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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

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

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, on his visit to Australia, from 4 to 18 October 2016.

* The present document was submitted late to reflect the most recent developments.

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** 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 UN 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 Departments of the Prime Minister and Cabinet; Attorney-General; Foreign Affairs and Trade; Environment; Immigration and Border Protection; Communications and the Arts; and Social Services. He also met with representatives of the Parliamentary Joint Committee on Human Rights, the Australian Human Rights Commission (AHRC) and the Commonwealth Ombudsman.
3. There were also meetings with state governments in New South Wales, Northern Territory, Queensland, Tasmania and Victoria. The Special Rapporteur held discussions with Victorian Parliament's Scrutiny of Acts and Regulations Committee 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 for the visit.
4. The Special Rapporteur is grateful to the Government of Australia for the invitation and 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 (AHRC) 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 term of 2018-2020, noting the Government's commitment to the promotion and protection of human rights and that its membership would be advanced through 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 core international human rights treaties, including its recent ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.² However, it has yet to become a party to the International Conventions on the Protection of the Rights of All Migrant Workers and Members of Their Families; 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 Government is urged to ratify the remaining international human rights treaties and reconsider its reservations and interpretative declarations to the treaties, which could affect the full realization of human rights.
8. Australia issued a standing invitation to all special procedures of the Human Rights Council. The Government's cooperation with international human rights mechanisms was

¹ <http://dfat.gov.au/international-relations/international-organisations/pages/australias-membership-unhrc-2018-2020.aspx>.

² http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN.

demonstrated by its acceptance of five special rapporteur visits in the course of 2016 and 2017.

9. Australia was reviewed under the universal periodic review for the second time in November 2015.³ The Government made nine voluntary commitments, including designation of a standing national mechanism to strengthen its overall engagement with UN human rights reporting.⁴ It subsequently established a Standing National Human Rights Mechanism to strengthen engagement with human rights reporting.⁵ The Government plans to promote a strong multilateral human rights system and deliver on its commitment in the 2017 Foreign Policy White Paper.⁶

B. Domestic framework

10. Australia is a federation of six states and two self-governing territories, 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 Australia's system of government are however not set down in the Constitution 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, which results in the creation of legal precedents on points or interpretation of law to be followed by courts. When interpreting legislation, courts presume the Parliament did not intend to interfere with fundamental human rights or presume that legislation ought to be consistent with Australia's international human rights obligations in cases of ambiguity.⁷ The High Court ruled that since the Constitution is predicated on a system of 'representative democracy', the implied freedom of political communication would invalidate legislation that infringes on that right, unless necessary to protect other public interest.

12. In 2009, following extensive public consultations, there was a proposal to explicitly include rights in a Commonwealth Human Rights Charter, but it was rejected by the Government. Instead, the Australian Human Rights Framework was adopted in 2010, focusing on human rights education and introducing a new national action plan on human rights.⁸ Nonetheless, at the state level, the Australian Capital Territory was the first jurisdiction to adopt the Human Rights Act 2004. It was followed by Victoria State, which passed the Charter of Human Rights & Responsibilities Act 2006. The two laws do not serve as constitutions, but operate as Acts of Parliament that cover a selective range of rights, predominantly drawing from the ICCPR.

13. At the federal level, there are mechanisms that seek to ensure that governments act consistently with Australia'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 function. The Human Rights (Parliamentary Scrutiny) Act 2011 requires federal legislation be accompanied by a Statement of Compatibility. The Statement is considered by the Parliamentary Joint Committee on Human Rights for compliance with international human rights law.⁹

³ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/AUindex.aspx>.

⁴ A/HRC/31/14, Section III.

⁵ CCPR/C/AUS/CO/6, para. 3c.

⁶ <https://www.fpwhitepaper.gov.au/foreign-policy-white-paper>.

⁷ A/HRC/WG.6/23/AUS/1, para.17.

⁸ <https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>.

⁹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights.

14. During the visit, the Special Rapporteur was frequently reminded how the federal system poses practical challenges to the domestic implementation of Australia's international human rights obligations. Legislation at state levels still needs to be harmonized to comply fully with international human rights norms and standards. Even though parliamentary scrutiny measures improved deliberation within legislatures, they are said to have limited impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights on many occasions.¹⁰ Those concerns were reiterated by the Human Rights Committee, especially that bills are sometimes passed into law before the conclusion of review and that the quality of some statements of compatibility are questionable.¹¹

15. In November 2017, the Committee observed gaps in the application of the ICCPR rights and expressed concern about the lack of comprehensive incorporating legislation.¹² In view of the on-going challenges in harmonizing international human rights obligations in the federal, state and territory legislation, the Special Rapporteur recommends Australia adopt a comprehensive legislative framework to give more human rights protection and fuller legal effect to the treaty human rights provisions across all jurisdictions in the country.

