Генеральная Ассамблея

Distr.: General
22 October 2018
Russian
Original: English

Совет по правам человека
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26 февраля – 23 марта 2018 года
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Доклад Специального докладчика по вопросу о положении правозащитников о его миссии в Австралию*

Записка секретариата

Секретариат имеет честь препроводить Совету по правам человека доклад Специального докладчика по вопросу о положении правозащитников Мишеля Форста о его миссии в Австралию в период с 4 по 18 октября 2016 года.

* Доклад был представлен с опозданием в связи с необходимостью отразить в нем самые последние события.

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Report of the Special Rapporteur on the situation of human rights defenders on his mission to Australia**

Contents

** Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on the situation of human rights defenders conducted an official visit to Australia from 4 to 18 October 2016, at the invitation of the Government. The main objective of the visit was to assess the situation of defenders in the context of the State's obligations and commitments under international human rights law, including the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders).

2. The Special Rapporteur held meetings in Canberra, Brisbane, Darwin, Hobart, Melbourne and Sydney. He met with a wide range of high-level officials from the federal Government, including the Department of the Prime Minister and Cabinet; the Attorney General's Department; the Department of Foreign Affairs and Trade; the Department of the Environment and Energy; the Department of Immigration and Border Protection; the Department of Communications and the Arts; and the Department of Social Services. He also met with representatives of the Parliamentary Joint Committee on Human Rights, the Australian Human Rights Commission and the Commonwealth Ombudsman.

3. There were also meetings with state governments in New South Wales, the Northern Territory, Queensland, Tasmania and Victoria. The Special Rapporteur held discussions with the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria and state-level human rights commissioners and ombudspersons. He met with a large number of human rights defenders from six states and two territories, and received inputs from many others.

4. The Special Rapporteur is grateful to the Government of Australia for its invitation and its support throughout the visit. He also thanks the federal and state authorities and other stakeholders who took the time to meet with him and shared their valuable insights. He appreciates the support from the Australian Human Rights Commission and numerous civil society networks, whose assistance was critical to the success of the visit.

5. He congratulates Australia on its election as a member of the Human Rights Council for the period 2018–2020, noting the Government's commitment to promoting and protecting human rights by building around five pillars: gender equality; good governance; freedom of expression; the rights of indigenous peoples; and strong national human rights institutions and capacity-building.[1]

II. Normative and legal framework

A. International framework

6. Australia is party to most of the core international human rights treaties, including, through recent ratification, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, it has yet to become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

7. The Special Rapporteur urges the Government to ratify the remaining international human rights treaties, and to reconsider its reservations and interpretative declarations relating to the treaties, which could affect the full realization of human rights.

[1] See http://dfat.gov.au/international-relations/international-organisations/pages/australias-membership-unhrc-2018-2020.aspx.

8. Australia has issued a standing invitation to all special procedures of the Human Rights Council. The Government's cooperation with international human rights mechanisms was demonstrated through five special rapporteur visits conducted in the course of 2016 and 2017.

9. Australia was reviewed under the universal periodic review for the second time in November 2015.[2] The Government made nine voluntary commitments, including one to designate a standing national human rights mechanism to strengthen its overall engagement with United Nations human rights reporting.[3] It subsequently did establish this mechanism,[4] and now plans to promote a strong multilateral human rights system and to deliver on the commitments it made in the 2017 Foreign Policy White Paper.[5]

B. Domestic framework

10. Australia is a federation of six states and two self-governing territories, all of which have their own constitutions, parliaments, governments and laws. The Constitution establishes the Federal Government by providing for the Parliament, the executive and the judiciary. Some of the central features of the country's system of government are not set out in the Constitution, however, but are based on custom and convention.

11. The Constitution of 1901 includes certain limitations on government power that protect civil liberties. There is no separate bill of rights. The recognition and protection of many rights and freedoms are enshrined in common law, resulting in the creation of legal precedents to be followed by courts. When interpreting legislation, in the event of ambiguity courts presume either that the Parliament did not intend to interfere with fundamental human rights, or that legislation is intended to be consistent with the country's international human rights obligations.[6] The High Court of Australia has ruled that, since the Constitution is predicated on a system of representative democracy, the implied freedom of political communication would invalidate any legislation that infringes that freedom, unless it is necessary to protect other public interests.

12. In 2009, extensive public consultations led to a proposal to set out rights explicitly in a Commonwealth human rights charter, but this was rejected by the Government. Instead, in 2010 the Australian Human Rights Framework was adopted, focusing on human rights education and introducing a new national action plan on human rights.[7] At the state level, however, the Australian Capital Territory was the first jurisdiction to adopt human rights legislation, namely, the Human Rights Act 2004. It was followed by Victoria, which passed the Charter of Human Rights and Responsibilities Act 2006. The two laws do not operate as constitutions, but rather as acts of Parliament that cover a selective range of rights, drawing predominantly from the International Covenant on Civil and Political Rights.

13. At the federal level there are mechanisms that seek to ensure that governments act consistently with the country's international obligations. In particular, the Australian Human Rights Commission Act 1986 includes a number of human rights instruments and creates a human rights complaints procedure. The Human Rights (Parliamentary Scrutiny) Act 2011 requires that federal legislation be accompanied by a Statement of Compatibility, which confirms that it has been examined by the Parliamentary Joint Committee on Human Rights and is considered compliant with international human rights law. [8]

14. During the visit, the Special Rapporteur was frequently reminded how the federal system in Australia poses practical challenges to the domestic implementation of its international human rights obligations. Legislation at the state level still needs to be

[2] See www.ohchr.org/EN/HRBodies/UPR/Pages/AUindex.aspx.
[3] See A/HRC/31/14, sect. III.
[4] See CCPR/C/AUS/CO/6, para. 3 (c).
[5] See www.fpwhitepaper.gov.au/foreign-policy-white-paper.
[6] See A/HRC/WG.6/23/AUS/1, para. 17.
[7] See www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf.
[8] See www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights.

harmonized in order to comply fully with international human rights norms and standards. Even though parliamentary scrutiny measures have improved deliberations within legislatures, they are said to have on many occasions had limited impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights.[9] The United Nations Human Rights Committee expressed a similar concern, noting, in particular, that bills are sometimes passed into law before the conclusion of the review by the Parliamentary Joint Committee on Human Rights and that the quality of some statements of compatibility is questionable.[10]

15. In November 2017 the Committee observed gaps in the application of the International Covenant on Civil and Political Rights and expressed concern about the lack of comprehensive legislation to incorporate its provisions into national law.[11] In view of the ongoing challenges encountered when harmonizing federal, state and territory legislation with international human rights obligations, the Special Rapporteur recommends that Australia adopt a comprehensive legislative framework in order to increase human rights protection and give fuller legal effect to human rights treaty provisions across all jurisdictions in the country.

16. The primary duty to promote and protect human rights and fundamental freedoms, which includes guaranteeing the right of everyone, individually and in association with others, to strive for the protection and realization of human rights, lies with the Australian State. In other words, everyone in Australia has the right to advocate for human rights.

III. Situation of human rights defenders

A. General context

17. From the outset, Australia has been noted for its continuous engagement in human rights at the global level and for its staunch support of national human rights institutions in Asia. Its traditional safeguards of constitutional democracy and the rule of law are widely recognized.

