



Law Council
OF AUSTRALIA

Concept Paper for a National Anti-Racism Framework

**Australian Human Rights Commission
Racial Discrimination Commissioner**

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia is grateful to its National Human Rights Committee and Indigenous Legal Issues Committee, as well as the Law Society of New South Wales, Law Institute Victoria, Law Society Northern Territory, and New South Wales Bar Association, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in response to its Concept Paper for a National Anti-Racism Framework.²
2. The Law Council strongly supports the overarching commitment of the AHRC and Racial Discrimination Commissioner to address racism and promote racial equality across Australia.
3. However, it suggests that the current Concept Paper outline for a National Anti-Racism Framework is at a high level of generality and the resources of the AHRC and Racial Discrimination Commissioner might be more specifically directed toward acute human rights needs within Australia's legal and policy frameworks that are tied to racism and racial inequality.
4. On the basis of input from the Law Council's Indigenous Legal Issues Committee, this submission focuses in particular on recognising the issues and acute needs facing Aboriginal and Torres Strait Islander peoples, in combatting racism and promoting racial inequality in this country.
5. At the same time, the Law Council fully recognises the diversity of the issue of racism and the need for the National Anti-Racism Framework to capture and respond to multiplicities of experience. While it has been unable to specifically address the experiences of other affected cohorts in this submission, the Law Council strongly supports the goal of the Commission to ensure that all persons are free from racism and discrimination.
6. The Law Council is pleased to make the following overarching suggestions in response to the Concept Paper:
 - the National Anti-Racism Framework be approached within the context of the need for a robust human rights framework in Australia, including at minimum a federal human rights act;
 - a precise national picture of existing legal protections and policy programs, implementation gaps, and outstanding recommendations, as well as the necessary data relating to racism and racial discrimination, be mapped, including through close consultation with state and territory human rights bodies and commissioners, in order to buttress the case for a National Anti-Racism Framework and direct resources to acute areas;
 - the experiences of Aboriginal and Torres Strait Islander peoples be properly centred, through close consultation and collaboration with the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner;
 - to this end, consideration be given to prioritising research into how best to implement, as the AHRC has flagged,³ the United Nations Declaration on the Rights of Indigenous Peoples domestically in Australia, as the comprehensive

² Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (March 2021) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_cp_national_anti-racism_framework_2021_.pdf>.

³ Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Incorporating UNDRIP into Australian law would kickstart important progress', *Canberra Times* (13 September 2021, online) <<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>>.

international standard setting out the human rights that indigenous peoples are entitled to enjoy;

- consultation on country be fostered and resourced at the AHRC, whereby Commissioners and staff engage with grassroots communities on a regular basis, particularly in remote areas, in order to ensure that the lived experiences and views of Aboriginal and Torres Strait Islander peoples direct the work of the Commission; and
- an independent review of the AHRC's funding be undertaken to ensure it is able to carry out its mandates.

7. Specific responses to the proposed guiding principles and national outcomes set out in the Concept Paper are also provided from page 13 of this submission.

General Comments

8. The Law Council considers that as a general approach to the development of the National Anti-Racism Framework there needs to be a clearer and more detailed picture of the nature of racism in Australia, and in particular an understanding of both the breadth and depth of the issue to be addressed.
9. Rather than the high level of generality at which the Concept Paper currently outlines the issue, a more in-depth analysis might be required of the multiple drivers, risk factors, harms, outcomes, experiences, survivors, and perpetrators, of racism and racial inequality across Australia. This includes recognising that while all racism is inherently harmful, for certain groups racism is perpetuated in a grossly systemic way and specific to unique historical context. This also includes a clear understanding that racism presents not only in person-to-person interactions, but systemically, in the assumptions, values and processes on which our institutions are built and function.
10. The Law Council supports supplementing messages of personal responsibility with a comprehensive critique of the systems that uphold racial inequality in Australia. It suggests that development of the National Anti-Racism Framework should be directed beyond education campaigns and public and private sector guidance to a detailed consideration of the legal and policy frameworks necessary to ensure the rights of minority or marginalised groups.
11. Campaigns such as '*Racism. It Stops With Me*' are important and welcome, but a more transformative approach would pay close regard to Australia's legal and policy frameworks. This includes ensuring effective access to rights for minority or marginalised groups, widespread public understanding of how conflicting rights ought to interact, government implementation of both the positive and negative obligations inherent to rights such as the right to equality and non-discrimination, and the existence of effective remedies for breaches of rights.
12. The Law Council has previously outlined its position that renewed leadership – by governments, business and community leaders – is necessary to foster a culture of human rights for all Australians.⁴ In its submission to the AHRC's *Free and Equal: An Australian Conversation on Human Rights*, the Law Council advocated for a proactive approach to human rights protection, whereby human rights are recognised and

