

10 March 2020

Our ref: ND - MC

Law Council of Australia
Margery Nicoll, Acting Chief Executive Officer
19 Torrens St
Braddon ACT 2612

By email: [REDACTED]

Dear Ms Nicoll

Universal Periodic Review (third cycle) stakeholder submission – List of issues

Thank you for your memo dated 24 January 2020 and for the opportunity to provide comments on the Law Council of Australia's (LCA) submission on the third cycle of the Universal Period Review (UPR) of Australia's compliance with its international human rights obligations. The Queensland Law Society (QLS) appreciates being consulted on this important process.

This response has been compiled by the QLS Human Rights and Public Law Committee, the QLS First Nations Legal Policy Committee, the QLS Elder Law Committee, the QLS Health and Disability Law Committee and the QLS Domestic and Family Violence Committee whose members have substantial expertise in this area.

The timeframe to respond on this matter is extremely short, relative to the significance and breadth of obligations and issues to be considered. For this reason, this submission does not represent comprehensive consideration of the issues. We would welcome the opportunity to work with the LCA further as its submission develops.

Overall, QLS supports the themes and issues identified by the LCA to be raised in the submission to the UPR. We offer the following additional comments, relevant to the themes identified:

General issues

We recommend the LCA consider the following in developing its UPR submission:

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- The obligations of Australia to respect, protect and promote human rights as a current member of the Human Rights Council;
- The recommendations made in Australia's second cycle of the UPR (2015), including Australia's response and implementation of those recommendations;
- The voluntary commitments made by Australia in the course of the second cycle of the UPR. In our view, many of these commitments remain unmet. These include:
 1. A commitment to holding a referendum to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution;
 2. A commitment to resettle 12,000 refugees fleeing conflict in Syria and Iraq;
 3. Addressing the scourge of family violence;
 4. Improving the way the criminal justice system treats people with cognitive disability who are unfit to plead or found not guilty by reason of mental impairment;
 5. Strengthening advocacy for the worldwide abolition of the death penalty;
 6. A commitment to promoting and protecting the rights of older people internally by modelling and advocating better use of existing UN human rights reporting mechanisms;
 7. Ending unlawful discrimination on the grounds of sexual orientation, gender identity and intersex status under Australian law;
 8. A commitment to supporting the protection and promotion of human rights through Australia's foreign aid program by promoting prosperity, reducing poverty and enhancing stability;
 9. A commitment to working with the Australian Human Rights Commission to develop a public and accessible process for monitoring Australia's process against UPR recommendations.
- Given the UPR is a peer review process, unlike many other international human rights processes, the importance of identifying and engaging with the views of other member states must be considered. In particular, consideration should be given to areas in which the members of the troika are most likely to direct their interest and recommendations. The troika members for Australia's upcoming UPR are Democratic Republic of the Congo, Italy and Czech Republic.
- QLS considers consultation with the NGO Coalition (coordinated by the Human Rights Law Centre, Caxton Legal Centre and Kingsford Legal Centre) crucial to developing a strong and consistent non-government response to the upcoming UPR.

Domestic Implementation of International Human Rights and a Federal Charter of Rights

QLS supports the enactment of a Federal Charter of Rights. Despite recognition and ratification of core human rights treaties, Australia has not fully incorporated the rights set out in these treaties into domestic law and there remains no comprehensive legal

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framework for the protection of human rights in Australia. As a result of the substantial gaps in the protection of human rights in Australia, access to effective remedies is limited. A Federal Charter of Rights would prescribe important legislative standards, enable judicially enforceable human rights protections to be established and influence community standards.

In addition, QLS suggests the LCA recommend that the Australian Government commit to consideration and implementation of recommendations arising from the Australian Human Rights Commission's 'National Conversation on Human Rights'.¹

Rights of Aboriginal and Torres Strait Islander Peoples

QLS recommends that the LCA highlight the significant issues and failings of the Australian Government in ensuring the rights of Aboriginal and Torres Strait Islander people in Australia are protected, promoted and fulfilled. Despite numerous inquiries and reviews, as well as the voluntary commitments made during the last cycle of the UPR and undertakings made in Australia's bid for a seat on the Human Rights Council, very limited progress has been achieved.

QLS supports the LCA's focus on over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system; Constitutional recognition of Aboriginal and Torres Strait Islander people and implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In addition, we suggest the LCA raise the following issues:

Closing the Gap

We recommend the LCA refer to the 12th Closing the Gap report, noting that five of seven targets are not on track.

Domestic implementation of UNDRIP, including the right to self-determination²

There is an ongoing failure to meaningfully implement UNDRIP in Australia. Two key recent examples of this that the LCA may wish to highlight are:

1. The decision to abolish the stand-alone Indigenous Legal Assistance Program (ILAP), despite the recommendations of the recent review of ILAP,³ and roll funding and administration of Aboriginal and Torres Strait Islander Legal Services under the next National Partnership Agreement on Legal Assistance Services. The National Aboriginal and Torres Strait Islander Legal Services expressed the following concerns in relation to this decision:

A separate ILAP is important to maintain ATSILS unique, culturally safe and community-controlled approach to legal services, and for the self-determination of Aboriginal and Torres Strait Islander people. This includes the flexibility

¹ See <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-australian-conversation-human-rights-2019>.