18. A free, unconstrained media plays a vital role in the public debate about important issues. The Government has traditionally provided generous support for "peak bodies" (organizations composed of groups or associations with allied interests) and the Australian Human Rights Commission. Despite the budgetary constraints facing the country, there was a sense of general commitment by the Government to supporting civil society.

19. The Special Rapporteur initially expected to encounter mostly good practices exemplifying the implementation of the State's obligations. He was however astonished to observe mounting evidence of a range of cumulative and persistent measures that have levied enormous pressure on Australian civil society. It was surprising to observe the increasing discrepancy and incoherence between the Government's external pronouncements, on the one hand, and the domestic implementation of its human rights obligations on the other.

20. While Australia advocates globally for the Human Rights Council resolutions in support of national human rights institutions, the Australian Human Rights Commission and its president have been undermined and targeted by senior public officials.[12] The Government supports resolutions on defenders considered by the General Assembly and Human Rights Council, yet activists in Australia complain about severe pressure and vilification from public officials and media outlets. Despite the Government's pledged support for protecting freedoms such as freedom of expression and of peaceful assembly and association, its civil society and journalists have raised concerns about regressive legislation stifling those very freedoms.

[9] George Williams, "The Legal assault on Australian democracy", *QUT Law Review*, vol. 16, issue 2, pp. 38–39.

[10] CCPR/C/AUS/CO/6, paras. 11–12.

[11] Ibid., para. 5.

[12] The term "public official" refers to officials from all three branches of the Commonwealth and state governments — the executive, the legislature and the judiciary.

21. The Government is proud of its long tradition of holding an annual non-governmental organization forum on human rights as a consultation mechanism for human rights issues.[13] The Special Rapporteur was informed of other opportunities for civil society to feed into the decision-making processes. However, the view of civil society is that consultations resemble information-sharing meetings and are rarely meaningful. The principle of free, prior and informed consent from the indigenous peoples is not recognized under Australian law. The "lip service" paid to consultations with civil society was mentioned in almost all meetings with defenders who advocate for the rights of refugees, indigenous peoples and the environment. Information is not adequately shared. Critical inputs or alternative suggestions are not sufficiently considered on their merits. No follow-up is ensured on past agreements, and public officials may simply choose to consult with the individuals and organizations they prefer.

22. Overall, the Special Rapporteur's observations from the stakeholder meetings at the Commonwealth and state levels are that Australia could, and ought to, do better. The Government should formulate and implement a legal and policy framework that will promote and empower defenders across the country. The reports by the mandate-holder,[14] as well as recommendations contained at the end of the present report, provide guidance to that end.

B. Freedom of expression

23. Freedom of expression and of the press is not only critical to a vibrant democracy, but also vital for a healthy civil society. By exercising free speech, journalists and activists can ensure the free flow of information, inform the public about social matters, encourage transparency and strengthen government accountability.

24. New laws and policies have increased secrecy provisions, particularly in the areas of immigration and national security. Under international law, free speech may be constrained only if it is reasonable, proportionate and necessary, either to protect the rights or reputation of others or to protect national security, public order or public health. Some Australian jurisdictions still treat defamation as a crime. Even though such crimes are rarely invoked, the Human Rights Committee urges States parties to the International Covenant on Civil and Political Rights to decriminalize defamation, and it underlines that the application of the criminal law should be countenanced only in the most serious of cases, and that imprisonment is never an appropriate penalty.[15]

25. Defenders and journalists have a right to seek information about governmental activities, and such information should be accessible unless there is specified protection need. Australia has numerous secrecy laws that unnecessarily restrict access to government information. Section 70 of the Crimes Act has a broad prohibition on the disclosure of government information by public servants and contractors in breach of confidentiality obligations, which carries a penalty of two years' imprisonment. Section 79 of the Act criminalizes the unauthorized receipt of information, which is of concern to journalists.

26. In 2010, the Australian Law Reform Commission recommended reducing the scope of secrecy laws to consider disclosures to be unlawful if they harmed essential public interests.[16] The recommendation was not implemented, however. On the contrary, secrecy provisions were reinforced, including through the controversial Australian Border Force Act. The Human Rights Committee has expressed concern about severe restrictions on access to and information regarding the offshore immigration processing facilities, including a lack of monitoring by the Australian Human Rights Commission.[17] The Act made it a criminal offence, punishable by two years' imprisonment, for a broadly defined "entrusted person" to make a record of or disclose "protected information" obtained in his or her capacity of "entrusted person". That applied not only to government officials but also to anyone defined as an Immigration and Border Protection worker, including those contracted by the Government and its employees.

[13] See A/HRC/WG.6/23/AUS/1, para. 28.
[14] See A/HRC/25/55 and A/HRC/31/55.
[15] General comment No. 34 (2011) on the freedoms of opinion and expression.
[16] See www.alrc.gov.au/publications/report-112.
[17] See CCPR/C/AUS/CO/6, para. 35.

27. The cumulative effect of the secrecy laws was to create significant barriers to legitimate reporting on human rights abuses and to whistle-blowing on misconduct in Government activities. It also led to a worrying trend of pressure exerted by the Government on civil society through intimidation and persecution. The Special Rapporteur received credible reports of doctors, child protection officers and even academics who were subjected to such pressure.

28. The Special Rapporteur is aware of the exemptions provided for disclosures required by law or to prevent or lessen a serious threat to the life or health of an individual. There is also protection for whistle-blowers under the Public Interest Disclosure Act. Substantive improvements in terms of awareness of, training on and implementation of the Act are still needed, however. Many potential whistle-blowers reportedly considered the risks of disclosure high because of the complexity of the laws, the severity and scope of the penalty, and the hostile approach by the Government and media to whistle-blowers. On 20 October 2016, recommendations from an independent review of the Act were tabled in the Parliament, and on 7 December 2017 a bill to improve whistle-blower protection in the corporate and tax sectors was introduced.

29. Following civil society criticism and legal challenges in the High Court, the Australian Border Force Amendment (Protected Information) Bill was enacted in October 2017. This applied retroactively, and clarified the intention of the Australian Border Force Act 2015 with regard to protected information, which was to prevent the unauthorized disclosure of information that could cause harm to the national or public interest, such as information relating to operational security, the protection of life or officer safety. The Government also introduced the National Security Legislation Amendment Bill 2017 to repeal sections 70 and 79 of the Crimes Act and to amend the Criminal Code 1995 through the introduction of a new harm-based secrecy framework.

30. Secrecy laws in the area of national security have also been expanded through the adoption of section 35P of the Australian Security Intelligence Organisation Act, which bans the disclosure of information relating to an Australian Security Intelligence Organisation "special intelligence operation", with a penalty ranging from 5 to 10 years' imprisonment. Given the overall secrecy of intelligence operations, and without confirmation from the Organisation, it is challenging for journalists to determine whether an activity of interest is a special intelligence operation. Because of the risk of severe sanctions, the provision may lead to self-censorship by the media, which may take a more cautious approach to reporting on the Organisation's activities.