16. The primary duty to promote and protect human rights and fundamental freedoms lies with the Australian State, which includes guaranteeing the right of everyone, individually and in association with others, to strive for the protection and realization of human rights. 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, it is a country reputed for its continuous engagement in human rights at the global level and for its staunch support of national human rights institutions in Asia. Australia's traditional safeguards of constitutional democracy and rule of law are widely recognized.

18. The free and unconstrained media plays a vital role in the public debate about important issues. The Government has traditionally provided generous support to peak bodies and the AHRC. 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's initial expectation from his visit was 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 accumulative 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 an important resolution to support national human rights institutions, the AHRC and its president were undermined and targeted by senior public officials.¹³ The Government supports resolutions on defenders at the UN General Assembly and Human Rights Council, yet activists in Australia complain about

¹⁰ "The Legal Assault On Australian Democracy", George Williams, QUT Law Review, Vol. 16, Issue 2, pp. 38-39.

¹¹ CCPR/C/AUS/CO/6, paras.11-1.2

¹² CCPR/C/AUS/CO/6, para.5.

¹³ The term 'public official' refers to officials from all three branches of the Commonwealth and State governments - the executive, the legislature and the judiciary.

severe pressure and vilification from public officials and media outlets. Despite Australia's pledged support to protect such freedoms as expression, peaceful assembly and association, its civil society and journalists have raised concerns about regressive legislations stifling those very freedoms.

21. The Government is proud of its long tradition of holding the annual NGO Forum on human rights as a consultation mechanism on human rights issues.¹⁴ The Special Rapporteur was informed of other opportunities for civil society to feed into the decision-making processes. However, the view from civil society is that consultations resemble information-sharing meetings and are rarely meaningful. The principle of free, prior and informed consent of the indigenous peoples is not recognized under Australian law. The 'lip-service' 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 the preferred individuals and organizations to consult with.

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,¹⁵ as well as recommendations contained at the end of this report, thus provide guidance.

B. Freedom of expression

23. Freedom of expression and the press is not only critical to a vibrant democracy but also vital for a healthy civil society. Through exercising free speech, journalists and activists can ensure 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 only be constrained 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 have criminal defamation. Even if rarely invoked, the Human Rights Committee urges States parties to the ICCPR to decriminalize defamation and underlines that the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.¹⁶

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 for public servants and contractors to disclose government information in breach of confidentiality obligations, which is punishable with two years of imprisonment. Section 79 of the Act criminalizes the receipt of 'unauthorized' information, which is of concern to journalists.

26. In 2010, the Australian Law Reform Commission recommended to reduce the scope of secrecy laws so that disclosures are considered to be unlawful if they harm essential public interests.¹⁷ However, the recommendation was not implemented. Secrecy provisions were reinforced, including through the controversial Australian Border Force Act. Human Rights Committee was concerned about "severe restrictions on access to and information regarding the offshore immigration processing facilities including lack of monitoring by the

¹⁴ A/HRC/WG.6/23/AUS/1, para.28.

¹⁵ See A/HRC/25/55 and A/HRC/31/55.

¹⁶ General Comment 34, CCPR, CCPR/C/GC/34, 12.09.2011.

¹⁷ <https://www.alrc.gov.au/publications/report-112>.

Australian Human Rights Commission”.¹⁸ The Act made it a criminal offence, punishable by two years’ imprisonment, for a broadly-defined ‘entrusted person’ to make record or disclose ‘protected information’, which was obtained by a person in his/her capacity of ‘entrusted person’. That applied not only to government officials but also to anyone prescribed to be an ‘Immigration and Border Protection worker’, including those contracted by the Government and their employees.

27. The cumulative factor of secrecy laws created significant barriers to legitimate reporting on human rights abuses or to whistleblowing 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 academicians who suffered.

28. He is aware of exemptions provided for disclosures required by law or to prevent or lessen a serious threat to individual life or health. There is also protection to whistleblowers under the Public Interest Disclosure Act. However, the Act requires substantive improvements in terms of awareness, training and implementation. Many potential whistleblowers reportedly considered the risks of disclosure high because of the complexity of the laws, severity and scope of the penalty, and hostile approach by the Government and media to whistleblowers. On 20 October 2016, recommendations by an independent review of the Act were tabled in the Parliament. On 7 December 2017, a bill to enhance whistleblower protection in the corporate and tax sectors was introduced to the Parliament.

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, applying retroactively and clarifying its original intent to prevent the unauthorised disclosure of information that could cause harm to the national or public interest, such as information relating to operational security, 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 propose a new harm-based secrecy framework in the Criminal Code 1995.

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 disclosure of information related to an ASIO “special intelligence operation” with the penalty ranging from five to ten years’ imprisonment. Given the overall secrecy of intelligence operations and without confirmation from ASIO, it is challenging for journalists to determine if an activity of interest would be a special intelligence operation. Due to high sanctions, the provision may lead to self-censorship by the media, which may take a more cautious approach to reporting on ASIO’s activities.

