

8 March 2017

Public Consultations Team
White Paper Task Force
Department of Foreign Affairs and Trade
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Dear Public Consultations Team,

Submission – DFAT Foreign Policy White Paper 2017

Australian Lawyers for Human Rights (ALHR) thanks you for the opportunity to provide this submission in relation to the Foreign Policy White Paper.

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Methodology

We have set out on the following page the questions posed in the Call for Submissions¹ and the Terms of Reference relating to the Foreign Policy White Paper². Rather than answering the questions, or addressing the issues in the Terms of Reference, individually we respond (as no doubt many others will do), by submitting that the practice and promotion of human rights both within Australia and internationally, as well as the use of a human rights framework against which to assess both internal legislation and Australian foreign policy, will best advance Australia's interests in all of the areas mentioned.

We have addressed the issues thematically, according to the different human rights issues involved.

¹ Australian Government, *Call for Public Submissions: Foreign Policy White Paper*, available at: <https://dfat.gov.au/whitepaper/wp-content/uploads/2016/11/foreign-policy-white-paper-call-for-submissions.pdf>, accessed 1 March 2017.

² Australian Government, *Foreign Policy White Paper Terms of Reference*, available at: <http://dfat.gov.au/whitepaper/about/terms-of-reference/index.html>, accessed 1 March 2017

Questions

01. Australia's Foreign Policy Needs to be Grounded in a Clear-Eyed Assessment of our National Interests.

→ How should we define Australia's national interests in a changing world? How should our values underpin Australia's foreign policy? What should we do differently? How can we do better?

02. Australia has Diverse Interests that Span the Globe.

→ Which countries will matter most to Australia over the next 10 years? Why and in what ways? How should we deepen and diversify key relationships?

→ Which global trends, such as developments in technology, environmental degradation and the role of non-state actors, are likely to affect Australia's security and prosperity? How should Australia respond?

03. Australia is an influential player in regional and international organisations.

→ Which regional and global organisations matter most to us? How should we support and shape them? How can we maximise our influence?

04. Australia needs to be ambitious in grasping economic opportunities.

→ What steps should be taken to maximise our trade and investment and expand commercial opportunities for Australian business? How can we ensure Australia is positioned to take advantage of opportunities in the global economy? What are the key risks to Australia's future prosperity and how should we respond?

05. Australia confronts a range of strategic, security and transnational challenges.

→ How can Australia best deal with instability beyond our borders? How can our foreign policy, including our overseas development assistance program, support a more prosperous, peaceful and stable region? How should our international engagement work to protect Australia against transnational security threats, such as terrorism?

06. Australia uses a range of assets and capabilities to pursue our international interests.

→ What assets will we need to advance our foreign policy interests in future years? How can we best use our people and our assets to advance Australia's economic, security and other interests and respond to external events?

→ How can Government work more effectively with non-government sectors, including business, universities and NGOs, to advance Australia's interests?

Terms of Reference

The White Paper will:

- Examine the foreign, security, economic and international development issues and global trends shaping Australia's international environment;
- Define Australia's interests and policy priorities in response to that environment;
- In light of those interests, outline how Australia should advance relations with major international partners;
- Identify approaches to support and better utilise multilateral and regional structures to promote and protect Australia's interests and values;
- Establish a roadmap to pursue Australia's economic interests as an open, export-oriented market economy to ensure we continue to capitalise on our competitive advantages, guard against economic risks and maximise national prosperity;

- Examine how Australia should promote its regulations, institutions and standards in the region, and globally, to support our commercial interests;
- Assess options for mitigating and responding to security risks, including strategic competition in the Indo-Pacific and transnational threats;
- Outline how we can promote prosperity and stability through our aid program with a focus on the Indo-Pacific; and
- Examine how we should best use our assets to pursue our interests internationally.

Table of Contents

ALHR	1
Methodology	1
Questions.....	2
Terms of Reference	2
Table of Contents.....	3
Summary	4
1. Introduction	6
2. History of Australia's Record of Implementing IHRL Obligations	7
3. Importance of Implementation of Existing Ratified IHRL Instruments and Human Rights Framework.....	9
4. A National Action Plan (NAP) for implementing the UN Guiding Principles (UNGPs) on Business & Human Rights.....	11
5. The importance of foreign policy for refugee protection in Australia and the region	12
6. Advancing the rights of people with disabilities through domestic legislation....	13
7. Australia's Advocacy for the Abolition of the Death Penalty.....	15
8. Rights of Indigenous Peoples	17
9. Rights of Women and Children	18
10. Recommended Future IHRL Ratifications.....	18
11. Future Innovations on the UN Human Rights Council.....	19
12. Conclusion	20

Summary

We summarise our recommendations below. They are not in order of importance.

1. That Australia adopts a principled and consistent human rights-based approach to foreign policy work that engages with the United Nations human rights system and addresses human rights abuses in the region and globally.
2. That the Commonwealth Government implement Australia's outstanding IHRL obligations including by way of a Commonwealth Bill of Rights or Human Rights Act. This includes:
 - incorporating Australia's obligations under the *Convention on the Rights of Persons with Disabilities* into domestic legislation to ensure the rights of people with disabilities are protected and promoted;
 - incorporating the principles of the United Nations *Declaration on the Rights of Indigenous Peoples* into domestic law so as to address key matters of "unfinished business" including land rights, constitutional recognition, Treaty, sovereignty and Indigenous representative governance;
 - incorporating the principles of the *Convention on the Elimination of all Forms of Discrimination Against Women* into domestic law to ensure that women have human rights consistently enforceable throughout Australia and that protection of those rights is funded, in particular, the right of women to live free from violence;
 - adopting stronger legislation so that the Australian Federal Police is required by law and in operational procedures not to share information with other law enforcement agencies that would potentially result in suspected perpetrators facing the death penalty, perhaps through a law similar to the US Leahy Law which would prohibit Australia from providing direct aid or assistance to any foreign government or security forces against which there is credible information of serious human rights abuses.
3. That the Commonwealth Government develop National Action Plans for improving the legal, regulatory and policy framework required to successfully implement the UN Guiding Principles (UNGPs) on Business and Human Rights, involving transparency and:
 - a consultative, multi-stakeholder process that includes civil society;
 - an evidence-based process to include a national baseline assessment of existing legislative gaps in UNGP implementation in Australia;
 - provision for ongoing monitoring and review of the NAP; and
 - comprehensive content which extends beyond a statement of current policy or commitments, contains forward-looking action points and has a human rights-based focus.
4. That the Commonwealth Government implement the recommendations of the Australian Human Rights Commission's report, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea* particularly by closing Manus and Nauru offshore centres and ceasing indefinite incarceration.
5. That Australia promptly ratify:
 - the Migrant Workers Convention;
 - the ILO Forced Labour Convention;
 - the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.
6. That, if elected to the UN Human Rights Council, Australia take a positive, proactive and innovative leadership role on the UNHRC by sponsoring or co-sponsoring motions to:

- draft a binding convention on the rights of indigenous peoples as a progression from UNDRIP;
- support the drafting work on a binding convention on business and human rights; and
- establish a World Court or Global Tribunal of Human Rights as recommended by Australian Gallipoli hero Colonel William Roy Hodgson during the drafting of the *1948 Universal Declaration of Human Rights*.