31. The Parliamentary Joint Committee on Human Rights advised that section 35P was not a reasonable, necessary or proportionate limitation on the right to freedom of expression.[18] The Independent National Security Legislation Monitor concluded that the impact of section 35P on journalists was two-fold: first, it created a chilling effect of uncertainty as to what might be published about the activities of the Australian Security Intelligence Organisation without fear of prosecution; and secondly, journalists were now prohibited from publishing — anywhere, at any time — any information relating to a special intelligence operation, regardless of whether that information had any operational or continuing significance and even if it revealed reprehensible conduct by Organisation insiders.[19] The Government informed the Special Rapporteur that it had implemented the recommendations of the Independent National Security Legislation Monitor through the Counter-Terrorism Legislation Amendment Act 2016.

32. Furthermore, new national security laws pertaining to metadata have had serious implications for journalists and whistle-blowers. The Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 required telecommunications providers to retain a user's metadata for two years, and allowed Government agencies to access that data. Amendments providing for a warrant regime to govern access to metadata, which could be used to identify journalists' confidential sources, were introduced and then enacted so

[18] Australia, Parliamentary Joint Committee on Human Rights, "Sixteenth report of the 44th Parliament" (2014), p. 56.

[19] Australia, Independent National Security Legislation Monitor, "Report on the impact on journalists of section 35P of the ASIO Act" (October 2015).

speedily that meaningful scrutiny processes could not be applied: they were reportedly introduced and passed in the House of Representatives within the space of two hours, and were approved by the Senate within a week. The rushed passage of the law on 26 March 2015 in effect pre-empted a related ongoing inquiry by the Parliamentary Joint Committee on Intelligence and Security, which submitted its report on 8 April 2015.[20]

33. The Special Rapporteur received numerous testimonies from journalists that the Act had a cumulatively stifling impact on the media's freedom. It also dampened the confidence of whistle-blowers who sought to engage with the press. Expressing concern about the lack of judicial authorization for access to metadata, and its extensive use in national security and criminal investigations, the Human Rights Committee has urged the Government to strengthen the safeguards against arbitrary interference with the privacy of individuals with regard to accessing metadata by introducing judicial control over such access.[21] The Government points to the authorization regime in place, which involves "authorized officers" from enforcement agencies rather than judicial officers, and to the existence of independent Public Interest Advocates with scrutiny authority under the Journalist Information Warrant regime.

34. A free press and independent civil society play a crucial watchdog role in a democracy, informing the public and holding governments accountable. This is a key element of good governance. The High Court has described the free flow of information as "a vital ingredient in the investigative journalism which is such an important feature of our society".[22] For this purpose, journalists and defenders depend on access to information and sources, including whistle-blowers within government.

35. The Special Rapporteur urges the Government to conduct a broad review of the cumulative impact of counter-terrorism and national security legislation on defenders and journalists, including a review of the adequacy of the whistle-blower protection provided by the Public Interest Disclosure Act 2013, with a view to ensuring full protection of freedom of expression. This would be in accordance with the Government's pledges on good governance and freedom of expression made in the context of its election to the Human Rights Council.[23]

36. Access to information is a critical element of freedom of expression. Public servants, however, reportedly feel antipathy or powerlessness in relation to the freedom of information provisions, due in part to a lack of resources for processing applications for information, but also to a general fear of the consequences if the information obtained is subsequently exposed. Such antagonism is becoming more widespread and increasingly public, to the point where a public official has described the freedom of information laws as "pernicious".[24]

37. Defenders, journalists and lawyers who have filed freedom of information applications informed the Special Rapporteur of significant challenges in obtaining the information requested. Increasingly, those applications are immediately denied, triggering an appeal process; are delayed for more than six months; or are granted with substantially redacted material or a demand for the payment of huge fees for the information, resulting in the non-pursuit of the initial request.

38. In 2014, the Government introduced the Freedom of Information Amendment (New Arrangements) Bill, proposing the closure of the Office of the Australian Information Commissioner. Owing to the inability to get the bill passed in the Senate, the Office is still functioning.[25] In 2016, the plans to abolish the independent watchdog were shelved, but the resources for the Office remained scarce and its information policy functions were not funded.[26]

[20] Australia, Parliamentary Joint Committee on Intelligence and Security, "Inquiry into the authorisation of access to telecommunications data to identify a journalist's source" (2015).

[21] See CCPR/C/AUS/CO/6, paras. 45–46.

[22] *John Fairfax & Sons Pty Ltd v. Cojuangco*, decision of 26 October 1988, para. 13.

[23] See http://dfat.gov.au/international-relations/international-organisations/pages/australias-membership-unhrc-2018-2020.aspx.

[24] See www.canberratimes.com.au/national/public-service/australian-public-service-commissioner-john-lloyd-says-foi-laws-mean-bureaucrats-dont-write-it-down-20151019-gkcird.html.

[25] See www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic.

[26] See https://opengovernment.org.au/2017/05/03/the-quest-for-open-transparent-government/.

39. The Government's approach to freedom of information — ranging from lukewarm acceptance to active antipathy — is surprising, given its strong commitment to the Open Government Partnership. The Government met an Open Government Partnership requirement by developing a national action plan containing 15 concrete commitments, covering transparency, anti-corruption, integrity and citizen participation initiatives. The Government has endorsed the Open Government Declaration, in which it is stated that "Governments collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities". States that endorse the Declaration commit to "promoting increased access to information and disclosure about governmental activities at every level of government".[27]

40. In the spirit of the commitment, set out in the Declaration, to "recognize the importance of open standards to promote civil society access to public data", the Government should facilitate free access to information by addressing the obstacles to accessing public information and by adopting a more enabling approach.

C. Freedom of peaceful assembly

41. Freedom of peaceful assembly is a fundamental human right and an essential element of democracy. Demonstrations help raise awareness about human rights and encourage dialogue on social concerns and environmental, labour or economic issues. Peaceful protests send indications to governments about social grievances and expectations.

42. Australia can be proud of its history of successful protest movements triggering political, social and environmental advances. Those positive changes have included important labour achievements and universal voting rights. Also notable are the reconciliation movement working towards the recognition of historic injustices suffered by the indigenous peoples, and one of the first environmental movements, in defence of the Franklin River in Tasmania.

43. Despite this, the Special Rapporteur was alarmed to observe the trend, on the part of state and territory governments, of introducing constraints on the exercise of this fundamental freedom. One method has been to introduce what is essentially anti-protest legislation. Jointly with others, the Special Rapporteur has conveyed concerns to the Government that such laws, where introduced, would contravene its obligations and commitments under international human rights law, including in relation to the rights to freedom of expression and peaceful assembly.[28] The laws are aimed at prohibiting and criminalizing a wide range of legitimate conduct by describing it as "disrupting" business operations, physically preventing a lawful activity or possessing an object for the purpose of preventing a lawful activity. Consequently, peaceful civil disobedience and non-violent direct action could be characterized as unlawful disruption and "physically preventing a lawful activity". Breaches of the laws are sanctioned by heavy fines or imprisonment for up to two years.

44. At the time of the visit, such a bill was under consideration by the Legislative Assembly of Western Australia.[29] The Tasmanian government had regrettably enacted the Workplaces (Protection from Protesters) Act in 2014. Since its adoption, the Act has unjustifiably targeted environmental protestors in Tasmania, the birthplace of the first Green Party in the world. The Special Rapporteur met a number of environmental defenders in Hobart, including those who had been charged under this law. He discerned their sense of bewilderment and indignation at the law's arbitrariness, unfairness and illegitimacy. The law criminalized protests that interfered with "business activity" or a "business access area", including forests and other areas on public and private land. Not only could police prevent or stop a protest on the reasonable belief that it would cause such interference, but the penalties for causing such interference could involve fines of up to A$ 10,000 or four years in prison for further offences.[30]

[27] See www.opengovpartnership.org/open-government-declaration.

