



Australian  
Human Rights  
Commission

# The role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses

Submission to the UN Working Group  
on business and human rights

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# 1 Introduction

The Australian Human Rights Commission (the Commission) is Australia's legislatively-mandated national human rights institution (NHRI), holding an A status level of accreditation under the Global Alliance of National Human Rights Institutions. The Commission provides independent and impartial services in carrying out its functions and responsibilities across education and public awareness, discrimination and human rights complaints, human rights compliance and policy and legislative development.

## 2 Summary

In this submission, the Commission provides responses to the discussion questions in the *Call for input by the Working Group on Business and Human Rights on the role of National Human Rights Institutes in improving access to an effective remedy for business-related human rights abuses* dated 2 May 2019 (Call for Input).

This submission also includes and builds on the information provided in August 2018 to the UN Working Group on Business and Human Rights (Working Group), in response to the discussion questions posed by the Working Group for the 2018 the Annual General Meeting of the Asia Pacific Forum of NHRIs' *Session on the Role of NHRIs in Facilitating Access to Effective Remedy in Business Related Human Rights Abuses*.

## 3 Response to discussion questions

### 3.1 The role and mandate of NHRIs in facilitating access to effective remedy for business-related human rights abuses

- (a) **Does your NHRI have an explicit or implicit mandate to handle complaints concerning alleged business-related human rights abuses? If yes, what methods (e.g. mediation or conciliation) can be used to facilitate access to remedy for human rights abuses?**

The Commission has an explicit mandate to investigate and attempt to conciliate complaints brought under Australia's anti-discrimination laws, namely, the *Race Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act*

1992 and *Age Discrimination Act 2004*. A complaint must be brought under the Australian anti-discrimination legislative framework in order for the Commission to exercise its investigative function. The Commission may investigate complaints against businesses regarding discrimination in the provision of goods, services, accommodation, education and employment.

The Commission has a non-determinative function in investigating complaints under Australia's federal anti-discrimination law and adopts an impartial role in working with parties to resolve disputes via conciliation. The investigative mandate may involve compelling information from organisations or compelling attendance at conciliation. The Commission does hold a determinative function in relation to complaints alleging unlawful discrimination.

**(b) What types of remedies could your NHRI offer to individuals or communities harmed by businesses? Do you consider those remedies to be effective?**

As part of its complaint handling function, the Commission has the power to investigate and where appropriate attempt to resolve complaints through conciliation. The Commission accepts and attempts to resolve complaints against businesses such as shopping centres, banks, financial institutions, telecommunications companies, insurance organisations and others, on a regular basis. Examples of successful party led remedies that the Commission has facilitated include:

- Arranging for a complainant party to have direct input to the decision-making processes of an organisation, on particular issues that are the subject matter of the complaint. Examples may involve enabling an individual to provide direct input into changing or developing policies and procedures or being involved in the participatory design of a new product
- Apology (public and/or private), and
- Compensation (financial or non-financial).

The *Australian Human Rights Commission Act 1986*<sup>1</sup> provides an explicit mandate for the Commission to ensure that any settlement of a dispute reflects a recognition of human rights and the need to protect those rights. In this regard, the Commission considers remedies that provide positive outcomes not only for the parties of a dispute but also for the interests of broader systemic outcomes

to ensure the protection of human rights.

- (c) **Does your NHRI have a mandate to investigate, conduct inquiry and adjudicate individual cases of alleged human rights abuses by businesses? If yes, please provide relevant statistics in relation to complaints received and adjudicated.**

The Commission has an explicit mandate to handle complaints made under international human rights frameworks against the Australian Commonwealth government or its agencies. The Commission does not have a mandate to handle complaints made under international human rights law against businesses.

The Commission handles complaints through a conciliation process. Conciliation is a form of alternative dispute resolution where the conciliator will facilitate a dispute and strive to be evaluative in identifying the strengths and weaknesses of the legislative framework under which the complaint is brought. A conciliator from the Commission will work with parties to achieve a remedy as opposed to making a determinative outcome or imposing a remedy.

- (d) **Does your NHRI give any special attention to facilitate access to your complaint mechanisms by vulnerable or marginalised groups? If yes, what measures have been taken in this regard?**

The Commission regularly provides community education and facilitates field work activities for vulnerable and marginalised communities— presenting seminars at community legal centres for migrant women, survivors of torture and trauma, people with disabilities and remote indigenous communities. Information sheets that outline the Commission’s complaints handling function and how it may be accessed are available on the Commission’s website in several different language groups.