31. The Parliamentary Joint Committee on Human Rights advised that section 35P was not a reasonable, necessary and proportionate limitation on the right to freedom of expression.¹⁹ The Independent National Security Legislation Monitor (INSLM) concluded that the impact of section 35P on journalists was two-fold: it created a ‘chilling effect’ of uncertainty as to what may be published about the activities of ASIO without fear of prosecution; and that journalists were prohibited from publishing anywhere at any time any information relating to a special intelligence operation, regardless of whether it had any operational or continuing significance and even if it discloses reprehensible conduct by ASIO insiders.²⁰ The Government informed the Special Rapporteur that it had implemented the INSLM’s recommendations and through the Counter-Terrorism Legislation Amendment Act 2016.

32. Furthermore, new national security laws pertaining to metadata for have had serious implications for journalists and whistleblowers. The Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 required telecommunication providers to retain user’s metadata for two years, and allowed government agencies to access that data.

¹⁸ CCPR/C/AUS/CO/6, para.35, 9.11.2017.

¹⁹ Parliamentary Joint Committee on Human Rights, Sixteenth Report of the 44th Parliament (2014) 57.

²⁰ Report on the impact on journalists of section 35P of the ASIO Act, INSLM, October 2015.

The 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 speedily that meaningful scrutiny processes could not apply. Within two hours the amendments were reportedly introduced and passed in the House of Representatives, and within a week it was approved by the Senate. The rushed passage of the law on 26 March 2015 in effect pre-empted a related on-going inquiry by the Parliamentary Joint Committee on Intelligence and Security, which submitted its report on 8 April 2015.²¹

33. The Special Rapporteur received numerous testimonies from journalists that it had a cumulatively stifling impact on the media's freedom. It also dampened confidence of whistleblowers to engage with the press. Expressing concern about the lack of judicial authorisation for access to metadata and its extensive use in national security and criminal investigations, the Human Rights Committee 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".²² The Government points to the authorisation regime in place, involving 'authorised officers' from the agencies rather than judicial officers, and the existence of independent Public Interest Advocates with the scrutiny authority under the Journalist Information Warrant regime.

34. The 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 described the free flow of information as "a vital ingredient in the investigative journalism which is such an important feature of our society".²³ For this purpose, journalists and defenders depend on access to information and sources, including whistleblowers 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 the adequacy of whistleblower protection provided by the Public Interest Disclosure Act 2013, with a view to ensuring full protection of freedom of expression. This would correspond to the Government's pledges on good governance and freedom of expression made in the context of its election to the Human Rights Council.²⁴

36. Access to information is a critical element of freedom of expression. However, there is reported antipathy or incapacity among public servants towards the Freedom of Information provisions, due in part to a lack of resources to match FoI applications but also a general fear of what exposure of the obtained information may imply. Such antagonism is becoming more widespread and increasingly public to the extent that a public official described FoI laws as 'pernicious'.²⁵

37. Defenders, journalists and lawyers who file FoI applications informed the Special Rapporteur of significant challenges in obtaining the requested information. Increasingly, those applications are immediately denied, triggering an appeal process, or delayed more than 6 months, granted with substantially redacted material or demanded to pay huge costs for the requested information, resulting in 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 (OAIC). Due to the inability to get the bill passed in the Senate, the OAIC is

²¹ Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Authorisation of Access to Telecommunications Data to Identify a Journalist's Source* (2015).

²² CCPR/C/AUS/CO/6, paras.45-46.

²³ *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 356.

²⁴ <http://dfat.gov.au/international-relations/international-organisations/pages/australias-membership-unhrc-2018-2020.aspx>.

²⁵ <http://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>.

still functioning.²⁶ In 2016, the plans to abolish the independent watchdog were shelved, but the resources for the OAIC remained scarce and its information policy functions were not funded.²⁷

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 OGP requirement by signing on to a national action plan containing 15 concrete commitments that cover covering transparency, anti-corruption, integrity and citizen participation initiatives. The Government endorsed the Open Government Declaration, which states that "Governments collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities. We commit to promoting increased access to information and disclosure about governmental activities at every level of government".²⁸

40. In the spirit of the Declaration's commitment to "recognize the importance of open standards to promote civil society access to public data", the Government should address obstacles in accessing public information and adopt a more enabling approach to facilitate free access to information.

C. Freedom of peaceful assembly

41. Freedom of peaceful assembly is a fundamental human right and is an essential part 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, universal voting rights, reconciliation movement 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 of introducing constraints by state and territory governments on the exercise of this fundamental freedom. One of the ways to achieve that included what essentially is anti-protest legislation. Jointly with others, the Special Rapporteur conveyed concerns to the Australian Government that such laws would contravene its obligations and commitments under international human rights law, including in relation to the rights to freedom of expression as well as peaceful assembly.²⁹ The laws aimed to prohibit and criminalize a wide range of legitimate conduct by determining them as 'disrupting' business operations, physically preventing a lawful activity or possessing an object for the purpose of preventing a lawful activity. Accordingly, peaceful civil disobedience and non-violent direct action could be characterized as unlawful disruption and 'physically preventing a lawful activity'. The sanctions carry hefty fines or imprisonment of up to two years.