[28] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E; and www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047&LangID=E.

[29] According to the Government, the bill has since lapsed and is no longer being pursued.

[30] "Bob Brown wins his case, but High Court leaves the door open to laws targeting protesters", *The Conversation*, 18 October 2017.

45. The Special Rapporteur conveyed to the Tasmanian government his concern about the law, its implementation and its deleterious impact on the freedom of peaceful assembly and human rights advocacy. The government appeared to prioritize business interests over the democratic right to protest peacefully and the social dialogue on environmental protection. The Special Rapporteur recalled that environmentalists had a legitimate right to protect all human rights, including the right to a safe and healthy environment, regardless of whether their peaceful activities were seen by some as frustrating business projects.

46. Local environmentalists Bob Brown and Jessica Hoyt were among the first charged under the law in January 2016. They subsequently challenged the Act's constitutional validity. The Special Rapporteur welcomes the decision of the High Court of 18 October 2017, in which the High Court ruled in favour of Mr. Brown and concluded that the law was both vague and unconstitutional.[31] Judge Gageler opined that the Act created "Pythonesque absurdity" when applied to various foreseeable public gatherings.

47. Another case of legislative encroachment on free assembly was exemplified by the Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act passed in New South Wales in March 2016. The law created a new offence of "aggravated unlawful entry on enclosed lands" under the Inclosed Lands Protection Act 1901, adding to an existing offence of intentionally or recklessly interfering with a mine, which carries a draconian penalty of up to seven years in jail. Other alarming examples included event-specific legislation, such as the G20 (Safety and Security) Act 2013, which may not have reached the balance of proportionality. The latter Act deterred Queenslanders from gathering peacefully to express their views on important issues that were at stake during the Group of 20 Summit in November 2014.

D. Freedom of association

48. The Australian public trusts human rights defenders. Their work, aimed at bettering society, addressing injustices and ensuring good governance, has won them hearts and minds. It has also made them influential politically, thanks to their effective policy advocacy. During the visit, the Special Rapporteur was repeatedly told that, because of their successful advocacy for the common good, civil society organizations have increasingly faced multifaceted attacks.

49. The first element of the attempts to reduce the influence and effectiveness of civil society involved reducing their public funding. Under the guise of budgetary reductions affecting all public institutions, the funding of peak bodies was suspended, reduced or totally cut. The funding cuts have had a negative impact on those organizations' ability to carry out their activities in support of vulnerable groups and populations.

50. Critical organizations were particularly targeted in what appeared to be an attempt to silence dissenting voices.[32] The drastic defunding of peak bodies by the Government has particularly targeted organizations advocating or litigating on such sensitive issues as immigration, security, the environment and the protection of land rights.

51. Regrettably, environmental defenders' offices and the National Congress of Australia's First Peoples were completely defunded by the Commonwealth Government. Testimonies from those organizations revealed concerns that the defunding could lead to their closure or, at the very least, would undermine the effectiveness of their grass-roots, community-based affiliates that engage with local and indigenous peoples and government. A year before the defunding of the Congress, the Government had established the Indigenous Advisory Council, which reports directly to the Prime Minister. The members are appointed by the Prime Minister, raising concerns about the Council's representation of Aboriginal and Torres Strait Islander peoples. The Government had informed the Special Rapporteur on the rights of indigenous peoples that some funding for the Congress had been reinstated, yet she expressed concern that funding remained insufficient for the Congress to exercise its mandate fully.[33]

[31] *Brown v. Tasmania*, order of 18 October 2017.

[32] Human Rights Law Centre, "Defending democracy: safeguarding independent community voices" (June 2017).

[33] See A/HRC/36/46/Add.2, para. 44.

52. Many peak bodies and organizations shared with the Special Rapporteur their concerns about the need for sustainable funding for independent civil society. The growing support for short-term and project contracts limits their ability to plan their activities over the medium to long term, and threatens the ability of their staff to enjoy long-term employment.

53. The introduction of the so-called gagging clauses in funding agreements has resulted in the banning of organizations that receive federal public funds from lobbying the Government or engaging in public campaigns. The clauses prevent those organizations from engaging in public advocacy, which may be seen as contrary to the principle of a free and democratic society. They may also point to ulterior motives for the broader actions taken to control civil society funding. The Special Rapporteur echoes the concern, voiced by the Special Rapporteur on the rights of indigenous peoples, that funding cuts have specifically targeted organizations undertaking advocacy and legal services and that provisions inserted into funding agreements restrict the freedom of expression.[34]

54. The authorities have increasingly stressed a distinction between the front-line services and advocacy work of peak bodies, with the latter activity not meriting official funds. To the Special Rapporteur, such a distinction is rather paradoxical and artificial. It is impossible for those organizations to provide direct services to vulnerable populations without advocating for their rights in the process. One cannot simply feed malnourished children, without advocating for the root causes of such malnourishment to be tackled. Public advocacy is important feedback for the Government to take on board rather than oppose, in its formulation of policy approaches to systemic issues.

55. The Special Rapporteur recognizes the profound expertise and dedication of community organizations that run indigenous legal centres, environmental legal aid offices, homeless shelters, women's refuges, and childcare facilities. Rather than undermining such organizations, authorities should value their opinions and acknowledge their important role in shaping public policy. In fact, the High Court has acknowledged that advocacy by community organizations is a vital part of political communication in Australia, which is, in turn, "an indispensable incident" of the nation's constitutional system, and contributes to the public welfare.[35]

56. The second element said to weaken independent civil society was the unleashing of more red tape. Conservation groups must file a Statistical Return of Tax Deductible Donations, which requires them to declare their total expenditure from public funds; more than 600 groups are affected. Yet in 2017, and without any apparent legal basis, the Department of the Environment and Energy demanded details of where the funds had been spent, whether within the country or offshore, and how much had been used for "on-ground environmental remediation", "campaign and advocacy" and "research".[36]

57. Civil society organizations believed there was more to that than met the eye, especially given the third method used to try to stifle them: stripping them of their tax-deductible status. In June 2014, at one political party's federal conference, a motion to remove the status from green organizations was passed unanimously, while sponsors singled out the Australian Conservation Foundation, the Wilderness Society and environmental defenders' offices, claiming that they "engage in untruthful, destructive attacks on legitimate business and undertake political activism, which shouldn't attract those very generous concessions from the taxpayer".[37] Such ungrounded and unjustifiable vilification of green activists as malign aggressors intent on destroying the benign mining industry was a frequent complaint raised with the Special Rapporteur.

58. In 2015, the Parliament's standing committee on the environment inquired whether environmental groups should lose their "deductible gift recipient" status, which allows them to draw donations from various sources, including business enterprises. Even before the

[34] Ibid., para. 41.

[35] *Aid/Watch Incorporated v. Commissioner of Taxation*, judgment of 1 December 2010, para. 44. Subsequently reiterated in the Charities Act 2013 (Cth).

