



ISHR

INTERNATIONAL SERVICE
FOR HUMAN RIGHTS



THE SITUATION OF HUMAN RIGHTS DEFENDERS

AUSTRALIA

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Australia has a vibrant, diverse and pluralistic civil society and demonstrates strong support for the work of human rights defenders (HRDs) at the UN Human Rights Council through its regular co-sponsorship of thematic resolutions on HRDs, civil society space, freedom of association and assembly, freedom of expression, reprisals, and the work of national human rights institutions. There is a growing disconnect, however, between Australia's position on HRDs at the international level and the situation of particular HRDs at the national level, with regressive laws and policies recently enacted or implemented which restrict the right to peaceful protest, diminish the independence and effectiveness of the national human rights institution, impose unreasonable restrictions on the capacity of non-governmental organisations to engage in advocacy, and potentially criminalise the work of journalists on the grounds of national security.

GENERAL LEGISLATIVE FRAMEWORK FOR HUMAN RIGHTS DEFENDERS

- In general terms, human rights defenders in Australia are able to undertake their work in a safe and enabling environment, free from harassment and attacks.
- Australia has failed, however, to take the necessary steps to guarantee and safeguard such an environment through the enactment of comprehensive national human rights legislation. In particular, Australia has failed to enshrine, legislatively or constitutionally, the rights that are necessary for civil society and HRDs to operate effectively, such as the rights to freedom of expression, association, assembly and peaceful protest. This is despite the recommendations of the 2009 Australia National Human Rights Consultation,¹ the repeated recommendations of UN treaty bodies² and Special Procedures,³ and recommendations made by a number of States (including Canada, France, Jordan, Norway and Timor Leste) during Australia's last Universal Periodic Review in January 2011.⁴

LEGISLATIVE, ADMINISTRATIVE AND FINANCIAL RESTRICTIONS ON THE WORK OF HUMAN RIGHTS DEFENDERS

- The lack of comprehensive legal or constitutional protection of human rights has enabled both the national legislature and state and territory

legislatures to enact and implement laws and policies which are incompatible with the Declaration on Human Rights Defenders and the International Covenant on Civil and Political Rights, including the following:

ANTI-PROTEST LAWS

- In November 2014, the Australian state of Tasmania enacted the *Workplaces (Protection from Protesters) Act 2014*.⁵ The Act specifically targets those who protest against the business activities or operations of mining, resource and forestry companies. In contravention of articles 19 and 21 of the ICCPR, the Act makes it a criminal offence for a person to participate in a protest on business premises or on any road, footpath or public land used to access the business premises where to do so may 'prevent, hinder or obstruct' business activity or access to the premises.⁶ Protesters may be issued with on-the-spot fines, subject to police orders to 'move on', and even subject to jail sentences of up to four years.⁷ The Act also confers additional powers on police, including the power to remove, arrest and use force against peaceful protesters.⁸ According to the UN Special Rapporteur on freedom of opinion and expression, 'the law itself and the penalties imposed are disproportionate and unnecessary in balancing the rights to free expression and peaceful assembly and the government's interests in preserving economic or business interests.'⁹ In the Special Rapporteur's view, the Act is likely to 'have the chilling effect of silencing dissenters

and outlawing speech protected by international human rights law.’

- In January 2015, the Tasmanian Government announced plans to enact legislation providing corporations with the right to sue protesters and advocates. This legislation would target land and environment defenders in particular.¹⁰
- In March 2014, the Victorian parliament enacted the *Summary Offences and Sentencing Amendment Act 2014*.¹¹ The Act provides police and protective services officers with the power to issue a direction to ‘move on’ to any person causing or likely to cause undue obstruction to another person or traffic, or ‘impeding or attempting to impede another person from lawfully entering or leaving premises’.¹² Failure to comply with a ‘move on direction’ or to disclose name and address to a police officer who intends to give a move on direction is a criminal offence.¹³ The law is directed, inter alia, at protesters, and also enables police to apply for a court order excluding a person from a public place for up to 12 months, contravention of which is punishable by two years’ imprisonment.¹⁴ According to the Human Rights Law Centre, the law imposes unreasonable limits on the rights to freedom of expression, assembly and association.¹⁵