44. At the time of the visit, such a bill was under consideration of the Legislative Assembly of Western Australia.³⁰ The Tasmanian government had regrettably enacted the Workplaces (Protection from Protesters) Act in 2014. Since the 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

²⁶ <https://www.oaic.gov.au/media-and-speeches/statements/australian-government-s-budget-decision-to-disband-oaic..>

²⁷ [https://opengovernment.org.au/2017/05/03/the-quest-for-open-transparent-government/.](https://opengovernment.org.au/2017/05/03/the-quest-for-open-transparent-government/)

²⁸ <https://www.opengovpartnership.org/open-government-declaration.>

²⁹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15002&LangID=E>; <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17047&LangID=E>.

³⁰ According to the Government, the bill lapsed and is no longer being pursued.

Hobart, including those who were charged under this law. He discerned their sense of bewilderment and indignation of the law's arbitrariness, unfairness and illegitimacy. The law criminalised protests that interfered with 'business activity' or 'business access area', including forestry and other areas on public and private land. Not only police could prevent or stop protest on the reasonable belief it would cause such interference, but the penalties for the contravention could involve fines up to 10,000 AUD or four years in prison for further offences.³¹

45. The Special Rapporteur conveyed to the Tasmanian government his concern about the law, its implementation and deleterious impact on the freedom to peaceful assembly and human rights advocacy. The government appeared to prioritize business interests over the democratic rights to peacefully protest or the social dialogue about environmental protection. He recalled that environmentalists have a legitimate right to protect all human rights, including the right to a safe and healthy environment, regardless of whether their peaceful activities are 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. The Court ruled in favour of Bob Brown and concluded the law was vague and declared it unconstitutional.³² Judge Gageler opined the law created 'Pythonesque absurdity' when applying to various foreseeable public gatherings.

47. Another case of legislative encroachment on free assembly was exemplified through 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' within the Inclosed Land 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 legislations, such as G20 (Safety and Security) Act 2013, which may have not reached the balance of proportionality. It deterred Queenslanders from gathering peacefully to express their views on important issues that were at stake during the G20 Summit in November 2014.

D. Freedom of association

48. The Australian public trusts human rights defenders. Their work aimed at bettering the society, addressing injustices and ensuring good governance has won them hearts and minds. It has also made them influential, politically, due to their effective policy advocacy. During the visit, the Special Rapporteur was repeatedly told that, because of their successful advocacy for the common good, CSOs 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 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.³³ The drastic defunding of peak bodies by the Government has particularly targeted organizations, which advocated or litigated on such sensitive issues as immigration, security, environment and land rights protection.

³¹ "Bob Brown wins his case, but High Court leaves the door open to laws targeting protesters", The Conversation, 18.10.2017.

³² Brown v Tasmania [2017] HCA 43 18 October 2017 H3/2016.

³³ Defending democracy: safeguarding independent community voices", Human Rights Law Centre, June 2017.

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 showed concerns that the defunding could lead to their closure or, at the very least, would undermine the effectiveness of their grassroots, community-based affiliates that engage with local and indigenous peoples and government. A year before the defunding of the National Congress, the Government had established the Indigenous Advisory Council, which reports directly to the Prime Minister raising concerns about its representation of Aboriginal and Torres Strait Islander peoples. The Government informed the Special Rapporteur on the rights of indigenous peoples that that some funding for the Congress was reinstated, yet there are still concerns that funding remains insufficient for the Congress to exercise its mandate fully.³⁴

52. Many peak bodies and organizations shared their concerns with the Special Rapporteur about the need for sustainable funding to independent civil society. The growing support for short-term and project contracts limit the possibility for mid- or long-term planning of their activities and threaten the ability of their staff for long-term employment.

53. The introduction of the so-called 'gagging' clauses in funding agreements banned organizations that receive federal public funds from 'lobbying' the governments 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 the ulterior motives for the broader actions to control civil society funding. The Special Rapporteur echoes the concern expressed by the UN expert on the rights of indigenous peoples that funding cuts have specifically targeted organizations undertaking advocacy and legal services and that provisions inserted in funding agreements restrict the freedom of expression.³⁵

54. The authorities have increasingly stressed a distinction between 'frontline 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 just feed malnourished children, without advocating for the root causes of such malnourishment. Public advocacy is important feedback for the Government to take on board, rather than oppose it, in its formulation of policy approaches to address systemic issues.

55. The Special Rapporteur recognizes profound expertise and dedication of community organizations that run indigenous legal centres, environmental legal aid, homeless shelters, women's refuges, childcare facilities. Rather than undermining them, 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 Australia's political communications that are, in turn, "an indispensable incident" of the nation's constitutional system that contribute to public welfare.³⁶

56. The second approach to weaken independent civil society was through unleashing more red tape. The Statistical Return of Tax Deductible Donations requires more than 600 conservation groups to provide the total expenditure from their public funds. Yet, in 2017 and without apparent legal basis, the Department of Environment demanded details of where the funds were spent, within the country or offshore, and how much used for 'on ground environmental remediation', 'campaign advocacy' and 'research'.³⁷

57. CSOs believed there was more than meets the eye, especially due to the third tried method to stifle them – stripping them of their tax-deductible status. In June 2014, at a

³⁴ A/HRC/36/46/Add.2, para.44.