[36] Lenore Taylor, "Government's letter to conservation groups has ominous implications", *The Guardian* (Australia edition), 15 July 2017.

[37] Mike Seccombe, "Nobbling the charities", *The Saturday Paper*, 19 August 2017.

conclusion of the inquiry, some members reportedly tweeted about cancelling tax-deductible status. In May 2016 the committee recommended that environmental organizations should spend at least 25 per cent of their resources on environmental remediation work.[38] The Community Council for Australia responded that the proposal would see green groups "picking up the dead fish instead of advocating to stop the poisons going into the stream", while Greenpeace saw it as an attempt to "turn environmental advocates into a clean-up crew for fossil fuel companies and the government".[39]

59. Following in the footsteps of the parliamentary committee, the Treasury launched a discussion paper on tax-deductible gift recipient reform opportunities, proposing that environmental organizations be required to devote up to 25 per cent of their expenditure to on-ground services and that their public advocacy should be more closely supervised.[40] Many charities lamented the palpable hypocrisy of the debate, exemplified by the growing scrutiny and politicization of charity funding, while there were few rules limiting the power the mining industry and lobby wielded over politics.[41]

60. The fourth element weakening freedom of association relates to the attempts to undermine the reputable Australian Charities and Not-for-profits Commission. After the Government's efforts to abolish the Commission failed in the Parliament, in June 2017 the Treasury announced its intention not to reappoint Commissioner Susan Pascoe, widely respected by civil society and supported by the Commission's advisory board.[42] Her departure came just prior to a review of the Commission's functions. More than 100 organizations wrote a letter to the Prime Minister to protest against Ms. Pascoe's removal and criticize the Government's treatment of the Commission.

61. The final approach in this vein involved proposals to amend the Electoral Act amid concerns about foreign donations to political actors wielding undue influence.[43] The amendments proposed placing restrictions on the use of foreign donations for reportable political expenditure, which civil society organizations saw as another ploy to stifle their advocacy by curtailing overseas donations for their work. The Charities Act already prohibits the groups from partisan political campaigning. Defenders decried the double standards: "If a green group hands out a how to vote card, you can complain and have it stopped. … But you can't complain about the Minerals Council telling people how they should vote, much less stop them."[44]

62. In protest, a coalition of 25 major Australian charities launched the Hands Off Our Charities campaign in November 2017, stressing a "categorical difference" between donations to political parties and philanthropy for charitable purposes.[45] Polling that same month showed that the public was behind the charities, with 76 per cent of respondents supporting their public advocacy role.[46] The public was reportedly far more concerned about foreign corporate interference in Australia — an issue that was not raised in the proposal aimed at addressing "a broad spectrum of foreign interference and covert political influence activity in Australia".[47]

[38] Taylor, "Government's letter".

[39] Seccombe, "Nobbling the charities".

[40] Michael Slezak, "Mining lobby calls for 10% limit on environmental charities' spending on advocacy", *The Guardian* (Australia edition), 31 August 2017.

[41] Tim Flannery, "The coalition attacks environmental groups with advice straight from the mining lobby", *The Guardian* (Australia edition), 13 September 2017.

[42] Seccombe, "Nobbling the charities".

[43] Human Rights Law Centre, "Defending democracy: safeguarding independent community voices" (June 2017).

[44] Seccombe, "Nobbling the charities".

[45] See www.handsoffourcharities.org.au.

[46] "Government called on to stop war on charities", Pro Bono Australia, 27 November 2017.

[47] Michael Slezak, "Charity coalition hits back over election advocacy restrictions", *The Guardian* (Australia edition), 26 November 2017.

E. Access to justice and remedies

63. Access to justice and an independent judiciary are vital to the functioning of civil society. Access to the courts to challenge administrative action is a recognized right in Australia. Judicial review of administrative action is about setting the boundaries of government power, and ensuring that public officials obey the law and act within their prescribed powers.[48]

64. The Australian Constitution guarantees the independence of the judiciary. In interpreting and applying the law, judges act independently and without interference from the Parliament or the executive. The guarantees of tenure and remuneration contribute to securing judicial impartiality. During the visit, defenders expressed their confidence in the overall independence of the judiciary, which can provide remedies for violations of their rights and those of the individuals they represent.

65. Those fundamental tenets of the rule of law, however, have been increasingly challenged in Australia. The Government has sought both to prevent the courts from reviewing important decisions in the politically charged area of immigration and to limit the access of environmental organizations to judicial review by repealing the federal provision on their extended legal standing.

66. In addition to the secrecy laws, migration laws in Australia have made it difficult for individuals to seek judicial review of government decisions, owing to personal, non-compellable discretionary powers delegated to the line minister. The other mechanism used to restrict access to the courts is the privative clause, which is a legislative attempt to limit access to judicial review in a particular field. In December 2015, the Australian Law Reform Commission recommended a review of privative clauses in Commonwealth laws.[49]

67. Furthermore, the Government has reportedly sought to grant officers in immigration detention centres immunity from criminal and civil liability for the exercise of reasonable force in good faith. Human rights lawyers are finding it increasingly challenging to represent their clients' interests, as public officials are increasingly exempted from judicial scrutiny. As observed by the Special Rapporteur on the human rights of migrants, because migrants already face many barriers, including language, lack of legal information, social isolation and the absence of financial means, "there can be no effective access to justice without effective support from competent judges, adequate legal representation and sufficient legal aid funding".[50]

68. The Government has also tried to hinder environmental groups' access to the courts under the key federal environmental law, the Environment Protection and Biodiversity Conservation Act 1999. In August 2015 it introduced the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 to repeal section 487 of the Act, which allowed individuals and organizations who had engaged in environmental or conservation activities for at least two years prior to a decision at issue to challenge that decision. When introducing the bill, vitriolic language was used by public officials. The section was described as a "provision that allows radical green activists to engage in vigilante litigation to stop important economic projects" and it was claimed that it provided "a red carpet" for radical activists.[51] The language was perceived as unfortunate because the Australian Law Reform Commission had repeatedly recommended that broader and more liberal standing rules should be adopted for public interest litigation across the country.

69. Even though the bill lapsed in April 2016, senior public officials reaffirmed that it remained official government policy. The Special Rapporteur understands that extractive industry lobbyists continued to urge the Government to amend those enabling laws. He supports a more liberal availability of the right to standing for judicial and administrative review.

[48] See www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf, p. 413.

[49] See www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf.

[50] See A/HRC/35/25/Add.3, para. 91.

[51] Lisa Cox and Jane Lee, "Abbott government to change environment laws in crackdown on 'vigilante' green groups", *Brisbane Times*, 18 August 2015.

70. The enormous costs and financial risks of litigation present another significant obstacle to pursuing public interest litigation, including for environmental protection. Environmental litigation of any significance is likely to be complicated and expensive. Where broad standing rules are present in environmental litigation, the objective of such rules can be undermined if accessing courts is subject to an adverse costs order. In Australia, "costs follow the event", so a party that prevails overall on a particular case is entitled to obtain its legal costs from the opposite party.

