's indigenous recognition plan' in the *Australian.* Craven wrote that Pearson proposed recognition, along with 'a simple insertion into the Constitution, provide for a body of indigenous scrutiny to -advise parliament and government on laws affecting indigenous people.' This 'genuinely brilliant' proposal from Pearson 'combined minimal constitutional exposure with maximum moral impact.'[96]
87. In the *Guardian* in April 2015, Fergal Davis discussed Pearson proposing a combination of Constitutional recognition with a 'non-binding consultative body' which 'would defer to parliament'. Whilst this idea was floated by the Wunan Foundation, it was advanced in a particular way by Pearson's 'proposal', where 'parliament would remain supreme, free to disagree with the proposals of the consultative body.' The body would have 'no legally enforceable right', but it would have 'political authority'. The government and parliament would 'face pressure to respect an institution established by the people through a referendum'. Davis observed that 'Many will see the proposals for a symbolic declaration and a consultative body as overly deferential to constitutional conservatives'.[97]
88. Thus, the Expert Panel's recommendations were based on widespread consultations with Aboriginal and Torres Strait Islander peoples. The recommendations then met 'political roadblocks' – over the course of 2010-2015, it became clear that it did not have the political support it would need to advance. This was due at least in part to the opposition of constitutional conservatives. Thus, Noel Pearson, a member of the Expert Panel, and subsequently a member of the Referendum Council, developed a proposal for different reforms to the Constitution, which, moved 'to the right and up', were moderate enough to win over conservatives. The nature of the

[94] Cape York Institute, Submission No 38 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, October 2014, 3.
[95] Anne Twomey, 'Putting words to the tune of Indigenous constitutional recognition', *The Conversation,* 20 May 2015. <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038 > at 21 June 2019. Bridie Jabour, 'Indigenous advisory body would have most impact: constitutional expert', *The Guardian*, 16 April 2015. <https://www.theguardian.com/australia-news/2015/apr/16/indigenous-advisory-body-would-have-most-impact-constitutional-expert> at 21 June 2019.
[96] Greg Craven, 'Noel Pearson's indigenous recognition plan profound and practical', *The Australian*, 23 May 2015. <https://www.theaustralian.com.au/nation/politics/noel-pearsons-indigenous-recognition-plan-profound-and-practical/news-story/472ff0238ad4f48cd423fdd9f74a9363> at 20 June 2019.
[97] Fergal Davis, 'Noel Pearson's proposal could deliver real authority for Indigenous Australia', *Guardian*, 14 April 2015. <https://www.theguardian.com/commentisfree/2015/apr/14/noel-pearsons-proposal-could-deliver-real-authority-for-indigenous-australia> at 20 June 2019.

reform was later characterised as a 'modest and conservative ask' by Referendum Council co-chair, Patricia Anderson.[98]

89. The Referendum Council was guided by 12 Regional Dialogues with Aboriginal and Torres Strait Islander peoples across Australia, an information session in Canberra, and a National Constitutional Convention in Uluru.[99] It too committed to assessing proposals in the light of certain principles, such as being 'capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'.[100] The dialogues included discussions of different types of reform, summarised in this table. Prohibiting racial discrimination was endorsed at most consultations.[101] The proposals for a Voice, and 'agreement making' through Treaty and Truth-telling were endorsed at all consultations.

	Statement of Acknowledgement	Head of Power	Prohibition on Racial Discrimination	A Voice to Parliament	Agreement-Making
Hobart	Not endorsed	Endorsed	Endorsed	Endorsed	Endorsed
Broome	Inconclusive	Endorsed	Not recorded	Endorsed	Not recorded
Dubbo	Not endorsed	Inconclusive	Not recorded	Endorsed	Endorsed
Darwin	Not endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Perth	Not endorsed	Endorsed	Endorsed	Endorsed	Endorsed
Sydney	Inconclusive	Inconclusive	Endorsed	Endorsed	Endorsed
Melbourne	Not endorsed	Not recorded	Not recorded	Endorsed	Endorsed
Cairns	Inconclusive	Inconclusive	Not recorded	Endorsed	Endorsed
Ross River	Endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Adelaide	Inconclusive	Inconclusive	Not recorded	Endorsed	Endorsed
Brisbane	Inconclusive	Not endorsed	Endorsed	Endorsed	Endorsed
Thursday Island	Not endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Canberra	Not endorsed	Not recorded	Not recorded	Not recorded	Not recorded

Endorsed
Not endorsed
Inconclusive
Not recorded

90. This was followed by the Uluru Statement from the Heart, agreed to by delegates from the consultations. The Statement affirms Aboriginal and Torres Strait Islander sovereignty, which it notes has not been ceded or extinguished. It calls for the 'establishment of a First Nations Voice

[98] Patricia Anderson, 'We are again asking the Australian people to walk with us', *Sydney Morning Herald*, 27 May 2019. <https://www.smh.com.au/national/we-are-again-asking-the-australian-people-to-walk-with-us-20190526-p51r7z.html> at 5 June 2019.
[99] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 9.
[100] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 5.
[101] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 15.

enshrined in the Constitution', and 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.'[102]

91. The nature of the Voice recommendation has also divided some of those who support the Uluru Statement from the Heart. The Referendum Council recommendation in relation to the Voice states

> That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.[103]

92. In this model, the Constitution is to establish the Voice for First Peoples, 'with the structure and functions of the body to be defined by Parliament'.[104]

93. This interpretation of the Uluru Statement was disputed by the Statement from the Heart Working Group (SfHWG). In a submission to a 2018 Joint Select Committee Inquiry, SfHWG noted that their

> members were elected from the Uluru First Nations' National Constitutional Convention in May 2017, drawing from the thirteen (13) Regional Dialogues across all States and Territories. The SfHWG was established by the delegates at the this (sic) Constitutional Convention, to pursue the implementation of the Uluru Statement, and to provide information to and receive feedback from the various regions of Australia.[105]

94. SfHWG note that 'All delegates agreed that there was a need for a national self-determining Voice, which is representative of All First Nations' Peoples'. However, 'First Nations People did not agree that a constitutionally entrenched advisory Voice to Parliament was a suitable option'. SfHWG

> strongly agrees with the consensus from the thirteen dialogues across Australia, that a single reform, such as an Advisory Voice enshrined in the Constitution, does not address the structural nature of being disenfranchised from years of being excluded from decision-making.[106]

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[102] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* i.
[103] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 2.
[104] Pat Anderson and Mark Leibler et al, *Final Report of the Referendum Council (2017)* 2.
[105] Statement from the Heart Working Group, Submission No 302 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 1.
[106] Statement from the Heart Working Group, Submission No 302 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 2.