³⁵ A/HRC/36/46/Add.2, para. 41.

³⁶ *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 556 [44]. Subsequently reiterated in the Charities Act 2013 (Cth).

³⁷ "Government's letter to conservation groups has ominous implications", *The Guardian*, 15.07.2017.

political party's federal conference a motion was passed unanimously to remove the status from green organizations, while sponsors singled out the Australian Conservation Foundation, Wilderness Society, and Environmental Defenders Offices for "engaging in untruthful, destructive attacks on legitimate business and undertake political activism, which shouldn't attract those very generous concessions from the taxpayer".³⁸ Such unjustifiable and ungrounded 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 if environmental groups should lose their Deductible Gift Recipient status, which allows them to draw donations from various sources including business enterprises. Even before the conclusion of the inquiry, some members reportedly tweeted about cancelling tax-deductible status. In May 2016, the committee recommended that advocacy of the environmental organizations should spend at least 25 per cent of resources on environmental remediation work.³⁹ The Community Council for Australia reacted that the proposal would see green groups "picking up the dead fish instead of advocating to stop the poisons going into the stream", while the Greenpeace saw it as an attempt to "turn environmental advocates into a clean-up crew for fossil fuel companies and the government".⁴⁰

59. Following the parliamentary committee, the Treasury initiated a discussion paper on tax deductible gift recipient reform opportunities, considering environmental organizations be required to devote up to 25 per cent of their expenditure to on-ground services and be supervised more closely regarding their public advocacy.⁴¹ Many charities lamented 'palpable hypocrisy' of the debate exemplified by the growing scrutiny and politicisation of charity funding, while few rules exist limiting the power of the mining industry and lobby over politics.⁴²

60. The fourth element of weakening freedom of association relates to the attempts to undercut the reputable Australian Charities and Not-for-profits Commission (ACNC). After Government's efforts to abolish the ACNC failed in the parliament, in June 2017 the Treasury announced its intention not to re-appoint the commissioner Susan Pascoe, widely respected by civil society and supported by the ACNC's advisory board.⁴³ Her departure will be followed with a review of the ACNC's functions. More than 100 organizations wrote a letter to the prime minister to protest Pascoe's removal and criticise the handling of the ACNC by the Government.

61. The final and more recent approach involved proposals to amend the Electoral Act amidst concerns about undue influence of foreign donations to political actors.⁴⁴ The amendments proposed placing restrictions on the use of foreign donations for reportable political expenditure, which CSOs saw as a ploy to also stifle their advocacy through 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

³⁸ "Nobbling the charities", The Saturday Paper, 19.08.2017.

³⁹ "Government's letter to conservation groups has ominous implications", The Guardian, 15.07.2017.

⁴⁰ "Nobbling the charities", The Saturday Paper, 19.08.2017.

⁴¹ "Mining lobby calls for 10% limit on environmental charities' spending on advocacy", The Guardian, 31.08.2017.

⁴² "The coalition attacks environmental groups with advice straight from the mining lobby", The Guardian, 13.09.2017

⁴³ "Nobbling the charities", The Saturday Paper, 19.08.2017.

⁴⁴ Defending democracy: safeguarding independent community voices", Human Rights Law Centre, June 2017.

complain about the Minerals Council telling people how they should vote, much less to stop them”.⁴⁵

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.⁴⁶ The polling on the same month showed that the public was behind charities, with 76 per cent of respondents supporting public advocacy role of charities.⁴⁷ The public was reportedly far more concerned about foreign corporate interference in Australia, an issue that was not raised by the proposal aimed at addressing “a broad spectrum of foreign interference and covert political influence activity in Australia”.⁴⁸

E. Access to justice and remedies

63. Access to justice and independent judiciary are vital to the functioning of civil society. Access to 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 public officials obey the law and act within their prescribed powers.⁴⁹

64. Australia’s constitution guarantees 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 remedy to violations of their rights and of those individuals who they represent.

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

66. In addition to the secrecy laws, Australia’s migration laws have made it difficult for individuals to seek judicial review of government decisions due to personal non-compellable discretions delegated to the 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 certain field. In December 2015, the Australian Law Reform Commission recommended a review of privative clauses in Commonwealth laws.⁵⁰

67. Furthermore, the Government 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 find increasingly challenging to represent their clients’ interests, when 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, absence of financial means, “there can be no effective access to justice without effective

⁴⁵ “Nobbling the charities”, The Saturday Paper, 19.08.2017.

⁴⁶ <http://www.handsoffourcharities.org.au>.