71. Despite disparaging pronouncements by some public officials, for environmental defenders the threat of an adverse costs order has been a significant obstacle to pursuing public interest litigation. It is rare for an individual litigant to be prepared to risk financial ruin in order to pursue such litigation. Smaller community groups may not even have sufficient financial resources available to them. Australian courts have recognized that the public interest nature of litigation in environmental and other related cases can be a sufficient basis for exceptional waivers of legal costs. Those are, reportedly, exceptional rulings, however, and consideration of the issue is deferred until the conclusion of the proceedings, causing uncertainty about the costs of litigation.

72. Community Legal Centres (not-for-profit community-based services) have long been perceived as stalwart providers of free, accessible legal services to hundreds of thousands of individuals each year. Under the new National Partnership Agreement on Legal Assistance 2015–2020, however, in 2017/18 the Centres faced a national funding cut of A$ 12.1 million, which represented 29 per cent of their budget. As the cut would have a significant impact on the Community Legal Centres, and on the many vulnerable and disadvantaged clients they support, the Special Rapporteur urged the Government to increase the budgetary allocations to the Centres with a view to ensuring the continued provision of effective and affordable legal assistance to the broader population in Australia. The Government informed the Special Rapporteur that the 2017/18 budget provided for an additional A$ 39 million to the Centres for funding front-line family law- and domestic violence-related services.

F. Specific groups of human rights defenders at risk

73. During the visit, the Special Rapporteur observed mounting evidence of regressive measures that have concurrently levied enormous pressure on Australian civil society. They include the growing body of statutory laws at the federal and state levels constraining the rights of defenders. The testimonies underlined that the regressive actions not only accentuated the disparity between the Government's declared commitments at international forums and their implementation within the country: they also aggravated the situation of defenders, including specific groups that had been exposed to particular risks.

74. The Special Rapporteur was astounded to observe frequent public vilification of defenders by senior public officials in what appears to be an attempt to discredit and intimidate them and to discourage them from their legitimate work. Business actors and the media have sometimes contributed to stigmatization.

75. The Special Rapporteur met with numerous women human rights defenders who had received threats on social media as a result of their advocacy in support of women with exposed vulnerabilities as single mothers, women living in poverty or women survivors of domestic violence. Women's rights peak bodies had faced funding constraints, increasingly leaving grass-roots women's organizations without a national voice and significantly weakening the situation of women's rights advocates at the national level.

76. The Declaration on Human Rights Defenders and General Assembly resolution 68/181 recognize the important role of women who work in defence of women's rights or on gender equality. Women defenders are subjected to the same types of risks as any human rights defender, but as women they are also targeted because of their gender and are exposed to gender-specific threats and violence. The reasons behind the targeting of women defenders can be multifaceted and complex, and can depend on the particular context in which the individual defender operates. The prompt investigation of intimidation, threats, violence and other abuses against women rights defenders, whether committed by State or non-State actors, is important.

77. The use of social media has empowered women in many ways. It has also, however, had the undesirable effect of proliferating the expression of abuse and threats. Consultations conducted by the Australian Human Rights Commission indicated that women advocates working in the area of domestic violence experience violence and harassment online, including the dissemination of private images or materials without consent and violent, sexualized abuse and harassment.[52] The Special Rapporteur also heard testimonies about online posts becoming very personal and, at times, involving children. It appears the most horrifying digital abuse is reserved for highly visible women who speak out, or those deemed to be feminist. The remedies have lagged behind the growing scale of abuse. The process of initiating follow-up by police is often ineffective.

78. Despite noticeable achievements by the Government in promoting the rights of the Aboriginal and Torres Strait Islander Peoples, many indigenous human rights defenders still experience severe disadvantages compared with non-indigenous activists. They are marginalized and unsupported by state and territory governments. In order to assert their land rights, claimants under the Native Title Act must prove that they have had an uninterrupted relationship with the land claimed, and that they have continued to practise their traditional laws and customs. Beyond this extraordinary burden of proof in the Australian context, the communities find themselves in an unfavourable situation owing to the complex land ownership system, with multiple and overlapping legal regimes applicable to native title claims and land rights at the federal, state and territory levels, compounded by insufficient indigenous legal professionals with expertise on land rights claims.[53]

79. This situation is exacerbated by the tendency of the Government to claim that the federal system somewhat limits its ability to exercise responsibility for supporting indigenous rights defenders. The principle of free, prior and informed consent is not recognized under Australian law, and the indigenous and community leaders feel they are not sufficiently or meaningfully consulted. Indigenous rights defenders also face a lack of cooperation or severe pressure from the mining industry with regard to project activities, as has been exemplified in the case of the proposed Carmichael Coal Mine in Central West Queensland. The Special Rapporteur is concerned about credible reports of retaliation against indigenous defenders in the form of their exclusion from consultations on key policies and legislative proposals.[54]

80. In recent years, state and federal governments have attempted to undermine the ability of defenders to protect the environment through political advocacy and litigation. The targeting of the advocacy of environmental human rights defenders can be seen as part of the broader intent to stifle criticism by community organizations. From the information received and meetings with business representatives, it appears that the anti-environmentalist campaign is closely linked to the intense lobbying by the extractive and mining industry, which vehemently opposes the use of strategic litigation by environmental activists.

81. Attacks against environmental activism have taken the form of funding cuts, threats to the deductible gift recipient status of environmental organizations, and efforts to vilify advocacy by environmental organizations by branding it as undue or political. The detrimental actions have also culminated in the governmental initiation of an inquiry, by the House of Representatives standing committee on the environment, to review environmental organizations' deductible gift recipient status, which allowed donations to such organizations to be tax-deductible. The inquiry quickly became politicized after politicians accused organizations of using their deductible gift recipient status for political activism.[55] Environmental organizations raised serious concerns about proposals that they should spend at least 25 per cent of public donations on "environmental remediation", and should be subjected to more reporting obligations and supervision, over and above what is required of other charities.

[52] See www.humanrights.gov.au/sites/default/files/AHRC_20170120_violence_against_women_submission.pdf.

[53] See CCPR/C/AUS/CO/6, para. 51; A/HRC/36/46/Add.2, para. 99.

[54] See A/HRC/36/46/Add.2, para. 41.

[55] Michael Slezak, "Environmental groups could lose charity status for encouraging civil disobedience", *The Guardian* (Australia edition), 4 May 2016.

82. The Special Rapporteur agrees with the recommendation of the environmental defenders' offices not to adopt any mandatory diversion or limitation of funding (on the grounds that the proposed measures will not align with the public interest and will undermine the protection of the environment), because in fact both environmental advocacy and conservation work are part and parcel of the broader effort to protect the environment.[56] He urges the Government to maintain the existing tax concessions for registered organizations and donors, including those that focus on environmental protection and advocacy.

83. More recently, in March 2017 a new parliamentary report singled out environmental organizations when it recommended banning foreign donations; it drew on testimony from the mining industry alleging that some activist groups "appear to be circumventing the system".[57] The Special Rapporteur calls on public officials to refrain from vilifying environmentalists or portraying them as eco-criminals, traitors and green radicals. Not only do those verbal attacks delegitimize valid environmental concerns in policy discussions, and shelter business interests linked to environmental harm, but they are also not in line with the responsibility of the State to respect the rights of defenders and support their work.