1. Introduction

ALHR is very pleased that the Australian Government has, over the years, signed and ratified the core International Human Rights Law (IHRL) treaties, covenants and conventions, as well as others such as the 1951 *Refugee Convention* and the 1967 *Protocol relating to the Status of Refugees*.³

ALHR remains primarily and significantly concerned:

- (1) about the Australian Government's many and various outstanding legal obligations to the international community under the various core IHRL instruments that the Australian Government has signed, ratified and become a consenting contracting party to, over the past 70 years; and
- (2) that Australia's future foreign policy strategy should be informed by, and tested against, international human rights standards.

ALHR strongly supports an innovative Foreign Policy White Paper which looks inwards as well as outwards and harmonises a holistic roadmap for advancing and protecting Australia's interests in a dynamic, complex and unpredictable international environment. ALHR agrees that such blueprint must be clear-eyed about Australia's interests, grounded in our values, and must ensure Australia is better positioned to seize opportunities and manage present and future risks.

ALHR agrees with the Foreign Minister that "*we need a contemporary foreign policy strategy*" and endorses the calls of other organisations such as the Human Rights Law Centre (HRLC) for the adoption of a principled and consistent human rights-based approach to foreign policy work that engages positively and constructively with the United Nations human rights system and addresses human rights abuses in the region and globally.⁴

Australia has a very proud history as a leader in IHRL with its involvement at the heart of the modern international legal architecture of the United Nations, negotiating its 1945 Charter, and supporting its focus on human rights as a strategy for encouraging and invoking peace, security and stability within the international system. As the Foreign Minister recently stated at the 2017 DFAT NGO Forum:

The idea that humans have inherent rights because and by virtue of their humanity, in fact defines Australia's approach to the promotion and protection of human rights, both at home and abroad. The Australian Government remains committed to the United Nations, to its principles and its Charter.

³ *International Covenant on Civil and Political Rights* (Adopted by UNGA Resolution 2200A (XXI) 16 December 1966, Entry into Force 23 March 1976) UN Doc. A/6316 (1966) 999 UNTS 171. Australia Signed: 18 December 1972, ratified: 13 August 1980 (**ICCPR**); *International Covenant on Economic, Social and Cultural Rights* (Adopted by UNGA Resolution 2200A (XXI) 16 December 1966, Entry into Force 3 January 1976) UN Doc. A/6316 (1966) 993 UNTS 3. Australia Signed: 18 Dec 1972, Ratified: 10 Dec 1975 (**ICESCR**); *International Convention On The Elimination Of All Forms Of Racial Discrimination* (Adopted 7 March 1966, Entered Into Force 4 January 1969) 660 UNTS 195 (**ICERD**); *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment* (Adopted By UNGA Resolution 39/46, Entered Into Force June 26, 1987), U.N. Doc. A/39/51 (1984). Australia Signed: 10 December 1985, ratified: 8 August 1989; *Convention on The Elimination of All Forms of Discrimination Against Women* (Adopted by UNGA Resolution 34/180, Entered Force 3 September 1981) UN Doc. A/34/46. Australia Signed: 17 July 1980, ratified: 28 July 1980 (**CEDAW**); *Convention on The Rights of The Child* (Adopted by UNGA Resolution 44/25, Entered into Force 2 September 1990) UN Doc. A/44/49 (1989). Australia Signed: 22 August 1990, ratified: 17 December 1990 (**CRC**); *Convention on The Rights of Persons with Disabilities* (Adopted by UNGA Resolution 61/106, 13 December 2006, Entered into Force 3 May 2008). UN Doc. A/RES/61/106. Australia Signed: 30 March 2007, Ratified: 17 July 2008 (**CRPD**). Australia has ratified the *Convention Relating to the Status of Refugees* (Adopted in Geneva 28 July 1951, Entry into Force 22 April 1954) 189 UNTS 137. Australia Signed 22 January 1954; Accession 22 January 1954).

⁴ *Australia as a Global Human Rights Leader: DFAT Foreign Policy White Paper Consultation 2017*, Human Rights Law Centre Submission 2 March 2017 available at: <https://www.hrlc.org.au/news/2017/3/2/protection-of-human-rights-should-guide-australias-foreign-policy-hrlc-white-paper-submission>, accessed 6 March 2017.

Attorney-General Brandis also stated the following at the 2017 DFAT NGO Forum when he announced the Government's commitment to ratifying the *Optional Protocol to the Convention Against Torture (OPCAT)*:⁵

As most of you would know, Australia was a founding member of the United Nations and one of only eight nations involved in drafting of the Universal Declaration on Human Rights. The committee that drafted the Declaration was chaired by Eleanor Roosevelt. She coaxed, wrangled and sometimes coerced a diverse committee of seasoned diplomats, cantankerous philosophers and renowned jurists. For Roosevelt, human rights were not some abstract concept or some burden imposed upon states from on high. They were earthier than that, grounded in people's everyday experience.

Speaking almost a decade after the Declaration's adoption, Eleanor Roosevelt asked a question that we must all continue to pose ourselves. "Where, after all, do universal rights begin?" Her answer? "In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere". This morning, my focus is on Roosevelt's small places, in particular, the places where people are detained at the hands of the state. Small though these places may be, they are of great consequence to the dignity of the individual.

In announcing Australia's candidacy for the United Nations Human Rights Council in 2018-2020, the Australian Government has stated:

Our inaugural candidacy embodies our commitment to the aims and purposes of the Universal Declaration of Human Rights and to the ongoing promotion and protection of human rights. This commitment reflects national values which are deeply embedded in Australian society and our respect for democracy and the rule of law. It also underpins the way we have always engaged with the international community – with active, practical advocacy, sensitivity and fairness, and a willingness to speak out against human rights violations and abuses⁶.

In ALHR's respectful submission these statements of commitment to international human rights standards must result in human rights advocacy becoming a central pillar in the framework of the Foreign Policy Whitepaper and Australia's contemporary foreign policy strategy.

International peace and security and hence Australia's ongoing prosperity depend on nation states actively promoting, protecting and complying with the rule of law. Indeed this has been the very basis of our international order since the end of World War II. It is now more critical than ever that Australia look to its proud history as a founding member of the United Nations and develop a written and publicly available foreign policy strategy that defends, upholds and promotes international law, including international human rights law.

2. History of Australia's Record of Implementing IHRL Obligations

Australia signed the *International Covenant on Civil and Political Rights (ICCPR)*⁷ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁸ over four decades ago, and has since ratified all seven core IHRL treaties and some of the Optional Protocols.⁹

⁵ Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006. The Australian Government signed the OPCAT on 19 May 2009, but has not yet ratified the agreement.

⁶ Australia's candidacy for the United Nations Human Rights Council 2018-2020 Department of Foreign Affairs and Trade Website: <http://dfat.gov.au/international-relations/international-organisations/Pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>

⁷ Ibid.