⁴⁷ “Government called on to stop war on charities”, Probonoaustralia, 27.11.2017.

⁴⁸ “Charity coalition hits back over election advocacy restrictions”, The Guardian, 26.11.2017.

⁴⁹ https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf, p.413.

⁵⁰ https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf.

support from competent judges, adequate legal representation and sufficient legal aid funding”.⁵¹

68. The Government also tried to hinder environmental groups’ access to the courts under the key federal environmental law, the Environment Protection and Biodiversity Conservation Act 1999 (“EPBC Act”). In August 2015, the Government introduced the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 to repeal its section 487, which allowed individuals and organizations who have engaged in environmental or conservation activities for at least two years prior to the 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 that it “provides a red carpet for radical activists”.⁵² 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 understood that extractive industry lobbyists continued to urge the Government to amend those enabling laws. He supports more liberal availability of the right to standing for judicial and administrative review.

70. 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 their legal costs from the opposite party who have not prevailed.

71. Despite disparaging pronouncements by some public officials, the threat of an adverse costs order has been a significant obstacle for environmental defenders to pursue public interest litigation. It is rare for an individual litigant to be prepared to risk financial ruin to pursue such litigation. Smaller community groups may not even have sufficient financial resources available to them. Australian Courts have recognised that the public interest nature of litigation in environmental and other related cases can be a sufficient basis for exceptional waivers of legal costs. However, those are reportedly exceptional rulings and the 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 been long perceived as stalwart providers of free and accessible legal services to hundreds of thousands of individuals each year. Under the new National Partnership Agreement on Legal Assistance 2015-2020, however, the Centres were nationally facing funding cuts of 12.1 million AUD in 2017-2018, which represented a 29 per cent of budget cut. Since the cut would have a significant impact on Community Legal Centres and on many vulnerable and disadvantaged clients they support, he urged the Government to increase 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 2017-2018 Budget provides for additional 39 million AUD to the Centres for funding frontline 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

⁵¹ A/HRC/35/25/Add.3, para.91.

⁵² <https://www.brisbanetimes.com.au/politics/federal/abbott-government-to-change-environment-laws-in-crackdown-on-vigilante-green-groups-20150818-gj1r4l.html>.

included 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 the international forums and their implementation within the country. They also aggravated the situation of defenders, including specific groups that have 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, intimidate and discourage them from their legitimate work. The media and business actors have sometimes contributed to stigmatization.

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

76. The Declaration on Human Rights Defenders and the GA resolution 68/181 recognize the important role of women defenders who work in defence of women rights or on gender equality. Women defenders are subject to the same types of risks as any human rights defender, but as women they are also targeted for their gender and exposed to gender-specific threats and violence. The reasons behind the targeting of women defenders can be multi-faceted and complex, and depend on the specific context in which the individual defender operates. 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. However, there is also an undesirable result of abuses and threats expressed through the social media. Consultations conducted by the AHRC indicated that women advocates on domestic violence experience violence and harassment online, including the dissemination of private images or materials without consent, and violent, sexualised abuse and harassment.⁵³ The Special Rapporteur also heard testimonies when online posts become very personal and at times it involves children. It appears the most horrifying digital abuse is reserved for women with high visibility, 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 made by the Government to promote 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 marginalised and unsupported by state and territory governments. In order to claim their land rights, claimants under the Native Title Act must prove that they have had an uninterrupted relation to the claimed land, and that they have continued to exercise their traditional laws and customs. Beyond this extraordinary burden of proof in the Australian context, the communities find themselves in the disadvantageous situation due to the complex system with multiple and overlapping legal regimes applicable to native title claims and land rights at the federal, state and territory levels, compounded with insufficient indigenous legal professionals with expertise on land rights claims.⁵⁴

79. This situation is compounded by the tendency of the Australian Government to claim the federal system as somewhat limiting 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 lack of cooperation or severe pressure from the mining industry with regard to project activities, as

⁵³ https://www.humanrights.gov.au/sites/default/files/AHRC_20170120_violence_against_women_submission.pdf.

⁵⁴ CCPR/C/AUS/CO/6, para. 51; A/HRC/36/46/Add.2, para.99.

has been exemplified in the case of the proposed Carmichael Coal Mine in central-western Queensland. The Special Rapporteur expresses concern about credible reports of retaliation against indigenous defenders in the form of their exclusion from consultations on key policies and legislative proposals.⁵⁵

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

81. The attacks against environmental activism took the form of funding cuts, threats to the deductible gift recipient status of environmental organisations and efforts to vilify advocacy by environmental organisations as undue or political. The detrimental actions 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 [DGR] status for political activism".⁵⁶ Environmental organizations raised serious concerns about proposals to spend at least 25 per cent of public donations on 'environmental remediation', to add more reporting and supervision over and above other charities.