- (e) **What gender-sensitive and gender-responsive measures your NHRI take in dealing with cases of alleged business-related human rights abuses?**

The Commission integrates a human-rights based approach to all of its work and

activities and takes active steps to understand and address the gender dimensions of many human rights challenges and issues. For example, while sexual harassment affects both men and women, the Commission's research has found that women disproportionately experience sexual harassment in the workplace. The Commission's research has found that in the vast majority of cases of sexual harassment, it is perpetrated by a man and in many cases; it is ongoing over an extended period. Disturbingly, the research also reveals that reporting of workplace sexual harassment continues to be low. Only 17% of people who experienced sexual harassment at work in the last five years made a formal report or complaint about the harassment.<sup>1</sup>

This research has been conducted as part of a National Inquiry into Sexual Harassment in the Australian Workplace. Through the Inquiry, the Commission will identify examples of existing good practice, and will make recommendations for change, providing a way forward for preventing and addressing sexual harassment in Australian workplaces.

- (f) **What other measures does your NHRI undertake to facilitate access to remedy indirectly for business-related human rights abuses (e.g. raising awareness about rights and remedial mechanisms, providing legal assistance, building capacity of communities or businesses, assessing effectiveness of other grievance mechanisms, and recommending reform of the national legal system to strengthen access to remedy)?**

*Awareness raising and tool development*

The Commission's functions include developing tools that assist businesses to embed human rights into their cultures, operations and activities, and meet their responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights. As such, the Commission provides support to Australian businesses on a range of critical human rights issues such as sexual harassment and cultural diversity. For example earlier this year the Commission published a toolkit titled *Multigenerational workforces: a guide to the rights of older*

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<sup>1</sup> Australian Human Rights Commission, Everyone's business; Fourth National survey on sexual harassment in Australian workplaces (2018) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>

*workers under the Age Discrimination Act 2004.*<sup>2</sup> Given the introduction of the *Modern Slavery Act 2018* (Cth) and the *Modern Slavery Act 2018* (NSW), the Commission has a particular focus on assisting businesses and government to identify and address modern slavery risks in their operations and supply chains.

### *Identifying gaps in law, policy and practice*

The Commission's statutory responsibilities include contributing to policy and legislative development on fundamental human rights issues. The Commission does this through engagement with stakeholders and by encouraging government, industry and community groups alike to see fundamental rights and freedoms realised. As noted above, the Commission is currently leading a National Inquiry into Sexual Harassment in the Australian Workplace, which will make recommendations for preventing and addressing sexual harassment in Australian workplaces.

In addition, in March 2015, the Attorney-General requested that the Commission undertake a National Inquiry into Employment Discrimination against Older Australians and Australians with Disability. The National Inquiry examined practices, attitudes and Commonwealth laws that deny or diminish equal participation in employment of older Australians and Australians with disability; and made recommendations as to Commonwealth laws that should be amended, or action that should be taken to address employment discrimination against older Australians and Australians with disability.

### *Advocating for reform*

The Commission also supports the promotion and operation of the OECD Australian National Contact Point (AusNCP), established under the *2011 OECD Guidelines for Multinational Enterprises*. The Commission is currently actively supporting the implementation of a range of reforms to increase the AusNCP's independence and accessibility, following a Government commissioned Independent Review of the AusNCP in 2017. The Commission has a position on the AusNCP's new multi-stakeholder Governance and Advisory Board and provides feedback on proposed updates to the AusNCP's Procedures to ensure the AusNCP is accessible, including to vulnerable complainants.

Access to remedy is a key area of focus under Australia's National Action Plan on Trafficking and Modern Slavery 2015-2017. However, this area has received limited attention to date. The Commission has been engaging on this issue

including by conducting ongoing advocacy (for example, through the UPR and Parliamentary Inquiries) and participating in the Australian National Roundtable on Human Trafficking and Modern Slavery. In addition, during the development of Australia's new modern slavery legislation, the Commission advocated for victims of modern slavery to have access to appropriate information, remedies and support.