² Declaration on the Rights of Indigenous Peoples, Article 3.

³ See <https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/Review-of-the-ILAP.PDF>.

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*provided through ILAP for ATSILS to directly determine service priorities and locations based on local knowledge and needs.*⁴

2. The expansion of the Cashless Debit Card (CDC) program demonstrates disregard for the disproportionate representation of Aboriginal and Torres Strait Islander participants in the income management program and CDC trials. There is widespread criticism of the expansion of this program. For example, in the 2016 Parliamentary Joint Committee on Human Rights' Final report 'Review of Stronger Futures measures', the Committee was critical of the measures to address alcohol abuse and income management which were not 'tailored to the needs and wishes of the local community' and which 'limit the right to equality and non-discrimination, the right to social security and the right to privacy and family'.⁵

Minimum age of criminal responsibility

QLS strongly supports raising the minimum age of criminal responsibility to at least 14. As part of this change, governments must increase investment in health and education for children. This includes providing support for families and protective factors for children, which could be achieved through a justice reinvestment approach.

QLS recently made a submission to the LCA on this issue to be considered as part of the LCA response to the Council of Attorneys General Age of Criminal Responsibility Working Group Review. This submission is **attached** for your reference.

Human Rights and the Environment

Climate change potentially has significant consequences for human rights, including those now explicitly recognised in the new *Human Rights Act 2019* (Qld) and under international instruments. These include the right to life, the right to privacy, family and home, the rights of children and cultural rights.

The Australian Human Rights Commission has recognised the social and human rights implications of climate change. It is the Commission's view that the right to life will be impacted by the effects of climate change both immediately, for example, through extreme weather events which cause death, and gradually, for example, through deterioration of health, reduced access to safe food and drinking water and increased susceptibility to disease.⁶

QLS notes the international commitments made by Australia as a signatory to the Paris Agreement. To achieve the aims of the Paris Agreement to limit global warming to 1.5

⁴ <https://www.als.org.au/natsils-media-release-abandoning-standalone-commonwealth-indigenous-legal-assistance-program/>. We note that QLS also raised concern about this decision at the time.

⁵ Commonwealth of Australia, 16 March 2016, Parliamentary Joint Committee on Human Rights, *2016 Review of Stronger Futures measures*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/strongerfutures2/Final_report.

⁶ <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/climate-change-and-human-rights>.

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degrees Celsius, a reduction in emissions is required with a view to achieve net zero emissions by 2050.

QLS emphasises the need for an evidence-based domestic legislative framework that will effectively allow Australia to meet its Paris Agreement commitments.

Finally, the rights of Australians to take personal action in relation to climate change must be protected, including the right to peaceful protest, which is an essential element of democracy.

Rights of older persons

QLS supports the negotiation of a new international instrument that protects the rights of older persons, as is currently being considered by the Open-Ended Working Group on Ageing by way of mandate from the UN General Assembly.⁷ We welcome the opportunity to work collaboratively with the LCA as this progresses. Australia must reengage as an active participant of the Working Group to develop improved international human rights protections for older people as a priority.

Following the second cycle of the UPR, Australia made a voluntary commitment to promote and protect the rights of older people internally by modelling and advocating for better use of existing United Nations human rights reporting mechanisms.⁸ Australia has not fulfilled this commitment, despite opportunities to do so.

We also recommend the LCA note the current Aged Care Royal Commission and the importance of the Australian Government implementing any Commission recommendations.

Rights of people with disability

QLS recommends the LCA raise ongoing issues around the unjust treatment of people with cognitive disability, psychosocial disability or mental illness within the criminal justice system. In particular, this should include issues arising where a person is deemed unfit to stand trial, including indefinite detention. The systemic failings which have contributed to the over-representation of people with disabilities in the criminal justice system are well articulated in the 2018 Human Rights Watch report, "I Needed Help, Instead I Was Punished".⁹

⁷ Resolution 67/139 (20 December 2012) and Resolution 74/125 (18 December 2019).

⁸ A/HRC/31/14, para 143.

⁹ Human Rights Watch Report, 'I Needed Help, Instead I Was Punished', <https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>

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We recommend the LCA express concern in relation to the failure to implement supported decision-making frameworks into domestic law in line with the Australian Law Reform Commission's recommendations.¹⁰

Finally, in light of concerns raised in relation to violence, abuse, neglect and exploitation of people with disability, QLS suggests the LCA highlight the importance of the Australian Government considering and implementing any recommendations made by the Royal Commission into Violence, Abuse, Neglect and Exploitation against People with Disability.

Rights of women

Gender inequality continues to compromise the realisation of rights for women in Australia. QLS recommends the LCA address ongoing economic inequality and violence against women in its response on the rights of women.