95. They note 'all of' the First Nations 'advisory bodies' since the 1970s, such as National Aboriginal Consultative Committee, Aboriginal and Torres Strait Islander Commission, the National Congress of Australia's First Peoples and Prime Ministerial advisory committees, 'have been defunded/removed from legislation, when engaged in conversations about Treaty, Sovereignty and a true sense of self-determination for First Nations' peoples.' Thus, they regard

> the Referendum Council's Advisory Voice model as unsustainable, and not providing the structural change needed to substantively address First Nations' inequality and inequity in this country.[107]

96. The

> fundamental issue in relation to the recommendations of the Referendum Council and its predecessors is whether any of the recommendations accord with the wishes of the Aboriginal and Torres Strait Islander Peoples.[108]

97. Whilst there is disagreement with the model proposed by the Referendum Council, there is some agreement in relation to what was said at the Regional Dialogues. A submission to the same inquiry was made by Referendum Council members Patricia Anderson, Noel Pearson, Megan Davis, and other legal experts. They note that 'At the Dialogues, much concern was expressed with the idea of the body being merely "advisory"'.[109] Consequently, in

> accordance with the views expressed in the Regional Dialogues and the national constitutional convention, the function of the Voice is not described as 'advisory' or 'consultative' only. The Voice is given a proactive, self-determined function of presenting its views, rather than waiting to be 'engaged by' or 'consulted by' the Parliament or the Executive.
>
> Again, consistent with the calls in the Regional Dialogues it does not limit the Voice to a Voice 'to Parliament', but, rather, explains that its primary function will be to present its views to Parliament and the Executive.[110]

98. In this submission, the body is not 'advisory', because it has a 'proactive, self-determined function of presenting its views', rather than waiting to be engaged or consulted. And it is not a Voice to Parliament, because it is expected to also present its views to the Executive. However, though the authors conclude that the body is not 'advisory',

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[107] Statement from the Heart Working Group, Submission No 302 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 2.

[108] Statement from the Heart Working Group, Submission No 302 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 3.

[109] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 7 n 10.

[110] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 7.

> It is not intended for the Voice to have any form of veto power over the legislative process, and therefore it will rely upon political respect from other constitutional institutions (the Parliament and the Executive) to achieve positive influence. Constitutional enshrinement gives it legitimacy and status from which to build this positive political influence.[111]

99. Due to the lack of veto power, 'or the power to delay legislative or executive decision-making', it 'does not interfere with the legislative or executive function'.[112] The 'detail of the Voice' will be 'determined by Parliament'. This means that functions can be conferred on the Voice by Legislation. Whilst these functions '*should* be determined in dialogue with First Nations', this does not mean they will be. There 'is no requirement for this design to be undertaken with the participation of Aboriginal and Torres Strait Islander peoples'.[113]

100. The authors support Constitutionally enshrining this body, to 'usher in a new era of stability and continuity in Aboriginal and Torres Strait Islander affairs.' This is needed, as in the past, 'there has been no protection against unilateral abolition of First Nations representative structures or against the instability, disempowerment and lack of certainty that follows.'[114] Yet if a Voice is Constitutionally established, whilst its functions, structure, membership and budget are determined by Parliament, only the nominal existence of the Voice would thereby by secured. The legislative power over the Voice could see it institutionally transformed every few years, with drastic fluctuations in membership, institutional structure, budget and function.

101. The Voice is the only part of the proposal from the Referendum Council proposals which requires Constitutional entrenchment. However, despite the support of 'Constitutional Conservatives', it has failed to win bipartisan support. Prime Minister Malcolm Turnbull rejected it in October 2017 as not 'desirable' and not 'capable of winning acceptance at referendum'.[115]

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[111] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 5.

[112] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 9.

[113] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 9-10. Emphasis added.

[114] Pat Anderson, Noel Pearson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, 3 November 2018, 4.

[115] Calla Wahlquist, 'Indigenous voice proposal "not desirable", says Turnbull', *Guardian*, 26 October 2017. <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull> at 6 June 2019. Malcolm Turnbull, '
Response to Referendum Council's report on Constitutional Recognition', 26 October 2017. <https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition> at 6 June 2017.

This was followed by the next Prime Minister, Scott Morrison, rejecting the proposed Voice to Parliament, claiming it would be a 'third chamber' to Parliament.[116]

102. Thus, the process of consultations with First Nations People saw a series of Constitutional reforms proposed. These substantive reforms did not progress, due to opposition by successive governments. This was followed by a new round of consultations, leading to a recommendation based on the hope of reaching consensus around a minimalist form of self-determination, where a First Nations Voice is Constitutionally entrenched, but whose powers and functions are to be determined by Parliament. Whether this model conforms to what was envisioned at Uluru is disputed by the Statement from the Heart Working Group. Yet even this model for constitutional reform has perhaps been rendered non-viable, due to a lack of political support. All reports on Constitutional reform have noted the need for support across the political spectrum. Yet substantive reforms – prohibiting racial discrimination, entrenching a First Nations Voice – have not received the support of either Prime Minister since the Statement from the Heart was issued.