⁸ Ibid.

⁹ *Optional Protocol to the International Covenant on Civil and Political Rights 1976*, individual complaints mechanism - Australia Ratification/Accession 1991. *Second Optional Protocol to the International Covenant on Civil and Political Rights 1991*, aiming at the abolition of the death penalty – Australia

Since our first ICCPR periodic report in 1983, Australia has periodically reported to each of the corresponding UN treaty bodies¹⁰ which, along with UN special rapporteurs,¹¹ have consistently expressed concern regarding Australia's ongoing IHRL breaches, and frequently recommended that Australia implement a Federal Bill of Rights or legislated Commonwealth Human Rights Act to resolve the Australian Government's ongoing non-compliance with international human rights norms.

The concerns of the international community about Australia's ongoing IHRL recalcitrance have been further emphasised, amplified and elaborated during Australia's first two appearances for its Universal Periodic Review (UPR) before the UN Human Rights Council in Geneva regarding its performance on human rights and IHRL generally. Australia's first UPR before the international community occurred in Geneva on 27 January 2011 and its second on 9 November 2015. Australia's human rights performance was assessed and critiqued by 53 UN member countries at its first UPR¹² and 104 UN member countries at its second UPR.¹³

During its first UPR, the Australian government received 145 recommendations from the international community as to how to improve its human rights performance and adherence to

Ratification/Accession 1990; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* 2000 – Australia Ratification/Accession: 2008; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* 2002 – Australia Signature 2002, Ratification/Accession 2006; *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* 2002 – Australia Signature 2001, Ratification/Accession 2007; *Optional Protocol to the Convention on the Rights of Persons with Disabilities* 2008 – Australia Ratification/Accession 2009.

¹⁰ See For Example; UN Human Rights Committee Concluding Observations On Australia's First Periodic Report (15th Session; 15 September 1983); Second Periodic Report (43rd Session; 28 September 1988); Third And Fourth Periodic Reports (69th Session; 28 July 2000); Fifth Periodic Report (7 May 2009); UN Committee On Economic, Social And Cultural Rights; Concluding Observations On Australia's; Third Periodic Report (22nd, 23rd And 24th Sessions; 22 May 2009); Committee On The Rights Of The Child Concluding Observations On Australia's; Combined Second And Third Periodic Reports (40th Session; 20 October 2005); Committee Against Torture Concluding Observations On Australia's; Third Periodic Report (40th Session; 15 May 2008); Combined Fourth And Fifth Periodic Reports (53rd Session; 3-28 November 2014); Committee On The Elimination Of Discrimination Against Women Concluding Observations On Australia's; Combined Sixth And Seventh Periodic Reports (46th Session; 30 July 2010); Committee On The Elimination Of Racial Discrimination Concluding Observations On Australia's Combined Fifteenth To Seventeenth Periodic Reports (77th Session; 27 August 2010). See Also: Department Of Foreign Affairs And Trade (DFAT) Website: 'Reports To United Nations Bodies': <http://Dfat.Gov.Au/International-Relations/Themes/Human-Rights/Pages/Reports-To-United-Nations-Bodies.aspx>

¹¹ Report Of The Special Rapporteur On The Highest Attainable Standard Of Physical And Mental Health, Mission To Australia, 3 June 2010; Report By The Special Rapporteur On The Rights Of Indigenous Peoples, Mission To Australia, 1 June 2010; Report On The Special Rapporteur On Adequate Housing, Mission To Australia, August 2006; Report Of The Special Rapporteur On The Promotion And Protection Of Human Rights And Fundamental Freedoms While Countering Terrorism, Australia, 14 December 2006; Mission To Australia Reports Of The: Special Rapporteur On Health (3 June 2010); Special Rapporteur On The Rights Of Indigenous Peoples (1 June 2010); Special Rapporteur On Adequate Housing (August 2006); Special Rapporteur On The Protection Of Human Rights While Countering Terrorism (14 December 2006); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, "Observations on communications transmitted to Governments and replies received*" UN Human Rights Council (Twenty Eighth Session Agenda Item 3) (UN Doc A/HRC/28/68/Add. 1); UN Special Rapporteur about Human Rights Defenders forthcoming report on Country Visit to Australia (14-22 September 2016) "End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders Visit to Australia", (18 October 2016). Available <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E#sthash.FmQK1jgW.dpuf>; UN Special Rapporteur on the Human Rights of Migrants forthcoming report on Country Visit to Australia in late 2016.

¹² UNHRC, 'Report of the Working Group on the UPR: Australia' (17th session: 24 March 2011) (UN Doc A/HRC/17/10). See also OHCHR Australia First UPR webpage: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/AUSession10.aspx>

¹³ UNHRC, 'Report of the Working Group on the UPR: Australia' (31st session: 13 January 2016) (UN Doc A/HRC/28/63) See also OHCHR Australia Second UPR webpage: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/AUSession23.aspx>

the various international human rights obligations it had signed up to via the ratification of various international human rights treaties. Sweden, France, Jordan, Argentina, Timor-Leste, Canada, Ukraine, the Russian Federation and Norway made specific recommendations that Australia properly implement its outstanding IHRL obligations by legislating and implementing a federal human rights act.

Concerningly, during its second UPR, the Australian government had received a further 290 recommendation from the international as to how to improve its human rights performance and adherence to the various international human rights obligations it had signed up to via the ratification of various international human rights treaties.

The increase in recommendations and the clear messages of significant concern by the international community are strong indicators that Australia's human rights performance is not improving especially in regarding to the rights of indigenous peoples, the rights of women and girls, the rights of refugees, migrants and asylum seekers and the rights of homeless people and the mentally ill and people with disabilities.

Of course, the efficacy of international human rights law relies on the 'delicate handshake' of international treaty ratification and honouring by sovereign nations that make up the international community. It is a fragile framework premised on good faith or the principle of "*pacta sunt servanda*" pursuant to Article 26 of the 1969 *Vienna Convention on the Law of Treaties*¹⁴ ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"). That is, while there is no strict enforcement mechanism or regulatory mechanism for IHRL and the voluntary IHRL obligation that contracting States assume, a good faith obligation requires that such commitment is performed in an authentic and effective manner.

3. Importance of Implementation of Existing Ratified IHRL Instruments and Human Rights Framework

In order to implement a persuasive, efficacious and compelling contemporary foreign policy strategy, and for Australia to maintain its regional leadership role in the Asia-Pacific, it is important that we are seen as a diligent, responsible, sovereign state with significant integrity in upholding international law and IHRL.

Implementing existing ratified IHRL Instruments

We understand that DFAT believes it is not its role to advocate within government for the implementation of outstanding IHRL obligations via a federally legislated Human Rights Act.¹⁵ With respect, ALHR submits that this is a misconceived position. Given that DFAT engages with the international community in the context of Australia's proud legacy on IHRL leadership, we submit that it is incumbent on DFAT to do everything within its power to ensure that such legacy continues and progresses, so as to strengthen and maintain the foundations of Australia's regional and international leadership in foreign affairs (and thus, we would argue, in human rights and IHRL). We believe that a Commonwealth Human Rights Act would significantly assist in this process as it would enable Australia to meet all its outstanding IHRL obligations in the one piece of legislation.