### *Convening stakeholder groups*

In partnership with the UN Global Compact Network Australia, the Commission leads an annual Dialogue on Business and Human Rights. This event is Australia's annual multi-stakeholder forum aimed at driving the business and human rights agenda forward. As an independent institution, the Commission plays an important role in bringing civil society, State and non-State actors together for the purpose of protecting human rights in business contexts.

Since 2014, the Dialogue has consistently achieved substantial engagement from business, investors, government, civil society and academia. The Dialogue supports knowledge sharing between stakeholder groups to further Australian businesses' positive uptake of human rights in their business operations and activities.

The focus of the 2018 Dialogue was addressing modern slavery in business operations and supply chains, and the importance of situating this work within a broader human rights framework. In 2019 the Dialogue will have sessions focusing on access to remedy through state and company based non-judicial grievance mechanisms.

(g) **How does your NHRI collaborate with other judicial or non-judicial remedial mechanisms (e.g. courts, labour tribunals, National Contact Points, and operational level grievance mechanisms) in dealing with complaints concerning business-related human rights abuses?**

The Commission regularly engages with a range of non-judicial bodies to exchange information and discuss ways to strengthen systems to ensure equitable and fair complaint handling processes are achieved holistically. The Commission shares knowledge with the Australian Fair Work Commission, and the Australian Council of Human Rights Agencies which includes the state and



territory Human Rights Commissions that have responsibility for discrimination, equal opportunity and human rights in their respective jurisdictions.

As discussed above, the Commission also engages extensively with the AusNCP and has a position on its new multi-stakeholder Governance and Advisory Board.

- (h) **Can your NHRI deal with alleged business-related human rights abuses with a transnational or cross-border dimension (e.g. through informal visits and exchange of information or a cooperation arrangement with counterparts in other States)?**

The Commission does not have a mandate to deal with business-related complaints that have a transnational dimension.

- (i) **Is your NHRI involved in any initiatives to stimulate effective multi-stakeholder grievance mechanisms to strengthen access to remedy for business-related human rights abuses?**

No.

- (j) **Where a National Action Plan on Business and Human Rights exists (or is under development), does it provide for a role for NHRIs in relation to access to remedy in case of business-related human rights abuses?**

Not applicable.

### **3.2 Good practices, innovations and recommendations to strengthen the role of NHRIs in facilitating access to effective remedy for business-related human rights abuses**

- (a) **Can you share any good practice examples in which your NHRI was able to facilitate, directly or indirectly, effective remedies for business-related human rights abuses?**

#### *Complaint handling*

As noted above, the Commission has an explicit mandate to investigate and attempt to conciliate complaints brought under Australia's anti-discrimination laws. As part of its complaint handling function, the Commission has the power to investigate and where appropriate attempt to resolve complaints through conciliation. In the 2017-2018 Australian financial year the Commission received 2,046 complaints about discrimination and breaches of human rights. Of those, 1,262 conciliation processes were conducted and 74% of these complaints were successfully resolved.<sup>3</sup> Many of these matters related to discrimination in relation to employment and the delivery of goods and services within the private sector.

Some examples of the Commission' complaint handling and conciliation since 2016 include:

#### Complaint of disability discrimination in goods, services and facilities<sup>4</sup>

The complainant has a back injury and requires support rails to access bathroom facilities. He claimed toilet facilities at the respondent shopping centre were not accessible. On being advised of the complaint, the shopping centre indicated a willingness to try to resolve the matter by conciliation. The complaint was resolved with an agreement that the shopping centre install unisex accessible toilet facilities. In the interim, the shopping centre undertook to install support rails in existing toilet facilities.

#### Complaint of sexual harassment in employment<sup>5</sup>

The complainant worked as a chef at a café. She alleged the head chef had sexually harassed her by brushing past or leaning over her, feeling her bottom

and breasts and making comments and jokes of a sexual nature. The complainant claimed that after she told the head chef that she found her behaviour inappropriate, the head chef began complaining about her performance to the manager, shouting at her, and not allowing her to take scheduled breaks. The complainant said she felt she had no option but to resign. Despite denying any unlawful conduct, the café agreed to participate in conciliation. The complaint was resolved with an agreement that the café pay the complainant \$9,000. The café also undertook to implement sexual harassment and sex discrimination policies in the workplace.