103. The conflict between the submissions by the Referendum Council and the SfHWG may perhaps be resolved by the report by the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples in 2018. It recommended a co-design process for the Voice, involving Aboriginal and Torres Strait Islander peoples and the government. Once this co-design process has taken place, it recommends 'the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice.' The Joint Select Committee also recommends supporting the process of truth-telling, and establishing a National Resting Place in Canberra for the remains of Aboriginal and Torres Strait Islander people. It does not make recommendations in relation to Makarrata Commission for agreement making and truth telling.[117] As the co-design principle may advance the Uluru Statement from the Heart, it should be adopted. The other recommendations from Uluru should also be adopted.

Recommendation 3: Repeal section 25 of the Constitution.

Recommendation 4: Progress the Uluru Statement from the Heart recommendation on a Constitutionally enshrined Voice, through the co-design process recommended by the

[116] Paul Karp, 'Scott Morrison claims Indigenous voice to parliament would be a third chamber', *Guardian*, 26 September 2018. <https://www.theguardian.com/australia-news/2018/sep/26/scott-morrison-claims-indigenous-voice-to-parliament-would-be-a-third-chamber> at 6 June 2019.

[117] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2018) xxvii-xxviii, 160-1.

Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.

Recommendation 5: Implement the Uluru Statement from the Heart recommendation on a Makarrata Commission to supervise a process of agreement making between government and First Nations, and truth-telling about our history.

J. How to protect human rights: human rights legislation in Australia

A human rights act for Australia

104. In these circumstances, it appears that whilst Constitutional reform would be the optimal way to entrench the rights of Aboriginal and Torres Strait Islander peoples, it may not be politically viable at this point in time. For any referendum to succeed, it needs bipartisan support, and the support of people across the social and political spectrum. The Expert Panel's recommendations did not progress for this reason. The Referendum Council's recommendations have been rejected by two Prime Ministers, though they may have represented a more moderate version of what was envisioned at Uluru. Due to this rejection, it seems unlikely that the Voice will proceed to Referendum. It seems Constitutionally prohibiting racial discrimination will not proceed to Referendum either, though the Dialogues indicated continuing significant First Nations support for this proposal.

105. If the Voice does not successfully make it through a referendum, or even to a referendum, after years of consultations, expert panels, parliamentary inquiries, and media campaigns, then the prospects for broader Constitutional reform in the near future seem politically non-feasible.

106. Yet if Constitutional reform may be politically unlikely, legislative protections of human rights are more feasible, and are worthwhile. The lack of general human rights protections in Australia has received repeated notice by international human rights bodies. In 2017, the Human Rights Committee recommended legal protections for human rights:

> The Committee notes the State party's position that existing domestic laws adequately implement the Covenant provisions, but observes that gaps in the application of Covenant rights still exist. The Committee thus remains concerned about the lack of comprehensive incorporating legislation. While acknowledging the efforts made to provide human rights training to judges, lawyers and public servants on an as-needed basis, the Committee is concerned about reports suggesting that there is limited awareness of the Covenant among State officials, which, coupled

> with the failure to incorporate the Covenant into domestic law, could adversely affect the effective implementation of the Covenant at the domestic level (art. 2).
>
> The Committee reiterates its recommendation (see CCPR/C/AUS/CO/5, para. 8) that the State party should adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions. It should also step up efforts to raise awareness about the Covenant and ensure the availability of specific training on the Covenant at the state and territory levels for judges, lawyers, prosecutors, law enforcement officers and public servants and for federal immigration staff.[118]

107. In 2009, the Human Rights Committee expressed concern

> that the [International] Covenant [on Civil and Political Rights] has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant. (art. 2)
>
> The State party should: (a) enact comprehensive legislation giving de facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; (b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; (c) provide effective judicial remedies for the protection of rights under the Covenant; and (d) organize training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee.[119]

108. These are worthwhile and substantive recommendations which would contribute to human rights in Australia. A mechanism to ensure laws are consistent with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights would be important for challenging laws arguably inconsistent with human rights, such as the Children and Young Persons (Care and Protection) Amendment Bill 2018 (NSW) discussed above. Effective judicial remedies would offer an avenue for redress, such as where Aboriginal children are inappropriately removed from their families and left with non-Indigenous carers. Training public officials such as the judiciary, prosecutors and law enforcement officers could contribute to a cultural shift, where rights were more broadly respected, and considered in everyday decision making.

[118] Human Rights Committee, *Concluding observations on the sixth periodic report of Australia,* UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 2.
[119] Human Rights Committee, *Concluding Observations of the Human Rights Committee, Australia,* UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 2.

Recommendation 6: Enact federal human rights legislation to give effect to all of the rights of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This legislation should

a) establish a mechanism to ensure Australian laws comply with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,

b) provide effective judicial remedies to protect those rights,

c) train the judiciary, lawyers, prosecutors, law enforcement officers, public servants and federal immigration staff on protecting rights.

Existing human rights acts in Queensland, Victoria and the Australian Capital Territory

109. Whilst there is presently no comprehensive legislative human rights protections, Victoria, Queensland and the Australian Capital Territory have enacted different version of human rights acts.[120] These are the *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (Qld), and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Though there are divergences in the three Acts, they converge in numerous ways. The points of convergence offer some guidance as to what kind of human rights legislation may be passed in states and territories.

110. One of the most striking elements of convergence of the three Acts is in relation to the rights that they recognise and protect. These rights are listed in the table below. The prescribed rights are primarily civil and political rights. The exceptions – economic, cultural and social rights – are proscribed. For example, the *Human Rights Act 2019* (Queensland) is the only one to prescribe a right to health services. Yet this right provides that

> (1) Every person has the right to access health services without discrimination.
>
> (2) A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.[121]

Right	**Vic** (section)	**ACT** (section)	**Qld** (section)
Recognition and equality before the law	8	8	15
Right to life	9	9	16
Protection from torture and cruel, inhuman or degrading treatment	10	10	17
Freedom from forced work	11	26	18
Freedom of movement	12	13	19
Privacy and reputation	13	12	25
Freedom of thought, conscience, religion and belief	14	14	20

[120] *Charter of Human Rights and Responsibilities Act 2006 (*Vic), *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (Qld)

[121] *Human Rights Act 2019* (Qld) s 37.