LAWS CRIMINALISING THE WORK OF JOURNALISTS AND WHISTLEBLOWERS

- In October 2014, the Australian parliament enacted amendments to the *Australian Security Intelligence Organisation Act 1979*. Section 35P of the amended legislation criminalises the disclosure of any information regarding a ‘special intelligence operation’ with imprisonment of up to 5 years or up to 10 years in the case of reckless disclosure. The provision applies to all persons, including lawyers, journalists and other civil society actors that report or advocate national security matters. The offence is not subject to any public interest exceptions, even if the disclosure reveals human rights violations or other forms of illegality.¹⁶

LAWS AND POLICIES RESTRICTING HUMAN RIGHTS ADVOCACY

- At both the state and national levels, Australian governments are enacting policies, and requiring entry into contracts, which restrict the right and ability of non-governmental organisations to solicit, utilise and receive resources for human rights advocacy, contrary to article 13 of the Declaration on Human Rights Defenders.
- In Queensland, for example, gag clauses have been included in contracts with community organisations which stipulate that such organisations ‘must not advocate for state or federal legislative change’.¹⁷ By contrast, the state of South Australia has enacted the *Not-for-Profit Sector Freedom to Advocate Act 2013*, which prohibits state agreements from restricting or preventing not-for-profit entities

from commenting on, advocating support for or opposing changes to state law, policy, or practice.¹⁸

- At the national level, the Australian Government has recently moved to prohibit community legal centres from using Commonwealth funds for law reform, policy or advocacy work,¹⁹ and has also defunded a number of key human rights organisations working in areas including indigenous rights,²⁰ refugee and asylum seeker rights,²¹ and homelessness.²²
- The Australian Government has also recently abolished the Human Rights Grants Scheme, which provided funding support to non-governmental organisations undertaking human rights advocacy in Overseas Development Assistance-eligible countries.²³
- Australian tax laws do not recognise the promotion and protection of human rights as a charitable purpose, meaning that it is very difficult for either national or international human rights organisations to obtain charitable or tax-deductible status.²⁴

SUBSTANTIAL WEAKENING OF THE NATIONAL HUMAN RIGHTS INSTITUTION

- On 15 December 2014, the Australian Government announced a substantial reduction in funding, of approximately 30 percent, to the national human rights institution, the Australian Human Rights Commission. This is despite the fact that Australia is the lead sponsor of the thematic resolution on national human rights institutions at the UN Human Rights Council, the most recent text of which calls on States to ‘strengthen [NHRIs] to enable the effective fulfilment of their mandate’²⁵ and ‘stresses the importance of financial and administrative independence and the stability of national human rights institutions’.²⁶
- The decision to defund the Australian Human Rights Commission has been criticised by the Human Rights Law Centre (HRLC) as likely to ‘significantly weaken the Commission and reduce the government’s accountability on human rights at a time when rights are being severely threatened, in particular by harsh migration and counter-terror laws’. The HRLC has also said that ‘it’s hard to avoid the conclusion that the cuts are a politically motivated response to the [Commission’s] children in immigration detention inquiry’.²⁷ The substantial funding cuts are notably incompatible with a recommendation accepted by Australia at its last UPR to ‘ensure the provision of sufficient funding and staffing’ to the Australian Human Rights Commission.
- In addition to Australia’s NHRI being weakened by severe funding cuts, the independence and effectiveness of the Australian Human Rights Commission has also been significantly weakened through the recent appointment of

Commissioners – including the Human Rights Commissioner – directly by the Attorney-General (a Government Minister) without any advertisement, transparency, or consultation with civil society or even parliament. This is despite the guidance to the Paris Principles recommending that any appointment be made following a public advertisement, transparent process and broad and pluralistic consultation.²⁸ Upon appointment, the Human Rights Commissioner pledged to ‘advance the government’s freedom agenda’.²⁹