⁴ Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) <<https://www.lawcouncil.asn.au/publicassets/01171551-eb0b-ea11-9400-005056be13b5/3712%20-%20Free%20and%20equal%20An%20Australian%20conversation%20on%20human%20rights.pdf>>.

protected through a robust legal and policy framework, which is best underpinned by a federal human rights act.⁵

13. In the Law Council's view, a federal human rights act would establish a strong ethos of respect for the fundamental rights of all Australians across the public and private sectors, including areas in which systemic racial discrimination has been found, such as within police, prisons, courts, aged care, disability services, child services, schools and hospitals.⁶ It would also foster a better parliamentary understanding of human rights, and, by extension, certain federal laws such as the *Racial Discrimination Act 1975* (Cth) (**RDA**).
14. The Law Council considers that mapping a detailed national picture of racism in Australia, and the 'implementation gaps' in terms of human rights legal and policy protections, first requires the collection, collation or assessment of large amounts of quantitative and qualitative data, and identifying with greater precision or in a centralised, accessible manner for stakeholders what is currently known and what is not. This should include comprehensive input by marginalised groups and their representative and expert organisations, as well as a stocktake of relevant policy frameworks and practical recommendations from royal commissions and other inquiries that remain outstanding. An assessment of the overlapping proposals that already exist in relation to different groups in the community that have been targets of racism or affected by institutionalised racism, including a survey of what has been proposed and/or adopted at the federal level across different platforms, such as in relation to the RDA and discrimination law more broadly, and other frameworks such as Closing the Gap, as well as by state and territory bodies such as human rights and antidiscrimination bodies, might provide a starting point for useful insights into what is needed. Such a preliminary process might help to make clearer the priorities for the National Anti-Racism Framework, and buttress the case for its support and adoption.

Aboriginal and Torres Strait Islander Peoples

15. In particular, it is the position of the Law Council that the experiences of Aboriginal and Torres Strait Islander peoples should be properly centred in any approach to combatting racism in Australia.
16. While the Law Council recognises that the Aboriginal and Torres Strait Islander Social Justice Commissioner has the key leadership role on issues affecting Aboriginal and Torres Strait Islander peoples, on the basis of advice from its Indigenous Legal Issues Committee, which has raised the importance of ensuring that issues and roles at the Commission are well aligned, the Law Council strongly supports close consultation and collaboration between Commissioners in developing the National Anti-Racism Framework. No National Anti-Racism Framework can be complete without incorporating the experiences and priorities of Aboriginal and Torres Strait Islander peoples front and centre.
17. The National Anti-Racism Framework should be based in a clear understanding of the history of Australia, particularly the continuing impact of colonisation on First Nations, the trauma that has been inflicted and endures across generations, and the strength, resilience and political aspirations of Aboriginal and Torres Strait Islander peoples in the century since dispossession.
18. Aboriginal and Torres Strait Islander peoples have a particular experience of Australia's institutions, through which the impact of systemic racism continues to

⁵ Ibid, 10.

⁶ Ibid, 11.

result in alarming health, education, socioeconomic, child protection and justice outcomes. As the AHRC is aware, there are long-recognised systemic barriers to the wellbeing of Aboriginal and Torres Strait Islander peoples and their enjoyment of their human rights. The Australian Government's Productivity Commission has released eight reports in its Overcoming Indigenous Disadvantage (**OID**) series, which, in drawing out statistics and outcomes related to wellbeing, illustrates in many ways the nature and extent of the systemic racism faced by Aboriginal and Torres Strait Islander peoples in the present day.