Freedom of expression	15	16	21
Peaceful assembly and freedom of association	16	15	22
Protection of families and children	17	11	26
Taking part in public life	18	17	23
Cultural rights	19	-	27
Property rights	20	-	24
Right to liberty and security of person	21	18	29
Humane treatment when deprived of liberty	22	19	30
Children in the criminal process	23	20	33
Fair hearing/trial	24	21	31
Rights in criminal proceedings	25	22	32
Right not to be tried or punished more than once	26	24	34
Retrospective criminal laws	27	25	35
Compensation for wrongful conviction	-	23	
Cultural and other rights of Aboriginal and Torres Strait Islander peoples	19	27	28
Right to education	-	27A	36
Right to health services	-	-	37

111. That is, the right to health services is limited to ensuring that health services do not discriminate, and providing life-saving health services in emergency conditions. This is less expansive than the Bill of Rights in the South African Constitution. The South African Constitution offers more expansive protections of economic and social rights. For example, it provides that

> 1) Everyone has the right to have access to:
>
> a. health care services, including reproductive health care;
>
> b. sufficient food and water; and
>
> c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
>
> 3) No one may be refused emergency medical treatment.[122]

112. Likewise, the Queensland legislation provides that 'Every child has the right to have access to primary and secondary education appropriate to the child's needs'. It further provides that 'Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.'[123] These do not offer the prospect of expanded economic rights, as opposed to defending the civil and political rights to enjoying services that are supposed to be provided to all Australians.

113. These may be compared to the more expansive rights protected in the South African Constitution. For example, they provide that 'Every worker has the right' to 'form and join a trade

[122] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 27.
[123] *Human Rights Act 2019* (Qld) s 36.

union' and 'to strike'.[124] Everyone 'has the right to an environment that is not harmful to their health or well-being', and 'to have the environment protected, for the benefit of present and future generations'.[125] Everyone has 'the right to have access to adequate housing', and the state 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' No one 'may be evicted from their home, or have their home demolished' without a court order, and the court having considered 'all the relevant circumstances'.[126] Furthermore, every child has the right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.[127]

114. Guaranteeing the right to family or parental care could offer legal protections for First Nations families. The provision about 'appropriate alternative care' could also offer protection in relation to Aboriginal and Torres Strait Islander children who are placed with non-Indigenous carers. Where carers are non-Indigenous, appropriate mechanisms for legal challenge could be engaged to challenge whether they can be considered 'appropriate'. Where removals occur, a family might argue that the child has a right to parental care. Where courts consider whether removal is appropriate, they can do so in light of the right of the child to parental care.

Recommendation 7: Human rights legislation should include the economic, cultural and social rights enshrined in the International Covenant on Economic, Social and Cultural Rights, and be modelled on the Bill of Rights in the South African Constitution.

115. As seen, the Human Rights Committee recommends that human rights legislation establishes a mechanism to ensure Australian laws comply with the International Covenant on Civil and Political Rights, and provides effective judicial remedies for protecting those rights. The legislation in Queensland, Victoria and the Australian Capital Territory (ACT) will be analysed with reference to these benchmarks.

Mechanism for ensuring Australian laws comply with human rights

116. When an Act is introduced to Parliament in Queensland or Victoria, the relevant Member of Parliament must include a statement of compatibility. In the ACT, this statement is provided by the Attorney-General. This statement must explain how the Bill is consistent with human rights in

[124] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 23(1)
[125] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 24.
[126] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 26.
[127] *Constitution of the Republic of South Africa Act 1996* (South Africa) s 28.

the relevant legislation. In each state and territory, a relevant Committee must then examine whether the Bill is compatible with human rights. If the Member of Parliament or relevant Committee fails to observe this procedure by providing the statement of compatibility, it will have no effect on the validity, operation or enforcement of the Act or its provisions.[128]

117. Thus, whilst the three human rights Acts ensure that bills are scrutinised in Parliamentary organisations for their compliance with human rights, there are no consequences for incompatibility. If a Member of Parliament finds their own Bill is inconsistent with human rights, there are no legal consequences. That person can continue to introduce the Bill, despite the inconsistency. If the Committee finds the Bill inconsistent with human rights, that will also have no consequences. Thus, these mechanisms may result in scrutiny of human rights, but they do not ensure that Australian laws comply with human rights.

Recommendation 8: If a Member of Parliament or Attorney-General, in their statement of compatibility, finds that a Bill is inconsistent with human rights, the Bill should be withdrawn. If a parliamentary Committee, engaging in mandated legislative scrutiny, finds that a Bill is inconsistent with human rights, the Bill should be withdrawn.

118. The Queensland and Victorian human rights Acts provide for override declarations. Override declarations provide that where an Act conflicts with relevant human rights, the Act will have effect despite that inconsistency. Override declarations provide a mechanism for ensuring that Australian laws do not have to comply with human rights. These provisions are inconsistent with Australian human rights obligations under international law. As such, they should be repealed, and should not be included in future human rights legislation.[129]

Recommendation 9: Override declarations should not be included in future human rights legislation. Override declaration provisions should be removed from the *Human Rights Act 2019* (Qld), and the *Charter of Human Rights and Responsibilities 2006* (Vic).

119. There are also limitations on the human rights Acts in relation to laws that are manifestly inconsistent with human rights. For example, the Victorian legislation provides that 'So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a

[128] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28-30; *Human Rights Act 2019* (Qld) 38-42; *Human Rights Act 2004* (ACT) ss 36-8.
[129] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 31; *Human Rights Act 2019* (Qld) 43-7.

way that is compatible with human rights.'[130] That is, if the purpose is to deny human rights, then statutes do not have to be interpreted consistently with human rights. Furthermore, in the Victorian legislation, this requirement 'does not affect the validity' of Acts or provisions that are 'incompatible with a human right'.[131]

120. Where the Human Rights Committee observes the need for a mechanism to ensure that laws are consistent with human rights, this is another mechanism for Australian laws to be inconsistent with human rights. The only requirement for this exemption is that the law's purpose be inconsistent with human rights. Exempting laws that are inconsistent with human rights from human rights legislation in effect is inappropriate. Such laws are likely to most require meaningful human rights intervention.