#### Complaint of age and disability discrimination in the provision of goods and services<sup>6</sup>

The complainant, aged 71, experiences pain when walking long distances and uses a walking stick. She claimed the layout of a domestic airport she used required passengers to walk long distances. She claimed there were no travelators, there was limited seating, and she could not find staff to provide assistance or a wheelchair. The airport agreed to take part in conciliation. The complaint was resolved with an agreement that the airport improve signage, provide maps indicating walking distances, review availability of seating and operate a transport service within the airport for passengers who need assistance with mobility. The airport also agreed to review customer service training provided to staff.

#### *Capacity building*

The Commission works with NHRIs and partners to build capacity, share information and strengthen networks in promoting an understanding of business and human rights issues. Examples of the activities the Commission has recently focused on include: leading capacity building workshops for NHRIs in the Pacific region on seasonal worker programs, facilitating business and human rights knowledge sharing for NHRIs within the ASEAN region and providing a platform for multi-stakeholder dialogue on business and human rights in Australia.

#### Regional knowledge sharing for NHRIs in the ASEAN

The Commission cooperates with the ASEAN Intergovernmental Commission on Human Rights (AICHR) to enhance the capacity of NHRIs and to promote and protect human rights within the ASEAN region. The Commission participated in

the *AICHR Interregional Dialogue: Sharing Good Practices on business and human rights* in June 2018 and 2019 and convened a side event for NHRIs in the ASEAN region in 2018. The side event enabled NHRI specific discussion on existing and future initiatives, including barriers and challenges faced by NHRIs in optimising the implementation of the United Nations Guiding Principles on Business and Human Rights within the region.

### Stronger seasonal worker programs—capacity building workshop

In Australia and New Zealand, Pacific participants to the respective Seasonal Worker Programs<sup>7</sup> are vulnerable to human rights abuses, for example in the form of underpayment of wages, non-payment of annual leave entitlements, excessive working hours, unsafe working conditions and sexual exploitation. Seasonal workers face barriers to accessing remedies, especially after returning to their home countries.

In partnership with the New Zealand, Fiji and Samoan Human Rights Commissions, the Business and Human Rights Resource Centre, and the Freedom Partnership, the Commission facilitated an introductory level capacity building program in April 2018. Participants included NHRIs, State agency offices, Civil Society/ Regional peak body representatives and Consular representatives from the Pacific region. The project was funded through the Danish Human Rights Institute's NHRI – EU funding program.

The purpose of the project was to build the capacity of NHRIs and their equivalent bodies in the Pacific to address human rights challenges faced by migrant workers. The two-day workshop provided an introduction to the key risks of forced labour, human trafficking, slavery and other forms of exploitation as well as the pathways to accessing remedy for participants on seasonal worker programs.

Participants gained an increased level of awareness of the human rights risks, issues and complex barriers faced by migrant workers on seasonal worker programs. Participants gained an increased understanding of the nature of the NHRI mandate, remediation and the relevant role NHRIs play in advancing human rights within seasonal worker programs.

(b) **How could NHRIs collaborate with regional and international human rights monitoring mechanisms (including the Universal Periodic Review) to facilitate access to remedy for business-related human rights abuses?**

NHRIs should engage in regional and international human rights monitoring mechanisms such as the UN UPR process to draw attention to business related human rights issues arising within their state's territory or jurisdiction. NHRIs should also provide feedback on draft Comments prepared by UN Committees and actively engage in visits from UN Special Rapporteurs to ensure that appropriate links are drawn between the issues raised, and the duties and responsibilities of states and corporations outlined in the United Nations Guiding Principles on Business and Human Rights.

Where appropriate, there is a role for NHRIs to raise specific concerns in communications with Special Rapporteurs, with a view to bringing international attention.

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<sup>1</sup> *Australian Human Rights Commission Act 1986* (Cth) s 10A.

<sup>2</sup> <https://www.humanrights.gov.au/about/news/new-guide-keep-our-older-workers-working>

<sup>3</sup> Australian Human Rights Commission, Annual Report 2017-2018 (2018),

<sup>4</sup> *Ibid*, 28

<sup>5</sup> Australian Human Rights Commission, Annual Report 2016-2017 (2017), 34

<sup>6</sup> *Ibid*, 34

<sup>7</sup> The Seasonal Worker Programme is open to individuals from Pacific island countries and Timor-Leste. It provides access to work opportunities in the Australian agriculture sector, accommodation sector in selected locations and tourism sector through the Northern Australia Tourism Pilot.