19. In its 2020 report from the OID series,⁷ the Productivity Commission is clear that:

*Poorer outcomes are not due to people **being** Aboriginal and/or Torres Strait Islander, rather, they are attributable to the additional personal challenges and structural barriers faced by many Aboriginal and Torres Strait Islander people compared with non-Indigenous people.⁸*

20. The Productivity Commission identifies multiple inequality indicators, which, it accepts, have been 'transmitted across generations through the trauma caused by colonisation, and subsequent government policies',⁹ including:¹⁰

- lower life expectancy, poor physical and mental health, disability and chronic disease barriers;
- less access to early childhood education and lower levels of literacy and numeracy skills and secondary education, post-secondary qualification and tertiary education participation and achievement;
- insecure housing, overcrowding in housing, and issues with access to clean water, functional sewerage, electrical services and other social infrastructure;
- unemployment, including because of a shortage of suitable jobs in remote areas, the costs of searching for a job being too high, further education or skills training being required, poor health or disability, and family and community caring responsibilities;
- poverty, socioeconomic disadvantage, and high levels of income support management, with arrangements that affect the way money is delivered or how the money can be spent;
- greater vulnerability to entering child protection services, irrespective of the underlying prevalence of abuse and neglect;¹¹
- disproportionate representation in prisons and youth detention centres, due to the discriminatory impact of criminal justice legislation and policies, and as an outcome of other risk factors, such as bail laws that favour those with secure accommodation; and
- discrimination when accessing support services or seeking opportunities (such as schooling, gaining employment or accessing finance to purchase a home).

21. The statistics are stark, and, while the whole picture cannot be captured here, some include:

⁷ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020) <<https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overcoming-indigenous-disadvantage-key-indicators-2020-report.pdf>>.

⁸ Ibid, 3.5 (emphasis in original).

⁹ Ibid.

¹⁰ Ibid, 3.5-3.6, 4.68.

¹¹ Ibid, 4.118: 'That is, if the prevalence was the same for Aboriginal and Torres Strait Islander children and non-Indigenous children, Aboriginal and Torres Strait Islander children would still be more likely to enter and be overrepresented in the system.'

- in 2018-2019, about one in two Aboriginal and Torres Strait Islander people aged 15 years or over lived with a disability or a long-term health condition;¹²
- about one in four Aboriginal and Torres Strait Islander people live with a disability, a figure largely unchanged over the past decade, and double the rate of non-Indigenous people;¹³
- in 2018-2019, the hospitalisation rate in major cities for end stage renal disease for Aboriginal and Torres Strait Islander people was five times the rate for non-Indigenous people, increasing to 75 times the rate in remote and very remote areas;¹⁴
- unlike non-Indigenous students, the Year 1 to 10 school attendance rate for Aboriginal and Torres Strait Islander students decreases with remoteness, from between 82 and 85 per cent in cities and regional areas in 2019, to 74 per cent in remote and 61 per cent in very remote areas;¹⁵
- only 48 per cent of potential Aboriginal and Torres Strait Islander students were enrolled in Year 12 in 2019, 11 per cent of potential students were eligible for an ATAR, and 8 per cent of potential students achieved an ATAR of 50.00 or above;¹⁶
- in 2018-2019, half of Aboriginal and Torres Strait Islander adults had or were working towards a post-secondary qualification, and, while this proportion had almost doubled since 2002, it was far less than the 75 per cent proportion of non-Indigenous adults;¹⁷
- in 2020, 52 per cent of Aboriginal and Torres Strait Islander people had experienced at least one form of racial prejudice in the past six months, an increase from 43 per cent in 2018;¹⁸
- in 2016, 28 per cent of Aboriginal and Torres Strait Islander people, compared to 18 per cent of non-Indigenous people, were in the lowest income quintile in Australia;¹⁹
- in 2014-2015, which was the latest period of comparable data, the median equivalised gross weekly household income for non-Indigenous peoples was 70 per cent more than for Aboriginal and Torres Strait Islander peoples;²⁰
- Aboriginal and Torres Strait Islander children are far more likely than non-Indigenous children to come in contact with child protection services. Once a substantiation occurs, Aboriginal and Torres Strait Islander children are increasingly more likely than non-Indigenous children to be placed on a care and protection order and/or in out-of-home care. In 2018-2019, around 16 per cent of Aboriginal and Torres Strait Islander children received a child protection service, compared with 2 per cent of non-Indigenous children;²¹ and
- despite accounting for roughly 3 per cent of the total population in Australia, Aboriginal and Torres Strait Islander peoples made up 29% of the prison

¹² Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 4.87.

¹³ *Ibid.*, 4.87-8.