RECOMMENDATIONS TO AUSTRALIA

- Australia should develop and enact specific laws and policies to recognise and protect the work of human rights defenders and which give full force and effect to the international Declaration on Human Rights Defenders at the national level. In particular, Australia should legislatively enshrine those rights which are necessary for civil society and human rights defenders to operate in a conducive and enabling environment – including the rights to freedom of expression, association, assembly, peaceful protest and non-discrimination – in a comprehensive, judicially enforceable human rights law.
- Australian states and territories should repeal legislation which restricts and criminalises the right to peaceful protest contrary to international human rights law. Legislation should safeguard the right to convene public, peaceful assemblies without notice and should prohibit the use of force merely because a protest is causing hindrance or obstruction.
- Australia should repeal section 35P of the *Australian Security Intelligence Organisation Act 1979* and should strengthen the *Public Interest Disclosure Act 2013* to provide protection to whistleblowers where the

disclosure relates to the alleged violation of human rights, or may expose or promote accountability for such violations, whether by State or non-State actors and whether the whistleblower is an employee of the organisation or agency or not.

- Consistent with the Declaration on Human Rights Defenders, Australian governments should remove and not impose restrictions on the right or ability of non-governmental organisations to undertake human rights advocacy, whether through legislation or funding or contractual arrangements.
- Australia should reinstate the Human Rights Grants Scheme.
- Australia should amend the *Income Tax Assessment Act 1997 (Cth)* to introduce a deductible gift recipient category for human rights organisations. In particular, Australia should amend the ITAA to include ‘the promotion and protection of human rights’ as a charitable purpose and to recognise that advocacy activities are essential to the realisation of this purpose.
- Australia should reinstate funding to the Australian Human Rights Commission, consistently with the Paris Principles’ requirements of independence and effectiveness. Australia should also resource the establishment of a dedicated human rights defender focal point within the national human rights institution.
- Australia should ensure that the process for appointment of Commissioners to the Australian Human Rights Commission complies with the Paris Principles and good practice, including that any vacancy is publicly advertised and that the process for appointment is transparent and includes meaningful consultation with human rights defenders, non-governmental organisations and other civil society actors.

Australia has announced its candidacy for election to the Human Rights Council for the 2018-20 term. While Australia’s commitment to supporting and protecting human rights defenders and civil society space at the international level is laudable, it should ensure that this commitment is reflected in domestic laws and policies. In particular, Australia should ensure that human rights defenders – including human rights and community organisations, journalists, whistleblowers and peaceful protesters – are able to undertake their vital work in an enabling environment free from unreasonable or unnecessary legal, administrative, financial or other restrictions.

ABOUT THIS BRIEFING PAPER

ISHR encourages States to consult UPR submissions by domestic NGOs and make recommendations to Australia regarding the protection of human rights defenders. An excellent local source of information on human rights issues in Australia is the Human Rights Law Centre (www.hrlc.org.au). For further information on this briefing paper, contact Phil Lynch (p.lynch@ishr.ch).