We note that Australia is alone amongst first world countries in not having a federal Bill of Rights or Human Rights Act. If Australia is to take a leadership role in foreign affairs, whether in the Pacific Region or internationally, this situation urgently needs to be redressed.

¹⁴ Department of Foreign Affairs Canberra, *Vienna Convention on The Law of Treaties* (Vienna, 23 May 1969). Entry into Force For Australia And Generally: 27 January 1980. AUSTRALIAN TREATY SERIES 1974 No. 2 Australian Government Publishing Service Canberra (Commonwealth of Australia 1995).

¹⁵ DFAT NGO Forum 2017, National Museum of Australia, Canberra comments by Dr Lachlan Strahan in response to question by Benedict Coyne, national President Australian Lawyers for Human Rights.

Importance of a Human Rights Framework

We submit that it is also important for DFAT's foreign policy to be based on, and tested against, a human rights framework because this is an effective and beneficial method of balancing competing interests and achieving a proportional legislative or policy response.

We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014¹⁶ as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

In applying human rights law, Donald and Howard point out that European case law establishes the principle that there is no hierarchy of rights amongst human rights, "meaning that in each instance, an attempt [must be] made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed."¹⁷ We submit that this is a principle that should be followed in the processes to be followed by DFAT.

Generally, behaviour should not be protected by Australian law or policy where that behaviour itself infringes other human rights. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.** Human rights also entail **both rights and obligations**. Hence in so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.¹⁸

In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and all should be protected together (the principle of interdependence).

Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law. The protection of one's internal beliefs is also described as an absolute right as an aspect of both freedom of speech and freedom of religion (as opposed to the more limited 'right' to express or act on one's own opinions and views). Subject to those absolutes, all rights must be **balanced** where they conflict and provide **reasonable accommodation** to other rights.¹⁹

These principles are commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and all European countries. **In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of these well-established points.**

In balancing the competing claims of human rights against each other, it is important to minimise any negative impact; to impinge as little as possible upon other rights. Therefore it will be very important to consider whether a particular expression of a human right by one

¹⁶ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>, accessed 16 January 2015.

¹⁷ *The right to freedom of religion or belief and its intersection with other rights* (2015) Dr Alice Donald and Dr Erica Howard, Middlesex University, ILGA Europe website at http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights.pdf, accessed 2 January 2017p I and see the text on page 7 relating to footnotes 27 and 28.

¹⁸ See generally, United Nations Human Rights Office of the High Commissioner, "What are Human Rights?" available at <<http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>>, accessed 9 February 2017.

¹⁹ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief* (2015) A/HRC/31/18 pursuant to the UN Human Rights Council Resolution 22/20 (cited as Bielefeldt (2015)) par 19ff.

person or group respects the rights of others or, conversely, causes harm or unreasonably impacts upon others.

Thus, proponents of intolerant religions which in practice restrict human rights cannot expect tolerance for the expression of their beliefs nor State protection for their actions. Their right to hold whatever belief system they wish to hold in private can be respected. Any purported 'right' to act on that belief system depends, however, upon the impact that those acts have on others. Donald and Howard describe this principle as 'respecting the believer rather than the belief.'²⁰

Legislation or policy should represent an appropriate and proportionate response to the harms being dealt with, and adherence to international human rights law and standards is an important indicator of proportionality.²¹

Conclusion

We submit that the introduction of a Commonwealth Human Rights Act or Bill of Rights would assist greatly in meeting Australia's outstanding IHRL obligations, in establishing a clear human rights framework against which all Australian legislation and policy can be tested, and in enhancing Australia's credibility when advocating for human rights internationally. We therefore submit that:

- DFAT should create a position paper on the implementation of outstanding IHRL obligations via a federally legislated Human Rights Act and should proactively advise and lobby within Government for this to occur; and
- Australia's foreign policy should be based on, and tested against, a human rights framework— ideally, as part of a Commonwealth Human Rights Act or Bill of Rights, but if not, by adopting the process of testing the policy against established international human rights by balancing conflicting rights in order to minimise harms.

4. A National Action Plan (NAP) for implementing the UN Guiding Principles (UNGPs) on Business & Human Rights

The development of a NAP is essential for improving the legal, regulatory and policy framework required to successfully implement the UNGPs.

In June 2014, the UN HRC called on member States to adopt NAPs as a means of implementing the UNGPs within their respective territories and jurisdictions.²² It is notable that the Australian Government supported this UNHRC resolution.

We refer to Australia's Universal Periodic Review before the UN Human Rights Council in November 2015 and note that both Norway and the Netherlands issued recommendations calling on the Australian Government to adopt a NAP.

Australia's NAP remains outstanding, although, positive developments have occurred for which the Australian Government should be commended. ALHR welcomed the announcement by the Australian Government in March 2016 that it intends to hold public consultations to consider the implementation of the UNGPs in Australia. ALHR further applauds the Government's creation of a multi-stakeholder advisory body to guide and inform the process of UNGP implementation in Australia.

²⁰ Donald and Howard, op cit, p 17.

²¹ See generally Law Council of Australia, "Anti-Terrorism Reform Project" October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> accessed 2 October 2014.

²² Human Rights Council Res. A/HRC/26/L.1. Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (27 June 2014).

ALHR has been centrally involved in this process to date. ALHR actively participates in initiatives to progress UNGP implementation in Australia and is a signatory to the Joint Civil Society Statement (August 2016).

In developing a NAP for Australia, ALHR considers an effective process as key to ensuring a successful outcome.

ALHR's expectations for the NAP **process** include:

- a consultative, multi-stakeholder process that includes civil society;
- transparency;
- an evidence-based process: NAP development to include a national baseline assessment of existing legislative gaps in UNGP implementation in Australia; and
- provision for ongoing monitoring and review of the NAP.

ALHR's expectations for the **content** of a NAP include:

- comprehensive nature: NAP must cover all the UNGPs;
- extends beyond a statement of current policy or commitments and contains forward-looking action points; and
- a human rights-based focus: aimed at protecting the human rights of all, including the most vulnerable groups in society.

The UNGPs establish a common global platform for action on corporate accountability for human rights abuses. If Australia is to participate in this global process and join ranks with fellow actors in the international community, it is essential that we immediately commence our own plan of action. A NAP will strengthen efforts to prevent and protect against the harmful impacts of Australian businesses, both at home and overseas. It will assist in promoting internationally-recognised corporate human rights requirements.

ALHR notes that the Government has committed to holding public consultations on implementing the UNGPs. ALHR strongly encourages the Government to set dates for these consultations as a matter of urgency and to commit to the development of a NAP for Australia.

5. The importance of foreign policy for refugee protection in Australia and the region

ALHR welcomes the fact that a key objective of the Terms of Reference is to 'identify approaches to support and better utilise multilateral and regional structures to promote and protect Australia's interests and values'. ALHR believes that this is a crucial plank of foreign policy that has particular importance for enhancing the human rights of refugees and asylum seekers with respect to whom Australia has international obligations.