84. The Australian legal framework that applies to asylum seekers and refugees is rather complex and continuously amended, making it challenging for individuals to understand, without assistance, their rights and the options available to them. Lawyers and human rights advocates who assist refugees and asylum seekers in immigration detention in Australia face many barriers. They include situations where detainees are not allowed mobile telephones; when telephone calls and visits to detention centres (in particular, the Christmas Island Immigration Detention Centre) are hard to arrange; and when detainees are frequently moved, or moved without notice. Moreover, interpreting services are limited and procedures change frequently.

85. In addition to using the Border Force Act, the Immigration Department has gone to extraordinary lengths to discourage whistle-blowers, public servants and contractors from sharing, with journalists, defenders or the public, information about serious human rights abuses in offshore detention centres. The Special Rapporteur had a chance to talk to such whistle-blowers, who validated the reports of service providers who had had their contracts cancelled for speaking out in broad terms about what they had witnessed. Other contractors, such as Save the Children, were subjected to raids and egregious allegations of misconduct, were removed from operations and had their personal and professional reputations targeted by politicians and media. Even where an independent investigation into those allegations found no evidence that the organization's staff had acted outside the scope of their duties, the organization and its staff were imbued with psychological harm and a sense of fear as a result.

86. Doctors advocating for better treatment and services for detainees in their care, such as Doctors for Refugees, faced retaliation when they spoke publicly. The Special Rapporteur raised concerns with the Government about the cases of unwarranted arrests and charges brought against defenders. For example, in November 2015 the convenor of Doctors for Refugees was arrested on a plane for disobeying a flight attendant, while several other defenders faced similar intimidation in connection with their activism.

87. During discussions with government authorities, the Special Rapporteur was informed that no prosecution had been conducted under the Australian Border Force Act at the time of the visit. He noted the information, and hoped that this would continue to be the case. However, the Act's sanctions, and government actions aimed at censoring and intimidating advocates, had a chilling effect on the disclosure of information about violations in regional processing centres. The Special Rapporteur can attest to the fear among individuals he met about serious consequences for whistle-blowing. He met numerous doctors, teachers, lawyers and journalists who had either spoken out about or reported on conditions in offshore detention facilities and who felt they were under heavy surveillance. The concerted efforts to monitor and control any public disclosures about potential human rights abuses stand in sharp contrast to the weak and little-known protections provided to whistle-blowers under Australian law.

[56] EDOs of Australia, "Submission on the tax deductible gift recipient (DGR) reform opportunities", discussion paper, 24 July 2017.

[57] Katharine Murphy, "Coalition report recommends ban on foreign donations to environment activists", *The Guardian* (Australia edition), 10 March 2017.

88. The Special Rapporteur was informed by the Government that, since 30 September 2016, consultants or contractors performing services as health practitioners had been explicitly excluded from the scope of the non-disclosure provisions in the Australian Border Force Act. He urges the Government to continue reviewing the Act's provisions to ensure they are fully in line with human rights principles, and to strengthen the Public Interest Disclosure legislation to ensure effective protection for whistle-blowers.

IV. National human rights institution

89. National human rights institutions are key partners in promoting the right to promote and protect human rights. They are also human rights defenders who sometimes face risks in carrying out their independent mandate. Such institutions are public organs specifically empowered to promote and protect human rights at the national level.

90. Even if these institutions may all be different, they share a number of features and basic requirements that allow them to achieve their shared objectives in an efficient and independent manner. Some of their principles are reflected in the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The Paris Principles define their mandate and responsibilities, their composition, their guarantees of independence and pluralism, and their methods of operation. They have become the basis of and reference for the establishment and functioning of national human rights institutions around the world.

91. National human rights institutions act as independent watchdogs over the public administration, prevent abuse by public bodies and promote general respect for human rights. In some cases, such institutions have quasi-judicial powers that enable them to receive and consider complaints and petitions concerning individual situations. Their role should be seen as complementary to other established institutions working for the protection and promotion of fundamental rights, such as the judicial and legislative authorities, parliamentary committees, government agencies and civil society.

92. At the Human Rights Council, Australia successfully led discussions on Council resolution 27/18, in which the Council recognizes that national human rights institutions and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates, including when taking up individual cases or when reporting on serious or systematic violations in their countries. The Council further emphasizes that any cases of alleged reprisal or intimidation against national human rights institutions and their respective members and staff, or against individuals who cooperate or seek to cooperate with national human rights institutions, should be promptly and thoroughly investigated, with the perpetrators brought to justice.

93. When reviewing the role of the Australian Human Rights Commission, the Special Rapporteur was struck by the lack of coherence between the actions of Australia to promote and defend a broader role for national human rights institutions in the international arena and its attacks against its own institution. On several occasions, he was alerted to government-led or -supported vilification of the Commission, which took the form of verbal attacks by public officials and media outlets.

94. The president of the Australian Human Rights Commission, Gillian Triggs, faced verbal intimidation by the Government aimed at publicly questioning her integrity, impartiality and judgement. This was especially the case following the Commission's inquiry into child harm in immigration detention.[58] The Special Rapporteur was not informed by the Government of any inquiry undertaken against the perpetrators of those attacks. In her parting statement, the Commission president conceded that human rights for women, asylum seekers, refugees, homeless people and indigenous Australians had "regressed" during her five-year tenure. She attributed the situation partly to having "a government that's ideologically

[58] See www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children.

opposed to human rights", and stated that it had been "exacerbated by the distance of most Australians from where these problems are actually most visible".[59]

95. The Special Rapporteur was also informed of several occasions when the Australian Human Rights Commission's financial resources and capacity were targeted for reduction.[60] In addition, the budget cuts were amplified by the assigning of extra functions to the Commission without an adequate budget allocation. The Special Rapporteur also received reports of the direct appointment of a commissioner by the Attorney General without prior advertisement, transparency or consultation with the Parliament, which would be contrary to the provisions of the Paris Principles. These reports lent weight to allegations that the Government had attempted to assume greater control of the Commission.

V. Role of non-State actors

96. Australia has a high concentration of media ownership compared with other Western countries. The ownership of national and state or territory newspapers is dominated by a couple of corporations which control the majority of media. The Special Rapporteur received information about a number of cases of vilification by media outlets against environmental defenders, depicting them as anti-development or frivolous in their attempts to challenge large-scale mining projects in different states and territories. Several defenders protecting the rights of refugees, or returning from Nauru or Papua New Guinea, also reported the media's role in inciting smear campaigns against them, after they had disclosed information relating to the conditions in immigration detention centres.

97. When the Australian Human Rights Commission was under severe pressure from the Government, the media coverage of the attacks against the watchdog was politically motivated, contributing to the intimidation of the institution. Trade unionists shared with the Special Rapporteur testimonies about concerted media campaigns aimed at discrediting their legitimate work and tarnishing their image. This was particularly the case when a Royal Commission launched an inquiry into trade union governance and corruption.[61]

98. The Special Rapporteur also learned about the role of business and the extractive industry, which indicated a pattern of portraying landowners, environmental defenders and watchdogs as activists who obstruct the economic development of the country. The mining industry has been reported as the most aggressive, exerting undue influence on government authorities and levying excessive pressure against environmental activists or indigenous peoples who tried to defend their land, environment and cultural heritage.