Recommendation 10: Existing and future human rights legislation should provide that all laws must be interpreted in a way that is compatible with human rights, irrespective of their purpose.

Effective judicial remedies

121. Two types of judicial remedies are envisaged under the three human rights instruments. One is a declaration of incompatibility by the relevant Supreme Court. The other is seeking non-damages related remedies against public officials who have breached human rights.

122. In Victoria, referrals to the Supreme Court for possible declarations of incompatibility can be made if there is already a proceeding in a court or tribunal. Referrals can be made in relation to statutory interpretation, or the application of the *Charter of Human Rights and Responsibilities.*[132] In the ACT, referrals can be made if there is already a proceeding in the Supreme Court, and an issue arises about whether an ACT law is consistent with human rights.[133] In Queensland, referrals can be made if there is a proceeding before a court or tribunal, and a question arises about interpreting a statutory provision, or a legal question in relation to the application of the Human Rights Act.[134]

[130] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32. Emphasis added. Similar provisions in *Human Rights Act 2019* (Qld) ss 48; *Human Rights Act 2004* (ACT) s 30.
[131] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.
[132] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 33.
[133] *Human Rights Act 2004* (ACT) s 32.
[134] *Human Rights Act 2019* (Qld) s 49.

123. Requiring an already existing court or tribunal proceeding to seek a declaration of incompatibility limits the availability of judicial remedies artificially. Such provisions should be removed to increase access to effective remedies for human rights breaches.

Recommendation 11: Seeking a declaration of incompatibility from the Supreme Court should not require referral from a court or tribunal.

124. Declarations of incompatibility are not an effective form of legal remedy. The three human rights instruments provide that such declarations have limited legal effect. The Queensland Act provides

> A declaration of incompatibility does not—
>
> (a)affect in any way the validity of the statutory provision for which the declaration was made; or
>
> (b)create in any person any legal right or give rise to any civil cause of action.[135]

125. The Victorian Charter provides that

> (5) A declaration of inconsistent interpretation does not—
>
> (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
>
> (b) create in any person any legal right or give rise to any civil cause of action.[136]

126. The *Human Rights Act 2004* (ACT) provides

> (3) The declaration of incompatibility does not affect—
>
> (a) the validity, operation or enforcement of the law; or
>
> (b) the rights or obligations of anyone.[137]

127. These ensure that any declaration of incompatibility between human rights and the relevant statutes does not offer an effective remedy, in the sense of invalidating laws or their operation where they are inconsistent with human rights.

128. Instead, the three instruments provide that the Supreme Court must give a copy of the declaration of incompatibility to the Attorney-General. The Attorney-General then gives a copy of that declaration to the relevant Minister, and either the Minister or Attorney-General must provide a written response to the declaration within six months. In Queensland, that written

[135] *Human Rights Act 2019* (Qld) s 54.
[136] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5).
[137] *Human Rights Act 2004* (ACT) s 32(3).

response is then referred to a portfolio committee, to consider and report on within three months.[138]

129. In state and territory based human rights legislation, there is some justification for this limited remedy. The *Australian Constitution* provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'[139] If a hypothetical human rights act in the Northern Territory were to conflict with Federal legislation, such as the Northern Territory Emergency Response, the result would not be the triumph of the Northern Territory Human Rights Act. Instead, the Northern Territory legislation would be ruled unconstitutional.

130. Whilst the declaration of incompatibility is a legally minimalist model, it has been upheld as constitutionally valid in *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011). This likely would not be the case if the Victorian *Charter of Human Rights and Responsibilities* were more interventionist.

131. However, whilst state and territory-based legislation cannot prevail over federal legislation, it is constitutionally permissible for it to prevail within its internal realm. To ensure that legal remedies under human rights instruments are effective, declarations of incompatibility should affect the validity, operation and enforcement of laws, under certain circumstances. If a future federal human rights act is legislated, declarations of incompatibility should invalidate relevant legislative provisions or their operation. Where state and territory based human rights acts apply, declarations of incompatibility should have an invalidating affect on impugned provisions provided that they are not federal legislation or subordinate legislation.

> **Recommendation 12: Under a future federal human rights act, a declaration of incompatibility should affect the validity, operation or enforcement of impugned legislation or statutory provisions. Under existing and future state and territory based human rights acts, declarations of incompatibility should affect the validity, operation or enforcement of impugned legislation or statutory provisions, unless they are federal legislation or subordinate legislation.**

132. Under the three human rights instruments, there are different circumstances where a person can initiate a legal challenge to a public official who has acted inconsistently with human rights.

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[138] *Human Rights Act 2019* (Qld) ss 55-7; *Human Rights Act 2004* (ACT) ss 32-3 *; Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 36-7.
[139] *Australian Constitution* s 109.

133. In Victoria, it is unlawful for a public authority to act in a way incompatibly with human rights, or to fail to give proper consideration to a relevant human right. A person may only seek a relief or remedy if they could already do so other than the Victorian Charter. In the ACT, to challenge a public authority, a person may independently start proceedings in the Supreme Court, or rely on their rights under the Act in other legal proceedings. In Queensland, a person may seek relief against a public entity, if there are other grounds to establish that the relevant behaviour or decision was unlawful, and that a basis for seeking other relief is available. A person may seek relief under the Human Rights Act, even if they are unsuccessful seeking relief under their alternative grounds for doing so. Damages cannot be sought as relief under any of the acts.[140]

134. Of the three human rights acts, the ACT model offers the broadest scope for challenging the behaviour of public officials. That is, where a public authority acts inconsistently with human rights, a person can independently start a Supreme Court proceeding to challenge the public authority. Such provisions are optimal, and should be adopted in future human rights legislation, and in Queensland and Victoria.