ALHR supports the Australian Government's commitment to eliminating the need for asylum seekers and refugees to undertake irregular and dangerous sea journeys. However, we believe that the current policies of offshore processing, boat turnbacks, temporary protection visas and endless incarceration with no plan for eventual termination of that incarceration are seriously inadequate from the human rights perspective. We suggest that Australia needs to engage with the refugee issue with the understanding that comprehensive and sustainable solutions cannot be achieved on a platform of unilateral action and deterrence. The issue of asylum seekers and refugees is of interest and importance to all countries in the Asia-Pacific Region, and this must be recognised in Australia's foreign policy.

ALHR has noted elsewhere that it supports measures by the Australian Government to 'work with UNHCR, States within the region and civil society on genuine regional solutions to enable

asylum seekers to apply for protection safely, including through the provision of funding'.²³ To this end, we suggest that the Australian Government use existing multilateral forums such as the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (the 'Bali Process')²⁴ to pursue enhanced cooperation on refugee protection issues within the region. ALHR supports the agreement by States at the Fourth Regional Ministerial Conference of the Bali Process in March 2011 that an 'an inclusive but non-binding regional cooperation framework would provide a more effective way for interested parties to cooperate to reduce irregular movement through the region'.²⁵ The importance of a regional cooperation framework has been highlighted to Government in the past, including by the Expert Panel on Asylum Seekers and Refugees.²⁶ ALHR supports ongoing work towards the establishment and implementation of such a framework in a medium to long term.

In the short-term, ALHR strongly urges the Australian Government to implement the recommendations of the Australian Human Rights Commission's report, *Pathways to Protection: A human rights-based response to the flight of asylum seekers by sea*. While ALHR supports all of the initiatives referred to in that report in relation to foreign policy, we suggest the following measures are of particular importance:

- restore and expand aid to countries affected by the displacement of asylum seekers in the region;
- increase funding for humanitarian agencies in the region, including UNHCR;
- enhance the strategic use of resettlement, including by using resettlement as leverage to negotiate protection commitments; and
- support and expand solutions in conjunction with other States, including through technical assistance increase or enhance alternative migration pathways,

and in particular, we submit that a plan needs to be in place for termination of the indefinite incarceration of refugees.

As an immediate measure, the offshore processing centres in Manus Island and Nauru must be closed. Not only has this system led to serious violations of the human rights of asylum seekers and refugees, it has also jeopardised Australia's credibility to advocate for enhanced protection standards in the region. If Australia wants to seriously engage with neighbouring countries on displacement, immigration and other matters of national significance, the Government must lead by example and comply with its international legal obligations.

Finally, Australia must not allow its own national interests and priorities to overshadow the importance of speaking out against human rights violations within and beyond the region. Advocating for the protection of human rights and the rule of law could, in fact, serve Australia's interests by promoting stability and reducing the need for displacement and secondary movements.

6. Advancing the rights of people with disabilities through domestic legislation

The focus of the Terms of Reference to 'define Australia's interests and policy priorities in response to that environment' invites comment on Australia's performance in ensuring the

²³ ALHR, 10 most needed changes to the Australian Government's approach to asylum seekers and refugees. Available at < <https://alhr.org.au/10-needed-changes-australian-Governments-policies-towards-asylum-seekers-refugees/> >

²⁴ This multinational forum is co-chaired by Australia and Indonesia. It includes 45 member states from Australia and the Pacific, and also includes UNHCR and the IOM.

²⁵ Marty Natalegawa, Indonesian Minister of Foreign Affairs and Kevin Rudd, Australian Minister for Foreign Affairs, 'Co-Chairs' Statement' (outcome document from the Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011) [16]

²⁶ Report of the Expert Panel on Asylum Seekers (August 2012)

rights of people with disabilities feature in its foreign policy and international relations. Australia has ratified the *Convention on the Rights of Persons with Disabilities* (CRPD) and Optional Protocol, though has failed to enact those obligations in domestic legislation. The recent introduction of the National Disability Insurance Scheme has provide a landmark commitment of the Australian Government to provide a rights based care system for people with disabilities. ALHR supports the NDIS and recognises the improvement it offers to provide people with disabilities.

The National Disability Strategy 2010-2020 (NDS) provides the commitment of all Australian governments to the obligations outlined in the CRPD as identified in the six key policy areas addressed by the NDS. ALHR supports the ongoing commitment to the NDS, noting that the Strategy guides public policy across governments and aims to bring about change in all mainstream services and programs, as well as community infrastructure which is critical to preserving and promoting the human rights of people with disabilities in Australia. However, ALHR is concerned that the NDS is not enough and the rights of people with disabilities must be a clear policy priority area for Australia's Foreign Policy White Paper.

In the Concluding Observations of the CRPD Committee (2013), recommendations were made for action by Australia across all areas addressed in the CRPD despite having the NDS and NDIS in place.²⁷ Life for people with disabilities in Australia is marginalised, disadvantaged and unequal with experiences of significant rates of unemployment²⁸, denial of the right to access justice including equal capacity before the law²⁹ and high rates of exploitation, abuse and neglect in institutionalised settings around the country.³⁰ The most recent implementation report on the NDS in 2014 noted some achievements in the areas of inclusive and accessible communities, economic security and personal and community support; though it is clear there is some way to go to achieve proper rights protection and advancement as promised in the CRPD for people with disabilities.

Australia has recently been called before the CRPD Committee on a number of occasions by individuals complaining that they are denied their right to access justice without any domestic remedy to protect them. The cases of Gemma Beasley³¹, Michael Lockrey³² and AM³³ identified the issue facing deaf jurors in Australia who are denied the right to participate as jurors on the basis of their disability. In the case of *Beasley v Australia* and *Lockrey v Australia*, the CRPD Committee found that both complainants were not afforded the right to access justice.

The rights of people with disability must be a policy priority for Australia's Foreign Policy White Paper. ALHR calls on Australia to incorporate its obligations under the CRPD into domestic legislation immediately to ensure the rights of people with disabilities are protected and

²⁷ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013), CRPD/C/CAUS/CO/1, page 1.

²⁸ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016).

²⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).

³⁰ Senate Standing Committees on Community Affairs, *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disabilities and Culturally and Linguistically Diverse people with disabilities* (2015).

³¹ Committee on the Rights of Persons with Disabilities, *Views: Communication No 011/2013*, 15th sess, UN Doc CPRD/C/15/D/11/2013 ('*Beasley v Australia*')

³² Committee on the Rights of Persons with Disabilities, *Views: Communication No 013/2013*, 15th sess, UN Doc CPRD/C/15/D/13/2013 ('*Lockrey v Australia*')

³³ Committee on the Rights of Persons with Disabilities, *Views: Communication No 012/2013*, 13th sess, UN Doc CPRD/C/13/D/12/2013 ('*AM v Australia*')

promoted, leading to an unprecedented recognition and protection of equal rights of for Australians with disabilities.