99. During the parliamentary inquiry on foreign political donations, the Joint Standing Committee on Electoral Matters drew on the allegations by the Minerals Council of Australia that some environmental organizations actively participated in "politically partisan" activities but were still registered as charitable organizations, thereby avoiding the disclosure of the source of their foreign and domestic funding.[62] The Council also called for the identity and location of donors to charities that engage in advocacy to be revealed, claiming that failure to do so would constitute "a potential threat to Australia's sovereignty, by allowing foreign interests to exert political influence by covertly funding domestic environmental groups".[63] In response, the Australia Institute released a report showing the large amount of tax-deductible advocacy carried out by foreign-funded lobbying groups, including the Minerals Council.[64]

[59] Rosie Lewis, "Gillian Triggs in parting shot on human rights", *The Australian*, 27 July 2017.

[60] See, for example, Human Rights Law Centre, "Safeguarding democracy" (February 2016), p. 33.

[61] See www.tradeunionroyalcommission.gov.au/Pages/default.aspx and https://theconversation.com/sorting-the-gems-from-the-dung-in-the-royal-commission-on-union-corruption-57202.

[62] See Murphy, "Coalition report"; and Minerals Council of Australia, "Submission on tax deductible gift recipient reform opportunities discussion paper" (August 2017).

[63] Slezak, "Mining lobby".

[64] See www.tai.org.au/content/undermining-our-democracy-foreign-corporate-influence-through-australian-mining-lobby.

100. The Special Rapporteur welcomes the statement by the country's biggest mining company, BHP, denouncing the proposals to lump charities in with political parties and stating its disagreement with changes that "limit public advocacy to 10 per cent of funds, or requirements to spend 25 per cent of funds on environmental remediation".[65] Following the rift within the industry, the Minerals Council retreated from its initial proposals and stated that it does not support policies requiring environmental charities to devote most of their resources to on-ground remediation.[66]

101. The Special Rapporteur recalls that public and private companies must respect human rights and the international principles on business and human rights, including the Guiding Principles on Business and Human Rights. They should publicly recognize and respect the positive role of defenders. Companies should refrain from actions that can negatively affect the enjoyment of human rights in any way. Companies should advocate for prior and meaningful consultation with indigenous communities when they intend to undertake a project affecting those communities. They should refrain from taking actions that can affect the consultation processes, including those that could contribute to the division of communities.

VI. Conclusions and recommendations

102. **The Special Rapporteur acknowledges the achievements of the Government of Australia in promoting respect for human rights around the world. He presents his report in the context of the Government's recent pledge to "advocate for the protection of journalists, human rights defenders and civil society",[67] and looks forward to continuing the dialogue with the Government on ways and means of acting on the commendable pledge within Australia.**

103. **Australia can be proud of its vibrant, diverse civil society. It includes organizations and defenders that advocate for a public cause, help communities in need, represent the vulnerable, protect biodiversity, report corruption, disclose abuse and promote equality. They are diverse, yet united by the same cause — ensuring that everyone in Australia lives in dignity, equality and security.**

104. **The Government has a responsibility to support defenders, empower them and engage them in meaningful consultations. The assessment of the situation of defenders in Australia shows, however, that, taken together, recent actions and legislation indicate an attitude by the Government towards civil society that has ranged from lukewarm to obstructive to hostile. Some observers refer to the Government's "war on charities". The Special Rapporteur's visit points to a "chilling effect" from the combined measures of the authorities, which have included secrecy laws and other regressive legislation; funding cuts; "gagging clauses" in funding agreements; general antipathy to public advocacy; pro forma consultations; double standards in treatment compared with extractive companies; attacks against the Australian Human Rights Commission; and the vilification of defenders.**

105. **The Special Rapporteur urges the Government to reverse the worrying trend. The Government should project its energy and expertise in advocating for human rights abroad to empowering civil society in Australia. In December 2018, the Declaration on Human Rights Defenders will mark its twentieth anniversary. This will be an opportunity for the Government to focus minds on the recognition of the important role of defenders and to redouble its efforts to strengthen civil society in the country.**

[65] Liz Hobday, "BHP backs green groups over the Mineral Council as industry rift widens", ABC News, 8 November 2017.

[66] Michael Slezak, "Mining industry body retreats from hardline stance on charities", *The Guardian* (Australia edition), 27 November 2017.

[67] See http://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/pillars-and-priorities/Pages/australia-will-promote-and-protect-freedom-of-expression.aspx.

106. **The Special Rapporteur concludes the report by putting forward the following recommendations.**

107. **The Special Rapporteur recommends that the Government of Australia:**

(a) **Consider adopting a federal human rights act to guarantee human rights constitutionally, with a clause of precedence over all other legislation;**

(b) **Review and revoke laws that unduly restrict the right to free and peaceful assembly;**

(c) **Review secrecy laws, the Crimes Act and the Border Force Act with a view to revising provisions that contravene international human rights norms and standards;**

(d) **Scrutinize and condemn violations of the rights of defenders, and raise awareness of their legitimate role in the protection and promotion of human rights;**

(e) **Ensure sufficient funding and legal assistance for civil society organizations and refrain from introducing measures that reduce, obstruct or unduly control the funding for civil society;**

(f) **Restore adequate operational funding to legal, environmental and indigenous peak bodies and recognize their important role in advocacy and strategic litigation;**

(g) **Remove the "gagging clauses" from all federal and state funding partnerships and funding agreements;**

(h) **Ensure prompt and impartial investigations into alleged threats and violence against defenders and trade unionists;**

(i) **Guarantee the meaningful participation of defenders and civil society in government decision making;**

(j) **Initiate a prompt and impartial inquiry into the attempts by public officials to intimidate and undermine the Australian Human Rights Commission;**

(k) **Ensure that the future appointment of Australian Human Rights Commission commissioners is made through public, transparent, merit-based appointments that are fully compliant with the Paris Principles;**

(l) **Formulate a national action plan on business and human rights, in consultation with civil society;**

(m) **Prior to the approval of large-scale projects, ensure that environmental impact assessments are prepared in full transparency and with the meaningful participation of affected communities;**

(n) **Engage with investors and business enterprises to uphold their human rights responsibilities and sanction those companies associated with violations against defenders, both at home and abroad.**

108. **The Special Rapporteur recommends that the Australian Human Rights Commission and state-level human rights institutions:**

(a) **Include, within their programme of work, specific activities on the protection and promotion of defenders;**

(b) **Compile and analyse data on the number of complaints received, cases monitored and recommendations adopted on the safety and security of defenders;**

(c) **Establish a focal point for defenders, with decision-making power;**

(d) **At the state level, adopt and contribute to the preventive and protective measures for defenders, and develop means for their public recognition.**

109. **The Special Rapporteur recommends that business enterprises and other non-State actors:**

(a) **Adopt and implement international human rights standards, including the Guiding Principles for Business and Human Rights and the Voluntary Principles on Security and Human Rights;**

(b) **Fulfil legal and ethical obligations, including rigorous human rights due diligence, and perform human rights impact assessments for large-scale projects, ensuring full participation with affected communities and defenders;**

(c) **Refrain from verbal attacks against and the legal intimidation of defenders and civil society organizations;**

(d) **Disclose information relating to planned and ongoing large-scale projects in a timely and accessible manner;**

(e) **Establish the grievance mechanisms necessary to avoid, mitigate and remedy any direct or indirect impact of human rights violations;**

(f) **Ensure that subcontractors respect the rights of indigenous peoples and affected communities, and establish accountability mechanisms for grievances.**