¹⁴ *Ibid.*, 4.93.

¹⁵ *Ibid.*, 4.49.

¹⁶ *Ibid.*, 4.61.

¹⁷ *Ibid.*, 4.77.

¹⁸ Reconciliation Australia, *2020 Australian Reconciliation Barometer* (25 November 2020)

<https://www.reconciliation.org.au/wp-content/uploads/2021/02/Australian_Reconciliation_Barometer_-_2020_Summary-Report_web_spread.pdf> 5.

¹⁹ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020 – Report* (December 2020), 4.103.

²⁰ *Ibid.*, 4.99.

²¹ *Ibid.*, 4.110, 4.112.

population in Australia at 30 June 2020.²² Statistics show that Aboriginal and Torres Strait Islander people fare worse at every stage of the criminal justice process compared to non-Indigenous people.²³

22. The AHRC would also be aware of the continuing and significant breaches of Aboriginal and Torres Strait Islander peoples' human rights across multiple areas, including in the protection of cultural heritage, the treatment of persons in custody, and compulsory management of social security income.
23. In the Law Council's opinion, the breadth and depth of the racism, racial inequality and discrimination experienced by Aboriginal and Torres Strait Islander peoples suggests that far more than a strategy to guide the public and private sectors in the prevention of racism is presently necessary.
24. The Law Council considers the experiences of Aboriginal and Torres Strait Islander peoples to be an area of acute concern exemplifying the gap between the promise and implementation of human rights protections in Australia.²⁴ In its submission in response to the AHRC's *Free and Equal: An Australian Conversation on Human Rights*, the Law Council asserted the importance of human rights legislation to assist in closing this 'implementation gap' by translating international human rights obligations into national law and practice.²⁵ Without a framework based in human rights law, breaches of human rights in Australia, particularly of marginalised groups, such as Aboriginal and Torres Strait Islander peoples, are likely to remain 'disturbingly routine'.²⁶
25. As particular statistics above suggest, systemic racism against Aboriginal and Torres Strait Islander peoples is pervasive,²⁷ and must be addressed through coordinated legal and policy reform across both the public and private sectors, and across all federal, state and territory jurisdictions. Effective reform requires the oversight and accountability of the government and business sectors, their institutions, systems and processes, framed through a robust human rights framework.
26. For Aboriginal and Torres Strait Islander peoples, the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)²⁸ is foundational to such a human rights framework. As the AHRC knows, the UNDRIP is the comprehensive international standard informing the way governments across the globe should engage with and

²² Australian Bureau of Statistics, *Prisoners in Australia* (online, 3 December 2020)

<<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>>.

²³ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, online, 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/overview-of-the-report-3/>>.

²⁴ Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019)

<<https://www.lawcouncil.asn.au/publicassets/01171551-eb0b-ea11-9400-005056be13b5/3712%20-%20Free%20and%20equal%20An%20Australian%20conversation%20on%20human%20rights.pdf>> 16.

²⁵ Ibid.

²⁶ Ibid, quoting George Williams and Daniel Reynolds, 'Out on a Limb: Australia's Troubling Exceptionalism on Human Rights' (2017) 38 *Law Society Journal* 40, 40.

²⁷ See, eg, Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015)

<https://humanrights.gov.au/sites/default/files/document/publication/RDA40_report_2015_AHRC.pdf> 41; Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project* (August 2018)

<<https://www.lawcouncil.asn.au/justice-project/final-report>> 7. Note also that the National Agreement on Closing the Gap includes commitments to address systemic and institutional racism: *National Agreement on Closing the Gap* (July 2020) <<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>> [19], [60].

²⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('UNDRIP').

protect the rights of indigenous peoples.²⁹ While the UNDRIP is not a treaty and therefore does not itself create legally binding obligations, many of its provisions have been recognised as reflecting customary international law.³⁰ Its articles also echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on indigenous peoples.³¹ Insofar as the UNDRIP relies on and elaborates well-established human rights obligations in international treaty and customary law, it is binding on Australia. As the United Nations Human Rights Council has explained:

The UNDRIP represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No 169 and other relevant instruments and processes.