Recommendation 13: Under existing and future human rights legislation, members of the public should be able to initiate legal proceedings where they allege that a public authority has acted inconsistently with their human rights. Doing so should not require an existing tribunal or court proceeding.

135. It would be ideal to enact a comprehensive federal human rights Act. Such an Act could prevail over inconsistent laws, whether federal, state or territory based. However, in the short term, it appears that it may be politically more feasible to pass state and territory based human rights Acts. Such Acts may offer less effective legal remedies than federal human rights legislation. Yet three human rights Acts have been passed in three jurisdictions in Australia. This creates momentum for human rights legislation across Australia. Additionally, campaigns for human rights act have the benefit of raising awareness and educating the public about their human rights., Even unsuccessful campaigns for human rights acts can be regarded as benefits to the community. Continued campaigns for state and territory based human rights legislation can therefore be regarded as positive contributions to developing a human rights culture in Australia. It is desirable for more states and the Northern Territory to enact such human rights legislation, whilst also improving those acts in line with the recommendations made above.

[140] *Human Rights Act 2019* (Qld) ss 58-9; *Human Rights Act 2004* (ACT) ss 40B-40C *; Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38-9.

Recommendation 14: Pass human rights legislation in the remaining State and Territory jurisdictions in Australia that do not have existing human rights Acts.

K. Barrier to protecting human rights in Australia – challenges to exercising self-determination

The right to self-determination

136. Self-determination is a fundamental right of all people, as affirmed in the first article of the International Covenant on Civil and Political Rights.[141] It is specifically upheld as a right of Indigenous Peoples in the United Nations Declaration on the Rights of Indigenous Peoples. Article 3 affirms that 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Article 4 affirms that

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[142]

137. The United Nations Special Rapporteur on the rights of Indigenous peoples observed that

> Self-determination is a fundamental element of the Declaration whereby indigenous peoples have the right to determine their political status freely and pursue their economic, social and cultural development freely (art. 3) and have the right to autonomy or self-government in matters relating to their internal and local affairs, and the ways and means for financing their autonomous functions (art. 4). The Declaration also states that indigenous peoples have the right to participate in decision-making in matters that affect their rights (art. 18).[143]

138. The Declaration does not prescribe a specific vehicle for self-determination. Self-determination could be exercised through reserved Parliamentary seats, or a separate parliamentary body, or the requirement for consultations and consent for policies that affect Aboriginal and Torres Strait Islander peoples.

Self-determination through representative bodies – the history since 1973

[141] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, 173 (entered into force 3 January 1976).
[142] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61st Sess, 107th Plen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
[143] Victoria Tauli-Corpuz, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, A/HRC/36/46/Add.2 (8 August 2017) 7.

139. Australia has a long history of First Nations bodies, intended to represent Aboriginal and Torres Strait Islander peoples at a national level. From 1973 to 2004, there has usually been 'an elected national Indigenous body providing advice to government'. These representative structures some internal critics among First Nations communities, and also 'difficult relations with government'.[144] They were all peremptorily abolished by Federal Governments – by the governments of Fraser, Hawke, and Howard. Their successor organisation, the National Congress of Australia's First Peoples, lost all its government funding in 2016. Thus, there is concern that government aversion to Aboriginal and Torres Strait Islander people advocating in relation to land rights and treaty inevitably runs into government opposition, and then the establishment of a new body in the hope it will be more politically moderate.

140. The first such organisation was the National Aboriginal Consultative Committee (NACC), set up by Whitlam's Government in 1973. Its main function was to advise the government on Indigenous Affairs. Angela Pratt and Scott Bennett observe that it was a 'troubled body for most of its relatively short-lived existence'. Much of this trouble seems to have related to conflict with the federal government. Pratt and Bennett observe that

> Its relations with the Whitlam Government were strained from the beginning: for example, when the NACC announced its intention to seek more control over Indigenous affairs than its advisory role allowed, and demanded control over the Indigenous affairs budget, the Minister for Aboriginal Affairs James Cavanagh responded by threatening to withdraw its funding.[145]

141. The government of Malcolm Fraser abolished NACC, and replaced it with the National Aboriginal Conference (NAC) in 1977. NAC did not shy away from political controversy, and was 'heavily involved in the treaty debates of the 1970s and early 1980s'.[146] Pratt and Bennett observe that

> Within 12 months of the Hawke Government being elected in 1983, an antagonistic relationship between government and the NAC had developed. For example, the NAC criticised the

[144] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[145] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[146] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019. Luke Pearson, 'What is a Makarrata? The Yolngu word is more than a synonym for treaty', 10 August 2017, *ABC News.* <https://www.abc.net.au/news/2017-08-10/makarrata-explainer-yolngu-word-more-than-synonym-for-treaty/8790452> at 30 May 2019.

> Government for inadequately resourcing the body, and accused the Hawke Government s first Minister for Aboriginal Affairs, Clyde Holding, of meddling in its affairs.[147]

142. '[S]hortly after his appointment' as the Minister, Holding 'commissioned a review of the NAC', which made a series of critical findings of it. Holding abolished NAC in April 1985.[148] This was followed by extensive consultation by the Bob Hawke Government on creating the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC legislation was introduced in 1988, and passed in 1989. The Opposition, led by John Howard, expressed in principle opposition to creating any such body. Howard said 'The ATSIC legislation strikes at the heart of the unity of the Australian people', and would 'create a black nation within the Australian nation'.[149]

143. ATSIC had 35 Regional Councils, elected every three years. It had an administrative arm, consisting of hundreds of Commonwealth public servants. It had limited internal autonomy – some 85 per cent of its budget was quarantined, to be spent on particular programs that were not determined by ATSIC. In 2003, this budget was about $1.3 billion. However, in 2003, Minister for Indigenous Affairs Phillip Ruddock further limited the autonomy of ATSIC, by creating an executive agency, ATSIS, to administer ATSIC programs, make decisions about grants and other funding to Indigenous organisations. In 2004, the Opposition leader Mark Latham called for ATSIC to be abolished. This was followed by the Howard government matching this commitment, and subsequently abolishing ATSIC.[150]

144. Since then, the most recent national representative Indigenous organisation established to advocate for First Nations peoples has been the National Congress of Australia's First Peoples ('Congress'). It was established in 2010 after comprehensive consultations and workshops around Australia. It is the largest Aboriginal and Torres Strait Islander organisation in Australia, with 9000 members and 180 member organisations.[151] The United Nations Special Rapporteur on Indigenous Rights observed that

> The establishment of the Congress in 2010 followed extensive consultations among indigenous peoples and is in accordance with article 18 of the Declaration [on the Rights of Indigenous

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[147] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[148] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[149] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[150] Angela Pratt and Scott Bennett, Parliament of Australia, Current Issues Brief, No. 4 2004–05, 9 August 2004. <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04> at 30 May 2019.