7. Australia's Advocacy for the Abolition of the Death Penalty

In announcing its candidacy for a seat on the UNHRC, the Australian Government has stated that if elected:

Australia would be a strong advocate for global abolition of the death penalty, one of Australia's core human rights objectives.

As a signatory to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty*³⁴, Australia is recognised on the world stage as being opposed to the imposition of the death penalty.³⁵ Its condemnation of the death penalty is reflected in calls for countries such as Iran, Egypt, China, Malaysia and Singapore to bring an end to capital punishment through the UN Human Rights Council's Universal Periodic Review Process.

ALHR strongly welcomes this commitment, and the Government's recent announcement that Australia is going to have a strategy to guide its advocacy against capital punishment in our region.

To date, Australia's international advocacy for the abolition of the death penalty has had a situational focus – that is, it has tended to come to prominence when Australian nationals are exposed to the risk of a death sentence overseas.

It is ALHR's hope that, as part of the Foreign Policy Whitepaper, the Government will now take more committed, consistent and strategic action in advocating for the abolition of the death penalty. Australia should be devoting greater resources to offering practical and more effective alternatives to States which retain and implement the death penalty.

Joint Standing Committee on Foreign Affairs, Defence and Trade's report, "A World Without the Death Penalty"

ALHR calls on the Australian Government to immediately implement in full the recommendations of the Joint Standing Committee on Foreign Affairs, Defence and Trade's report, "A World Without the Death Penalty". The report's 13 practical recommendations effectively deliver a blueprint for Australia's global leadership to abolish the death penalty.

Adoption of the UK model in providing strategic assistance to ASEAN civil society groups

ALHR calls on the Australian Government to provide strategic assistance to ASEAN civil society groups in their advocacy efforts towards the abolition of the death penalty. This has proven an effective strategy in the United Kingdom assistance to ASEAN civil society groups.

The United Kingdom (UK) Government's strategy for the abolition of the death penalty, which was updated in October 2011, includes clear benchmarks and goals to guide British embassies in advocating against the death penalty in countries in which executions continue. It defines three goals to support an overarching objective of global abolition:

1. increase the number of abolitionist countries, or countries with a moratorium on the use of the death penalty;
2. in countries that still apply the death penalty, secure further restrictions on its use and reductions in the numbers of executions;

³⁴ UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128,

³⁵ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>

3. when the death penalty is applied, ensure that universal minimum standards on its use are met. These include fair trial rights and the non-execution of juveniles.³⁶

Importantly, the UK Government's strategy also earmarks Foreign Commonwealth Office (UK FCO) funding to aid death penalty research, local lawyers in bringing challenges against the death penalty and civil society groups in their advocacy efforts towards the abolition of the death penalty. For instance, project work funded by the UK FCO, together with other Governments, is being used to help to clarify the question of public opinion on the death penalty in Japan, which executed three prisoners in 2014.³⁷

ALHR strongly endorses the comprehensive framework for action developed by the UK in advocating for the global abolition of the death penalty. In particular we applaud its recognition of the need to earmark funding to aid local lawyers and civil society groups in their advocacy efforts towards the abolition of the death penalty.

Changes to the policy framework within which the AFP operates

ALHR also calls on the Australian Government to be more transparent in respect of the approach taken to the death penalty in bilateral treaties³⁸ where there is a risk of exposing persons to the death penalty in a foreign country.

ALHR notes with concern Amnesty International's comments that the Federal Government's position on information-sharing protocols between the Australian Federal Police and foreign authorities does not reflect the recommendations of the Joint Standing Committee on Foreign Affairs, Defence and Trade which considered those issues in 2015, and could result in Australian citizens being executed overseas because of actions of Australian authorities.³⁹

This issue provides an example as to how we believe that Australian foreign policy should be tested against a human rights framework.

ALHR made submissions to that Committee in 2015 which included an express call upon the Government to "put in place stronger legislation so that the Australian Federal Police is required by law and in operational procedures not to share information with other law enforcement agencies that would potentially result in suspected perpetrators facing the death penalty".⁴⁰ ALHR submitted that review of Australia's advocacy for abolition of the death penalty and recommendations as to further steps that could be taken should be made within the context of the relevant international human rights law framework.

We attach at the end of this document an extract from our original paper, providing more detail. As we said in our original submission, making relatively small but highly significant changes to the policy framework within which the AFP operates would not prevent Australia from providing valuable assistance in matters involving offences for which the death penalty is maintained, it simply means that Australia's assistance and cooperation will always be conditional on an absolute guarantee from the requesting country that they will not impose or carry out the death penalty.⁴¹ It is not satisfactory to refuse to implement such changes on the basis that other countries might or might not give such guarantees.

³⁶ Chapter 5, United Kingdom Government Foreign and Commonwealth Office, *Human Rights and Democracy Report 2014* 12 March 2015 available at: <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014>

³⁷ Ibid

³⁸ Such as the *'Mutual Assistance in Criminal Matters (Republic of Indonesia)' Treaty* and the *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation*.

³⁹ Matthew Doran, "Amnesty International warns new AFP protocols could see more death sentences handed down", ABC News online, 1 March 2017, available at: <http://mobile.abc.net.au/news/2017-03-01/amnesty-warns-afp-protocols-could-allow-bali-nine-repeat/8316638>, accessed 1 March 2017.

⁴⁰ Amnesty International et al, "[Australian Government and the Death Penalty: A Way Forward](https://www.hrw.org/news/2015/05/20/australian-government-and-death-penalty-way-forward)", 20 May 2015, available at <https://www.hrw.org/news/2015/05/20/australian-government-and-death-penalty-way-forward>

⁴¹ The Hon. John von Doussa QC, President, Human Rights and Equal Opportunity Commission (HREOC), *The Death Penalty - a matter of principle*, 22 October 2006, Speech given to United Nations Association of

National Action Plan

ALHR calls on the Australian Government to urgently develop and fund a national action plan which adopts the four measures recommended by leading NGOs, being: Amnesty International, Human Rights Watch, the Human Rights Law Centre, Reprieve Australia, Australians Detained Abroad, NSW Council for Civil Liberties, Civil Liberties Australia, and Uniting Justice Australia in their paper “*Australian Government and the Death Penalty: A Way Forward*”⁴² Those measures are to:

1. *Develop a new Department of Foreign Affairs and Trade public strategy document aimed at ending the death penalty, everywhere;*
2. *Use the aid program to support civil society organisations campaigning for abolition in retentionist countries;*
3. *Join forces with other nations - through the United Nations and other multilateral and regional bodies - to push for universal adoption of a global moratorium on the death penalty;*
4. *Put in place stronger legislation so that the Australian Federal Police are required by law and in operational procedures not to share information with other law enforcement agencies that would potentially result in suspected perpetrators facing the death penalty.*

We also agree with the Human Rights Law Centre that Australia should introduce a law similar to the US Leahy Law which would prohibit Australia from providing direct aid or assistance to any foreign government or security forces against which there is credible information of serious human rights abuses.⁴³

8. Rights of Indigenous Peoples

In April 2009, Australia stated its public support for the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.⁴⁴ In 2013, the Australian government and Human Rights Commission made a joint statement to the UN Permanent Forum on Indigenous Issues, asserting that the Australian government and Indigenous peoples in Australia see “Australia’s support for the Declaration as another opportunity to rebuild our relationship”.⁴⁵ These recent developments indicate Australia’s acknowledgement that making progress in relation to the human rights of Indigenous peoples is both an obligation and a necessity at national and international levels.