82. The Special Rapporteur agrees with the recommendations of the Environmental Defender's Offices not to adopt any mandatory diversion or limitation of funding because the proposed measures will not align with the public interest and undermine the protection of the environment because both environmental advocacy and conservation work are part and parcel of the broader environmental protection.⁵⁷ 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 recommended banning foreign donations and singling out environmental organizations, by drawing on testimony from the mining industry alleging that some activist groups 'appear to be circumventing the system'.⁵⁸ The Special Rapporteur calls on public officials to refrain from vilification of environmentalists or portraying them as eco-criminals, traitors and green radicals. Not only those verbal attacks de-legitimize valid environmental concerns in policy discussions and shelter business interests linked to environmental harm, but those attacks 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 their rights and the options available to them, without assistance. Lawyers and human rights advocates who assist refugees and asylum seekers in immigration detention in Australia face many barriers. They include situations when detainees are not allowed mobile phones; when telephone calls and visits are hard to arrange to detention centres (particularly Christmas Island Immigration Detention Centre); and detainees are frequently moved and without notice; interpreting services are limited and procedures are frequently changing.

⁵⁵ A/HRC/36/46/Add.2, para.41.

⁵⁶ "Environmental groups could lose charity status for encouraging civil disobedience", The Guardian, 4.05.2016.

⁵⁷ "Submission on the tax deductible gift recipient reform opportunities", EDOs of Australia, 24.07.2017.

⁵⁸ "Coalition report recommends ban on foreign donations to environment activists", The Guardian, 10 March 2017.

85. Besides the Border Force Act, the Immigration Department has gone to extraordinary lengths to discourage **whistleblowers**, public servants or contractors, to share information with journalists, defenders or in the public domain about serious human rights abuses in off-shore detention centres. The Special Rapporteur had a chance to talk to such whistleblowers, who validated the reports of service providers whose contracts were 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, removed from operations and had their personal and professional reputations targeted by politicians and media. Even if an independent investigation into those allegations found no evidence of the organization's staff acting outside their duties, the organization and its staff were imbued with psychological harm and sense of fear as a result.

86. Doctors advocating for better treatment and services for detainees in their care, like 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, the convenor for the Doctors for Refugees was arrested in November 2015 on the plane for "disobeying flight attendant", while several other defenders faced similar intimidation in connection to their activism.

87. During discussions with government authorities, the Special Rapporteur was reassured that no prosecution has been executed under the Australian Border Force Act at the time of the visit. This may well, and hopefully remain 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 could attest to the fears among individuals he met about serious consequences for blowing the whistle. He met numerous doctors, teachers, lawyers and journalists, who had either spoken out or reported 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 whistleblowers under to the Australian law.

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

IV. National human rights institution

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

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

91. NHRIs serve as independent watchdogs over public administration, prevent abuse by public bodies and promote general respect for human rights. In some cases, NHRIs 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. Australia led with success discussions at the Human Rights Council on its resolution 27/18 on national human rights institutions, which provides that NHRIs 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 resolution further states that any cases of alleged reprisal or intimidation against NHRIs 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. While reviewing the role of the AHRC, the Special Rapporteur was struck by the lack of coherence between the actions of Australia promoting and defending a broader role for NHRIs at the international arena and its attacks against its own institution. On several occasions, he was alerted about government-led or supported vilification of AHRC, which took the form of verbal attacks by public officials and media outlets.

94. The president of the AHRC, Gillian Triggs, faced Government’s verbal intimidation that aimed at publicly questioning her integrity, impartiality and judgement. This was especially the case following the AHRC’s inquiry into the child harm in immigration detention.⁵⁹ The Special Rapporteur was not informed by the Government of any inquiry undertaken against the perpetrators of those attacks. In her parting statement, the AHRC president conceded that human rights for women, asylum-seekers, refugees, the homeless and indigenous Australians had ‘regressed’ during her five-year tenure. “It’s partly because we have a government that’s ideologically opposed to human rights, and I think it’s exacerbated by the distance of most Australians from where these problems are actually most visible,” she explained.⁶⁰

95. The Special Rapporteur was also informed of several occasions when the AHRC’s financial resources and capacity were targeted for reduction.⁶¹ The budget cuts were also amplified by the adjunct of additional functions to the AHRC without adequate budget allocation. He also received reports of a 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 in the Paris Principles. This raised questions about the alleged attempts of the Government to assume more control of the AHRC.

V. Role of non-State actors

96. Australia has a high concentration of media ownership compared to other Western countries. Ownership of national and state or territory newspapers are dominated by couple of corporations, which control the majority of media. The Special Rapporteur received information on a number of cases of vilification by **media** outlets against environmental defenders, depicting them as anti-development or frivolous in their attempt to challenge large-scale mining projects in different states and territories. Several defenders protecting the rights of refugees or returning from Nauru or PNG also reported the media’s role in inciting smear campaigns against them, after they had disclosed information related to the condition of detention in facilities or detention centres.

97. When the AHRC 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 also shared with the Special Rapporteur

⁵⁹ <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>.