1. National Human Rights Consultation Committee, National Human Rights Consultation Report (September 2009), Recommendation 18 at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>.
2. See, eg, Human Rights Committee, Concluding Observations on Australia, UN Doc CCPR/C/AUS/CO/5 (2009), para 8; Committee on Economic, Social and Cultural Rights, Concluding Observations on Australia, UN Doc E/C.12/AUS/CO/4 (2009), para 11; Committee on the Elimination of Discrimination against Women, Concluding Observations on Australia, UN Doc CEDAW/C/AUS/CO/7, paras 24–25; Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations on Australia, UN Doc CERD/C/AUS/CO/15-17/CRP.1, para 10.
3. See, eg, UN Doc A/HRC/4/18/Add.2, paras 10-11 and 15; UN Doc A/HRC/14/20/Add.4, paras 7, 14-15 and 100; UN Doc A/HRC/15/37/Add.4, para 14; and A/HRC/4/26/Add.3, paras 8, 10, 15 and 65.
4. Report of the Working Group on the Universal Periodic Review: Australia, UN Doc A/HRC/17/10, paras 86.18–86.22.
5. See http://www.austlii.edu.au/au/legis/tas/num_act/wfpa201425o2014498/.
6. Workplaces (Protection from Protesters) Act 2014 (Tas), Part 2.
7. *Ibid*, Part 4.
8. *Ibid*, Part 3.
9. 'UN experts urge Tasmania to drop its anti-protest bill', 9 September 2014, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>.
10. Michael Safi, 'Tasmania moves to allow corporations to sue protesters for defamation', The Guardian, 7 January 2015, at <http://www.theguardian.com/politics/2015/jan/07/tasmania-moves-to-allow-corporations-to-sue-protesters-for-defamation>.
11. See http://www.austlii.edu.au/au/legis/vic/num_act/soasaa201415o2014431/.
12. Summary Offences and Sentencing Amendment Act 2014 (Vic), section 3.
13. *Ibid*, section 4.
14. *Ibid*, section 5.
15. Human Rights Law Centre, Submission to the Scrutiny of Acts and Regulations Committee on the Summary Offences and Sentencing Amendment Bill 2013 at http://www.hrlc.org.au/wp-content/uploads/2014/01/HRLCsubmissiontoSARC_SummaryOffencesandSentencingAmendmentBill2013_Jan2014.pdf.
16. Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security on the National Security Legislation Amendment Bill (No 1) at <http://www.aph.gov.au/DocumentStore.ashx?id=cece506e-0aa0-41c8-b564-f70ff82cefba&subId=298844>.
17. Some funding agreements go even further to include a clause providing that 'The organisation must also not include links on their website to other organisations' websites that advocate for state or federal legislative change': see <http://www.brisbanetimes.com.au/queensland/gag-clauses-help-stop-grant-abuse-20120919-265tm.html>. The Queensland Government has also introduced a proposed amendment to section 289 of the Legal Profession Act 2007 to effectively prevent community organisations using funding from the Legal Practitioners Interest on Trust Accounts Fund, a vital source of funding for community legal centres, to undertake law reform and advocacy activities: see http://www.qails.org.au/_dbase_upl/Premier%20re%20JOLA%20law%20reform.pdf.
18. See <http://www.legislation.sa.gov.au/LZ/C/A/NOT-FOR-PROFIT%20SEC-TOR%20FREEDOM%20TO%20ADVOCATE%20ACT%202013/CUR-RENT/2013.46.UN.PDF>.
19. Community Law Australia, 'Brandis restrictions starting tomorrow seek to silence community legal centres speaking out on unfair laws, policies and practices', 30 June 2014, at <http://www.communitylawaustralia.org.au/brandis-restrictions-starting-tomorrow-seek-to-silence-community-legal-centres-speaking-out-on-unfair-laws-policies-and-practices/>.
20. In particular, the Australian Government has substantially defunded NATSILS (the national peak body for Aboriginal and Torres Strait Islander Legal Services) and the National Congress of Australia's First Peoples (the national representative body for Aboriginal and Torres Strait Islander peoples).
21. In particular, the Australian Government has substantially defunded the Refugee Council of Australia.
22. See Shalailah Medhora, 'Homelessness advocacy groups lose \$21 million in federal government funding', The Guardian, 23 December 2014 at <http://www.theguardian.com/australia-news/2014/dec/23/homelessness-advocacy-groups-lose-21m-in-federal-government-funding>.
23. See Robin Davies, 'Human Rights Day isn't what it used to be', ANU Development Policy Centre at <http://devpolicy.org/in-brief/human-rights-day-isnt-what-it-used-to-be-20141210/>.
24. See Human Rights Law Centre/Blake Dawson, 'Submission to the Henry Review of Australia's Tax System', 12 May 2009, at <http://www.hrlc.org.au/files/henry-review-submission.pdf>.
25. 'National institutions for the promotion and protection of human rights', UN Doc HRC/Res/27/18, para 2.
26. 'National institutions for the promotion and protection of human rights', UN Doc HRC/Res/27/18, para 8.
27. Human Rights Law Centre, 'Slashing funding for human rights watchdog is dangerous for human rights and democracy', 15 December 2014 at <http://hrlc.org.au/slashing-funding-for-human-rights-watchdog-is-dangerous-for-human-rights-and-for-democracy/>.
28. See OHCHR, National Human Rights Institutions: History, Principles, Roles and Responsibilities (2010), UN Doc HR/P/PT/4/Rev.1, pages 38-9 at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.
29. See <http://www.news.com.au/national/tim-wilson-to-head-freedom-campaign-as-human-rights-commissioner/story-e6frfkp9-1226784792400>.

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