UNDRIP is not a binding treaty, yet the standards it enshrines reflect the universal human rights standards protected in binding international treaties, notably the ICCPR and ICESCR. ALHR calls on the Australian Government to significantly strengthen its commitment to UNDRIP by incorporating rights protections for indigenous peoples into Australian domestic law.

The collective human right of self-determination is a key feature of UNDRIP, and a foundation principle in the international human rights framework more broadly. The adoption of self-determination as the central principle in relation to Indigenous peoples’ rights would transform Australian understandings of what commitment to UNDRIP means and requires. The right of self-determination contains a range of possibilities for Indigenous peoples to realise both

Australia, Adelaide - available at: <https://www.humanrights.gov.au/news/speeches/death-penalty-matter-principle> accessed 18 September 2015

⁴² Amnesty International et al, “*Australian Government and the Death Penalty: A Way Forward*”, 20 May 2015, available at <https://www.hrw.org/news/2015/05/20/australian-government-and-death-penalty-way-forward>

⁴³ op cit, page 3 par 5 and page 8.

⁴⁴ GA Res 61/295, A/RES/61/295 (2007).

⁴⁵ Mandy Doherty and Jenny Bedford “Implementation of the Declaration of the Rights of Indigenous Peoples” (Speech on behalf of the Australian Government and Australian Human Rights Commission to the Permanent Forum on Indigenous Issues, New York, 22 May 2013).

“rights as citizens *and* a unique status as Indigenous peoples recognised by the state.”⁴⁶ Such possibilities can be enabled across the extremely broad range of areas in which Indigenous peoples’ rights and opportunities are lacking as compared to the general Australian population, for example, child welfare, employment, health, housing and access to justice.

By formally adopting the principles of UNDRIP and integrating them into Australian domestic law and practice, the Australian Government could address key matters of “unfinished business” including land rights, constitutional recognition, Treaty, sovereignty and Indigenous representative governance.⁴⁷ In doing so, Australia would position itself internationally as a nation which is true to its commitments and determined to address a troubled history and present by showing human rights leadership in future.

9. Rights of Women and Children

Australia must adopt an approach to foreign, security, economic and international development issues that is consistent with its international human rights obligations pursuant to the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) and the Declaration for the Elimination of Violence against Women.

To this end, it is essential that CEDAW is fully incorporated into national legislation and that domestic mechanisms are introduced to ensure that women have human rights consistently enforceable throughout Australia. In particular, the right of women to live free from violence must be addressed and steps taken to ensure that there is segregated federal funding of women’s refuges and specialised domestic violence services that cater exclusively to women and children escaping violence.

The particular disadvantage and exposure to risk of Aboriginal and Torres Strait Island women, women with disabilities and migrant and refugee women must be investigated and addressed as a matter of urgency. The increasing use of incarceration of these women is of particular concern. Measures must be taken to improve access to justice and also to institute a child protection framework that ensures complaints of violence and abuse are thoroughly investigated and addressed in a timely manner.

Finally, Australia must reassess its economic measures that fail to take account of the unpaid care work carried out within the community. In keeping with global trends and steps taken by other progressive western democracies such as Finland, the Netherlands, Canada, Scotland, Sweden and New Zealand, the Australian Government should explore the possibility of trialling a Universal Basic Income at the earliest opportunity.

10. Recommended Future IHRL Ratifications

ALHR warmly welcomes Attorney-General Brandis’ recent announcement at the DFAT NGO Forum on 9 February 2017, that in the lead up to the vote for its candidacy to the United Nations Human Rights Council, the Australian Government will ratify the OPCAT.⁴⁸

ALHR commends the Australian Government’s excellent record of IHRL ratifications to date and further recommends it take urgent, meaningful and practical steps toward the ratification of the following IHRL instruments:

⁴⁶ Stuart Bradfield, “Separatism or the Status-Quo? Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC” (2006) 52 Australian Journal of Politics and History 80 at 81.

⁴⁷ Amy Maguire, “The UN Declaration on the Rights of Indigenous Peoples and Self-Determination in Australia: Using a Human Rights Approach to Promote Accountability” (2014) 12 New Zealand Yearbook of International Law 105.

⁴⁸ Attorney-General for Australia Senator the Hon George Brandis QC, “Speech - 2017 DFAT-NGO Forum on Human Rights, National Museum of Australia, Canberra”, 9 February 2017. Available: <https://www.attorneygeneral.gov.au/Speeches/Pages/2017/Firstquarter/2017-Dfat-Ngo-Forum-On-Human-Rights-National-Museum-Of-Australia-Canberra.aspx>

- the Migrant Workers Convention
- the ILO Forced Labour Convention,
- the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

11. Future Innovations on the UN Human Rights Council

ALHR proudly supports the Australian Government's candidacy for election to the UNHRC for the 2018-2020 term.

As noted in the introductory section above, in announcing Australia's candidacy the Australian Government has stated:

Our inaugural candidacy embodies our commitment to the aims and purposes of the Universal Declaration of Human Rights and to the ongoing promotion and protection of human rights. This commitment reflects national values which are deeply embedded in Australian society and our respect for democracy and the rule of law. It also underpins the way we have always engaged with the international community – with active, practical advocacy, sensitivity and fairness, and a willingness to speak out against human rights violations and abuses⁴⁹.

However, if Australia wishes to authentically pursue its claim for a seat on the Council from 2018-2020, then it must in actions as well as words live up to these claims. Australia's real and effective advocacy toward the ongoing promotion and protection of human rights is dependent upon IHRL being at the core of any Foreign Policy White Paper.

ALHR supports the general five-pillar platform articulated by the Foreign Minister and DFAT during the campaign including:

- (i) Gender equality
- (ii) Good governance
- (iii) Freedom of expression
- (iv) The rights of indigenous peoples
- (v) Strong national human rights institutions and capacity building.

ALHR urges the Government, if elected to the Human Rights Council, to take a positive, proactive and innovative leadership role on the UNHRC by sponsoring or co-sponsoring motions to the following effect:

- Draft a binding convention on the rights of indigenous peoples as a progression from UNDRIP;
- Support the drafting work on a binding convention on business and human rights;
- Establish a World Court or Tribunal of Human Rights as originally proposed by Colonel William Roy Hodgson during the drafting negotiations of the *Universal Declaration of Human Rights (UDHR)*.⁵⁰ This would be distinguished from the United Nations Human Rights Committee which takes individual complaints from contracting parties under the ICCPR First Optional Protocol. Such a court is envisaged to have a superior and strengthened jurisdiction akin to the International Criminal Court (ICC).