⁶⁰ <http://www.theaustralian.com.au/national-affairs/gillian-triggs-in-parting-shot-on-human-rights/news-story/e74ceb524c3dd9e3e79263b1b65148b>.

⁶¹ See also “Safeguarding democracy”, Human Rights Law Centre, February 2016, p.33.

testimonies about concerted media campaigns aimed at discrediting their legitimate work and tarnishing their image. This was particularly the case when the Royal Commission launched inquiry on “Trade Union Governance and Corruption”.⁶²

98. The Special Rapporteur also learnt about the role of business and extractive industry, which indicated a pattern of portraying landowners, environmental defenders and watchdogs as activists who obstruct 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 drew⁶³ on the allegations by the Minerals Council of Australia that some environmental organizations actively participated in ‘politically partisan advocacy’ but were still registered as charitable organisations, avoiding disclosure of the source of their foreign and domestic funding.⁶⁴ The Council also called for the identity and location of donors to charities that engage in advocacy be revealed, or failure to do that “constitutes a potential threat to Australia’s sovereignty, by allowing foreign interests to exert political influence by covertly funding domestic environmental groups”.⁶⁵ In response, the Australia Institute released a report, showing the large degree of tax-deductible advocacy carried out by foreign-funded lobbying groups including the Minerals Council.⁶⁶

100. The Special Rapporteur welcomes the statement by Australia’s biggest mining company BHP denouncing the proposals to lump charities with political parties and stating their 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.”⁶⁷ 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.⁶⁸

101. The Special Rapporteur recalls that public and private companies must respect human rights, the international principles on business and human rights, including the UN 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 communities when they have the intention to undertake a project affecting indigenous communities. They should refrain from taking actions that can affect these consultation processes, including those that can contribute to the division of communities.

⁶² <https://www.tradeunionroyalcommission.gov.au/Pages/default.aspx>; <https://theconversation.com/sorting-the-gems-from-the-dung-in-the-royal-commission-on-union-corruption-57202>.

⁶³ “Coalition report recommends ban on foreign donations to environment activists”, The Guardian, 10 March 2017.

⁶⁴ “Submission on tax deductible gift recipient reform opportunities discussion paper”, Minerals Council of Australia, August 2017.

⁶⁵ “Mining lobby calls for 10% limit on environmental charities’ spending on advocacy”, The Guardian, 31.08.2017.

⁶⁶ <http://www.tai.org.au/content/undermining-our-democracy-foreign-corporate-influence-through-australian-mining-lobby>.

⁶⁷ “BHP backs green groups over the Mineral Council as industry rift widens”, ABC news, 8.11.2017.

⁶⁸ “Mining industry body retreats from hardline stance on charities”, The Guardian, 27.11.2017.

VI. Conclusion and recommendations

102. The Special Rapporteur acknowledges achievements made by the Australian Government in promoting respect for human rights around the world. He presents the report in the context of the Government's recent pledge to "advocate for the protection of journalists, human rights defenders and civil society"⁶⁹ and looks forward to continuing dialogue with the Government on ways and means to realise the commendable pledge within Australia.

103. Australia can be proud of its vibrant and 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's role and responsibility is to support defenders, empower them and engage them in meaningful consultations. However, the assessment of the situation of defenders in the country shows that culmination of recent actions and legislations indicate an attitude by the Government towards civil society that has oscillated from lukewarm to obstructive to hostile. Some observers refer to the Government's 'war on charities'. The Special Rapporteur's visit point to a 'chilling effect' from the combined measures of the authorities, which included secrecy laws and other regressive legislations; funding cuts; 'gagging clauses' in funding agreements; general antipathy to public advocacy; pro-forma consultations; double standards in treatment compared to extractive companies; attacks against the AHRC and vilifying defenders.

105. The Special Rapporteur urges the Government to reverse the worrying trend. The Government should project its energy and expertise of advocating for human rights abroad to empowering its 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 redouble its efforts in strengthening civil society in the country.

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

107. The Australian Government is recommended to:

(a) **Consider adopting a federal human rights act to constitutionally guarantee human rights 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, 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 to CSOs 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 partnership and funding agreements.**

⁶⁹ <http://dfat.gov.au/international-relations/international-organisations/pages/australias-membership-unhrc-2018-2020.aspx>.

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

(i) Guarantee 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 future appointment of AHRC commissioners is made through public, transparent, merit-based appointment that are fully compliant with the Paris Principles.

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

(m) Ensure that environmental impact assessments are prepared in full transparency and with meaningful participation of affected communities prior to the approval of large-scale projects.

(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 Australian Human Rights Commission and other state-level human rights institutions are recommended to:

(a) Include, within the 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 state levels, adopt and contribute to the preventive and protective measures for defenders, as well as develop means for their public recognition.

109. Business enterprises and other non-State actors are recommended to:

(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 or legal intimidation against defenders and CSOs.

(d) Disclose information related to planned and on-going large-scale projects in a timely and accessible manner.

(e) Establish grievance mechanisms necessary to avoid, mitigate and remedy any direct and 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.