[151] 'About us', *National Congress of Australia's First Peoples* <https://nationalcongress.com.au/about-us/> at 30 May 2019.

> Peoples], which states that indigenous peoples have the right "to participate in decision-making in matters which affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions". The Declaration also affirms in its article 39 that indigenous peoples have the right "to have access to financial ... assistance from States ... for the enjoyment of the rights contained in this Declaration".[152]

145. It originally received $29.2 million over five years. In May 2013, it received a commitment of $15 million in the coming budget by the Gillard Government, but this was discontinued by the incoming Liberal government.[153] In 2016, the Liberal government made clear that it would not continue federal government funding to Congress. The ABC observed that this peak 'advocacy group, that's often criticised the Federal Government, is set to lose its funding.'[154] The Special Rapporteur on Indigenous Rights commented that the

> explicit defunding by the Government of the national representative body for indigenous peoples, the National Congress of Australia's First Peoples, runs counter to the stated commitment of the Government to working with indigenous peoples.[155]

146. Like all the other representative First Nations bodies, it was critical of the Federal Government, and found its funding terminated. In June 2019, Congress announced that it was in 'serious financial trouble', and went into voluntary administration. It is expecting to cease operating on 30 June.[156]

> **Recommendation 8: Fully fund the National Congress of Australia's First Peoples, and commit to bipartisan entrenchment of its budget beyond election cycles.**

The government choosing First Nation voices to silence or engage with

[152] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 8.
[153] Dan Harrison, 'Indigenous organisation to defy Tony Abbott funding cut', *Sydney Morning Herald,* 19 December, 2013. <https://www.smh.com.au/politics/federal/indigenous-organisation-to-defy-tony-abbott-funding-cut-20131219-2znr4.html> at 30 May 2019.
[154] 'Tensions flare between Coalition and National Congress over Indigenous support', *The World Today*, 11 May 2016, ABC. <http://www.abc.net.au/worldtoday/content/2016/s4459990.htm> at 30 May 2019.
[155] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 8.
[156] Lorena Allam, 'Dodson, Burney call for government to fund National Congress of Australia's First Peoples', *The* Guardian, 12 June 2019. <https://www.theguardian.com/australia-news/2019/jun/12/national-congress-of-australias-first-peoples-fights-for-financial-survival> at 24 June 2019. Lorena Allam, 'Government fails to guarantee funding for key Indigenous body', *The Guardian*, 18 June 2019. <https://www.theguardian.com/australia-news/2019/jun/18/national-indigenous-body-will-have-to-meet-strict-conditions-for-funding-administrator> at 24 June 2019.

147. This fits a broader pattern of the government choosing to ignore or silence criticisms from Aboriginal and Torres Strait Islander people and organisations, whilst elevating and engaging with those whose politics are more amenable.

148. For example, the New South Wales Aboriginal Land Council (NSWALC) published *Tracker*, a monthly magazine advocating for Aboriginal rights, from April 2011. It intended to become a 'strong, campaigning magazine', which held 'government and mainstream media to account'. Its opening circulation of 35 000 made it the 'largest Aboriginal publication' in Australia.[157] However, in October 2013, *Tracker* ran a front-page story critical of the Liberal Party, arguing that Aboriginal people voted against Tony Abbott. In response, NSW Indigenous Affairs Minister Victor Dominello met with senior members of the NSWALC to express his concerns and objections. He put it to them that the reporting was not conducive to building 'good relationships with key stakeholders'. NSWALC responded by winding down *Tracker*, which finished its last issue in July 2014.[158] It proceeded to establish an e-bulletin, with a 'set of messages and a tone better targeted to MPs'.[159]

149. The United Nations Special Rapporteur on Indigenous rights has expressed similar concerns. Victoria Tauli-Corpuz wrote that she found it

> disconcerting that numerous representatives of indigenous organizations informed her of reprisals levied against them in the form of their exclusion from consultations on key policies and legislative proposals. Furthermore, she is deeply troubled by information indicating that funding cuts have specifically targeted organizations undertaking advocacy and legal services and that provisions inserted in funding agreements restrict the freedom of expression.[160]

150. The removal of all funding to Congress was followed by the Abbott government establishing the Indigenous Advisory Council (IAC) in 2013. It provided that the Council could have up to 12 members. Those members were all to be appointed by the Prime Minister, after consultation with the Indigenous Affairs Minister. Members would be both Indigenous and non-Indigenous. Members were to be appointed to three year terms, to be reviewed each year by the Prime Minister. The IAC was to meet three times each year with the Prime Minister and other relevant senior Ministers. The IAC was allowed to meet up to three more times each year. The Chair of the Council was to have monthly meetings with the Prime Minister, the Minister for Indigenous

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[157] NSW Aboriginal Land Council, 'NSWALC celebrates the launch of groundbreaking Aboriginal magazine' (Media Release, 28 April 2011) <http://alc.org.au/newsroom/media-releases/tracker-magazine-is-here.aspx>

[158] 'Tracker Mag Shut Following Abbott Spray', *New Matilda*, 4 March 2014. <https://newmatilda.com/2014/03/04/tracker-mag-shut-following-abbott-spray/> at 31 May 2019.