⁴⁹ Australia's candidacy for the United Nations Human Rights Council 2018-2020 Department of Foreign Affairs and Trade Website: <http://dfat.gov.au/international-relations/international-organisations/Pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>

⁵⁰ See generally: MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House, 2001); Civil Liberties Australia, "Dead to Rights: How an Aussie Hero Framed the World's Conscience" (24 April 2012). Available: <http://www.cla.asn.au/News/dead-to-rights-how-an/>

12. Conclusion

ALHR strongly supports an innovative Foreign Policy White Paper which looks inwards as well as outwards and harmonises a holistic roadmap for advancing and protecting Australia's interests in a dynamic, complex and unpredictable international environment. ALHR agrees that such blueprint must be clear-eyed about Australia's interests, grounded in our values and ensure Australia is better positioned to seize opportunities and manage present and future risks.

We reiterate the summary of our recommendations as follows. They are not in order of importance:

1. That Australia adopts a principled and consistent human rights-based approach to foreign policy work that engages with the United Nations human rights system and addresses human rights abuses in the region and globally.
2. That the Commonwealth Government implement Australia's outstanding IHRL obligations including by way of a Commonwealth Bill of Rights or Human Rights Act. This includes:
 - incorporating Australia's obligations under the *Convention on the Rights of Persons with Disabilities* into domestic legislation to ensure the rights of people with disabilities are protected and promoted;
 - incorporating the principles of the United Nations *Declaration on the Rights of Indigenous Peoples* into domestic law so as to address key matters of "unfinished business" including land rights, constitutional recognition, Treaty, sovereignty and Indigenous representative governance;
 - incorporating the principles of the *Convention on the Elimination of all Forms of Discrimination Against Women* into domestic law to ensure that women have human rights consistently enforceable throughout Australia and that protection of those rights is funded, in particular, the right of women to live free from violence;
 - adopting stronger legislation so that the Australian Federal Police is required by law and in operational procedures not to share information with other law enforcement agencies that would potentially result in suspected perpetrators facing the death penalty, perhaps through a law similar to the US Leahy Law which would prohibit Australia from providing direct aid or assistance to any foreign government or security forces against which there is credible information of serious human rights abuses.
3. That the Commonwealth Government develop National Action Plans for improving the legal, regulatory and policy framework required to successfully implement the UN Guiding Principles (UNGPs) on Business and Human Rights, involving transparency and:
 - a consultative, multi-stakeholder process that includes civil society;
 - an evidence-based process to include a national baseline assessment of existing legislative gaps in UNGP implementation in Australia;
 - provision for ongoing monitoring and review of the NAP; and
 - comprehensive content which extends beyond a statement of current policy or commitments, contains forward-looking action points and has a human rights-based focus.
4. That the Commonwealth Government implement the recommendations of the Australian Human Rights Commission's report, *Pathways to Protection: A human rights-based*

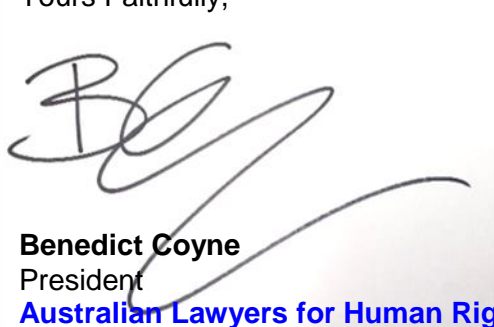
response to the flight of asylum seekers by sea particularly by closing Manus and Nauru offshore centres and ceasing indefinite incarceration.

5. That Australia promptly ratify:
 - the Migrant Workers Convention;
 - the ILO Forced Labour Convention;
 - the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.
6. That, if elected to the UN Human Rights Council, Australia take a positive, proactive and innovative leadership role on the UNHRC by sponsoring or co-sponsoring motions to:
 - draft a binding convention on the rights of indigenous peoples as a progression from UNDRIP;
 - support the drafting work on a binding convention on business and human rights; and
 - establish a World Court or Global Tribunal of Human Rights as recommended by Australian Gallipoli hero Colonel William Roy Hodgson during the drafting of the *1948 Universal Declaration of Human Rights*.

If you would like to discuss any aspect of this submission further, please email me at:

[REDACTED]

Yours Faithfully,



Benedict Coyne
President
[Australian Lawyers for Human Rights](#)

Contributors: Benedict Coyne, Khanh Hoang, Rebecca Dowd, Amy Sinclair, Kerry Weste Tamsin Clarke, Anna Kerr, Amy Maguire

Attachment: Extract from 2015 submission in relation to the Death Penalty

The United Nations Human Rights Committee has held that where countries have abolished the death penalty, they have an obligation not to expose a person to the real risk of its application.⁵¹

Given this obligation, **ALHR calls on the Australian Government to ensure our mutual assistance and agency assistance arrangements very clearly reflect Australia's commitment to abolishing the death penalty.**

Had it not been for inconsistencies between the safeguards applicable to mutual assistance and agency assistance, Andrew Chan and Myuran Sukumaran may not have been exposed to a sentence of death. There are currently no Australian laws that prevent a repeat of the circumstances that saw the Bali 9 sentenced to death and executed.

It is ALHR's view that our domestic laws and directives as well as bilateral arrangements presently still risk exposing Australians to the death penalty in foreign countries. We consider this to be inconsistent with Australia's obligations under the 2nd Optional Protocol. Moreover, it undermines Australia's principled opposition to the death penalty.

ALHR calls for the Australian Government to ensure AFP assistance to foreign law enforcement agencies is limited by a provision similar to that applying in the Extradition Act 1988. If this were the case, the AFP could only provide information to international authorities when it has a guarantee that the information will not be used to pursue capital charges.⁵² There is a pressing need for a requirement of Ministerial oversight to be introduced into the AFP guidelines concerning the sharing of information that could lead to the death penalty when Australian law enforcement agencies are providing assistance before arrest, charge, or conviction.

ALHR submits that the Federal Parliament should amend the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the 'Mutual Assistance Act') and the *Australian Federal Police Act 1979* (Cth) (the 'AFP Act'):

- to provide for the mandatory refusal of a request for mutual assistance in relation to an investigation which may expose a person to the risk of the death penalty, as set out in more detail in the *2012 Human Rights and Equal Opportunity Commission Submission to the Attorney-General's Department Mutual Assistance Review*⁵³; and
- to prohibit police sharing information which could lead to the death penalty for Australian citizens or persons otherwise under Australian jurisdiction.

ALHR also calls on the Australian Government to be more transparent in respect of the approach taken to the death penalty in bilateral treaties⁵⁴ where there is a risk of exposing persons to the death penalty in a foreign country.

⁵¹ In *Judge v. Canada*, United Nations Human Rights Committee Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

⁵² This is one of the recommendations in Amnesty International et al, op cit.

⁵³ <<https://www.humanrights.gov.au/mutual-assistance-review>> accessed 18 September 2015

⁵⁴ Such as the '*Mutual Assistance in Criminal Matters (Republic of Indonesia)*' Treaty and the *Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Australia on Combating Transnational Crime and Developing Police Cooperation*.