More substantial progress must be made to achieve economic equality of women in Australia. In 2018, the Australian Human Rights Commission reported that the national gender pay gap is 15.3 per cent. It has remained stagnant at between 15 and 19 per cent for the past two decades.¹¹ The Australian Human Rights Commission also reported that one in two mothers experience workplace discrimination as a result of pregnancy, parental leave or on return to work. Further, superannuation savings between men and women remain substantially disparate.

Economic inequality has consequences for women. In 2019, the Australian Human Rights Commission reported older women are the fastest growing group of people experiencing homelessness in Australia, with an increase of 30 per cent in the period between 2011 and 2016. Structural and societal barriers related to income, workforce participation and financial security exacerbate economic vulnerability, particularly for single women, during significant life disruptions such as job loss or the loss of a partner.¹²

QLS has expressed serious concern in relation to violence against women in Australia. Women are at significantly greater risk of physical and sexual violence by a partner. Approximately one in four women, compared to one in thirteen men, has experienced violence by an intimate partner.¹³ Women account for three-quarters of the people who experienced intimate partner violence since the age of 15 and approximately one in five women, compared to one in twenty men, has experienced sexual violence.¹⁴

¹⁰ Australian Law Reform Commission Report 124, Equality, Capacity and Disability in Commonwealth Laws; <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/recommendations-8/>

¹¹ See <https://www.humanrights.gov.au/our-work/education/facts-facts-gender-equality-2018>.

¹² See <https://www.humanrights.gov.au/our-work/age-discrimination/publications/older-womens-risk-homelessness-background-paper-2019>.

¹³ https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/01/19030556/ANROWS_VAW-Accurate-Use-of-Key-Statistics.1.pdf

¹⁴ https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/01/19030556/ANROWS_VAW-Accurate-Use-of-Key-Statistics.1.pdf

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We acknowledge the development of the Fourth Action Plan of the National Plan to Reduce Violence against Women and their Children 2010 – 2022, which sets out the five national priorities to reduce family, domestic and sexual violence. However, there is still an urgent need for progress in addressing domestic and family violence. In particular, the resourcing of domestic and family violence frontline services. The LCA must address these concerns.

QLS considers addressing underlying structural and systemic gender inequalities as key to improving economic equality for women as well as reducing violence against women. We strongly support measures aimed at driving change in the structures, norms and practices that lead to gender inequality and violence against women. We refer specifically to the recent government commitment to deliver a range of programs and campaigns which recognise that women's safety is founded on women's equality.¹⁵

Access to Justice

QLS has consistently advocated for increased funding and support for the legal assistance sector, including Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services. Chronic underfunding of the legal assistance sector creates a barrier to access to justice for a significant proportion of the Australian community.

Human rights, technology and artificial intelligence

QLS recommends that the LCA note the Australian Human Rights Commission's Human Rights and Technological Project, which specifically considers the protection and promotion of human rights in the context of the rise of new and emerging technologies.¹⁶

Technology and data-driven decisions have the potential for far-reaching adverse human rights outcomes. To be compatible with human rights, the use of artificial intelligence must be lawful, transparent and explainable. Such technology should be used responsibly, with clear parameters for liability and subject to appropriate human right oversight and intervention. We note several jurisdictions are already using or moving to use artificial intelligence-informed decision making, for example the recent adoption of such technology in NSW to detect driving offences.

QLS recommends the LCA emphasise the importance of the development of fair and ethical legal frameworks to control the development and deployment of automated means for decision-making.

¹⁵ The Commonwealth has committed \$20.9 million funding for Our Watch, the national organisation established to drive nationwide change in the structures, norms and practices that lead to violence against women.

¹⁶ See, <https://tech.humanrights.gov.au/human-rights>.

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Migration matters

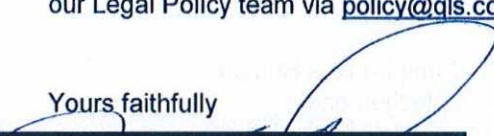

QLS shares the concerns raised by the LCA in relation to the adverse human rights implications of deporting long term permanent residents on 'character test' grounds. We recommend the LCA highlight the recent significant increase in visa cancellations on character grounds under the *Migration Act 1958* (Cth). This often results in family separation and deportation to a country that a person has little, if any, connection with. Mandatory visa cancellations have also led to prolonged and indefinite periods of immigration detention after expiration of custodial sentences for people, pending resolution of administrative reviews or appeals against visa cancellation determinations.

The deportation of non-citizens with strong family ties in Australia has been found to be contrary to international law.¹⁷ Rights in relation to children, family unity and non-refoulement are only given domestic effect through ministerial 'policy' guidance under the current process. The current, routine infringement upon these rights demonstrates a need for greater protection.

The UPR represents an important opportunity to hold the Australian government to account in domestic implementation of its international human rights obligations. This submission considers some of these issues and we look forward to working with you further in developing the LCA submission.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President

¹⁷ *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011).