[159] Paul Cleary, '"Biased" Land Council Mag Shut on Advice', *The Australian*, 28 July 2014. <http://www.theaustralian.com.au/media/biased-land-council-mag-shut-on-advice/story-e6frg996-1227003494869> at 31 May 2019.

[160] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 8.

Affairs, and the Parliamentary Secretary to the Prime Minister. The IAC could also convene Working Groups to report back to the IAC. However, working groups would operate on a non-remunerated basis. The Chair operated on a part-time paid basis, whilst other members receiving sitting fees, and costs related to attending meetings.[161] While Congress began with a budget of almost $30 million, the IAC was established with about $1 million.[162]

151. In essence, this was a body with no power or resources, which occasionally met each year. There was no claim to representation, as it simply represented the views of less than a dozen people the Prime Minister wanted to hear from. There was no obligation on anyone to consider the opinions of the IAC, and the IAC had no entrenched role in relation to government actions or policies. Members of the IAC were expected to earn their livelihood and devote most of their time elsewhere, as only the Chair received a part time salary for the work involved. Tauli-Cruz commented that the IAC 'is not representative of Aboriginal and Torres Strait Islander peoples as its members are appointed by the Prime Minister.'[163]

152. If the government wishes to support self-determination, it should properly fund representative organisations of Aboriginal and Torres Strait Islander peoples. It should not intervene in the internal operations of these organisations, and welcome their political engagement, even where this includes harsh political criticism or advocacy for broad systemic changes

Recommendation 9: Entrench government non-intervention in relation to the political advocacy of Aboriginal and Torres Strait Islander organisations. There should be a political norm, and legal requirement, that funding of Aboriginal and Torres Strait Islander organisations cannot be connected directly or indirectly to their political advocacy or involvement in controversies.

L. Advancing human rights

153. As reviewed above, there are considerable barriers to entrenching protections of the human rights of Aboriginal and Torres Strait Islander peoples in Australia. The Constitution enables racial

[161] Department of the Prime Minister and Cabinet, "Terms of Reference: Indigenous Advisory Council", 26 July 2016. <https://www.pmc.gov.au/resource-centre/indigenous-affairs/terms-reference-indigenous-advisory-council> at 31 May 2019.
[162] Dan Harrison, 'Indigenous organisation to defy Tony Abbott funding cut', *Sydney Morning Herald*, 19 December 2013. <https://www.smh.com.au/politics/federal/indigenous-organisation-to-defy-tony-abbott-funding-cut-20131219-2znr4.html> at 31 May 2019.
[163] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017) 8.

discrimination. Constitutional reform appears blocked by obstructionism by constitutional conservatives and successive federal governments. Existing human rights legislation has not prevented the large-scale removal of Aboriginal children from their families, or other human rights concerns.[164]

154. As there are political challenges in protecting human rights through legal reforms, it is worth also considering implementing policies that *advance* human rights. Aboriginal and Torres Strait Islander peoples face considerable discrimination and socio-economic disadvantage in Australia. In addition to reforming laws which fail to protect their rights, it is currently open to governments to implement the demands for policy reforms from First Nations peoples.

155. Congress is the national representative organisation for Aboriginal and Torres Strait Islander peoples. It has some 9000 individual members, and 180 organisational members. In 2016, it was a co-signatory to the Redfern Statement. The Redfern Statement was led by a range of First Nations organisations, such as the National Aboriginal and Torres Strait Islander Legal Services, National Aboriginal Community Controlled Health Organisations, National Family Violence Prevention Legal Services Forum, SNAICC - National Voice for our Children, Australian Indigenous Doctor's Association, Indigenous Allied Health Australia, National Aboriginal and Torres Strait Islander Health Workers Association.[165]

156. The Redfern Statement urges a range of reforms. These include funding Aboriginal and Torres Strait Islander led-solutions, commit to better engagement with Aboriginal and Torres Strait Islander peoples and their national peak organisations, recommit to Closing the Gap, establish a Department of Aboriginal and Torres Strait Islander Affairs led by senior Aboriginal and Torres Strait Islander public servants. It also calls for an 'agreement making framework (treaty)', restoring funding to Congress, national Aboriginal and Torres Strait Islander representative bodies for education, employment and housing, and funding the implementation plan for the National Aboriginal and Torres Strait Islander Health Plan. It calls for justice reforms to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, and implementing the Royal Commission into Aboriginal Deaths in Custody. It calls for preventing violence against Aboriginal and Torres Strait Islander women and children, addressing

[164] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, A/HRC/36/46/Add.2 (8 August 2017).
[165] Aboriginal and Torres Strait Islander Peak Organisations Unite, *Redfern Statement* (9 June 2016).<https://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf> 7 June 2019.

Aboriginal and Torres Strait Islander child safety, wellbeing and cultural identity, and addressing disability needs of Aboriginal and Torres Strait Islander people.[166]

157. This is a comprehensive agenda for reform. It does not require navigating the complex legal barriers of Constitutional reform. It is a policy agenda that can be implemented by any government. As continued failures to succeed in Closing the Gap demonstrate, governments at all levels in Australia need to shift their approach and genuinely work with Aboriginal and Torres Strait Islander people and their peak bodies to achieve substantive change. This is a question of political will. Addressing issues like the poorer health, education and employment outcomes of First Nations peoples may not constitute legally protecting their human rights. However, if these policies can be implemented, it would constitute significant advances in human rights in Australia. It would also mean a considerable advance in self-determination in Australia. First Nations people would determine the policies that they want, and would take the lead in designing and implementing those policies. We submit that an important way of protecting human rights in Australia is to support the policy platform of the Redfern Statement.

Recommendation 10: Implement the Redfern Statement.

This submission was prepared by Michael Brull with input from Rebecca McMahon and members of the NSWCCL Civil and Human Rights Action Group on behalf of the New South Wales Council for Civil Liberties.

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[166] Aboriginal and Torres Strait Islander Peak Organisations Unite, *Redfern Statement* (9 June 2016).<https://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf> 7 June 2019.