*The Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.*³²

27. The Law Council endorses the importance of the UNDRIP, and particularly emphasises the significance of the right to self-determination, which is the fundamental principle underpinning the instrument. As the Expert Mechanism on the Rights of Indigenous Peoples asserts in its recent report:

*All the rights in the Declaration are indivisible, interdependent and grounded in the overarching right to self-determination. The exercise of self-determination is therefore indispensable for indigenous peoples' enjoyment of all their other rights, including, importantly, land rights (arts 25-28, 30 and 32) and political participation (arts 18-20 and 34).*³³

²⁹ See, eg, Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

³⁰ International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.

³¹ Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

³² United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

³³ Report of the Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, UN Doc A/HRC/48/75 (4 August 2021) <<https://undocs.org/A/HRC/48/75>> 5.

28. Article 3 of the UNDRIP provides:

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*³⁴

29. The right to self-determination is also reflected in common article 1 of both the *International Covenant on Civil and Political Rights (ICCPR)*³⁵ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*³⁶. It has been articulated as involving and protecting, at a minimum, an 'ongoing process of choice' for indigenous peoples,³⁷ who are entitled to have control over their destiny and be treated respectfully.³⁸ Davis explains that:

*The right to self-determination, expressed as the right to determine their own economic, social, cultural and political destinies, came to represent the fundamental principle underpinning Indigenous peoples' advocacy. Almost universally, Indigenous peoples had been institutionalised to the extent that every aspect of their lives was controlled by the state. ... [Self-determination reflects] the idea that indigenous people should have some control over the decisions that are made about their lives.*³⁹

30. Other pivotal articles include article 19, requiring governments to obtain the free, prior and informed consent of indigenous peoples before adopting legislative or administrative measures that may affect them.⁴⁰ Integral to this concept is article 18, which articulates the right of indigenous peoples to participate in decision-making through their chosen representatives, and to maintain their own decision-making institutions.

31. The Australian Government announced its formal support for the UNDRIP on 3 April 2009, but more than a decade on, is yet to implement its standards and protections domestically in an explicit and comprehensive manner. There is little evidence that the UNDRIP is well understood or recognised across Australian governments and Parliaments generally, and the Law Council is unaware of any audit of legislation affected by the UNDRIP having been undertaken across government.

32. The Law Council contends that ensuring effective access by indigenous peoples in Australia to their rights must be a matter of the utmost priority, having regard to the concerns discussed above. It recognises and welcomes the work done by the

³⁴ UNDRIP, art 3.

³⁵ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**').

³⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**').

³⁷ Australian Human Rights Commission, 'Right to Self-Determination' (website, 30 April 2013) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>>.

³⁸ Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

³⁹ Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

⁴⁰ Report of the Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, UN Doc A/HRC/48/75 (4 August 2021) <<https://undocs.org/A/HRC/48/75>> 5.

Aboriginal and Torres Strait Islander Social Justice Commissioner to promote UNDRIP.⁴¹

33. The Law Council supports consideration of the appropriate means of implementation of the UNDRIP in Australia's domestic law, policies and practices.⁴² Possibilities in this regard include: legislative implementation –⁴³ noting that this approach was recently attempted, although not passed, in Canada;⁴⁴ amending the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to explicitly include the UNDRIP;⁴⁵ the development of a national action plan to progress the objectives of the UNDRIP, such as New Zealand is in the process of developing;⁴⁶ and an audit of existing laws, policies and practices for compliance with the UNDRIP. The Law Council suggests that options for domestic implementation of the UNDRIP might be a particularly fruitful area for inquiry by the AHRC, and would recommend this as a priority area of work in any approach to combatting racism in Australia.⁴⁷
34. In addition, such an approach requires a Commission that is steeped in the aspirations, priorities, and day-to-day realities, of First Nations peoples and communities, in relation to what they see as necessary and most pressing to human rights implementation.
35. As part of achieving this outcome, the Law Council strongly supports long-term, sustainable resourcing of regular consultation on country at the AHRC, to continue to allow its Commissioners and staff to engage with communities on the ground on a routine basis and across a wide variety of issues, noting the importance of previous engagements such as on health issues,⁴⁸ particularly in remote areas, in order to

⁴¹ Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Incorporating UNDRIP into Australian law would kickstart important progress', *Canberra Times* (13 September 2021, online) <<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>>.

⁴² Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) 3, [16] <<https://www.lawcouncil.asn.au/docs/971f3e13-cc39-e711-93fb-005056be13b5/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf>>. This was also a common theme in the recommendations of States Parties to Australia following the latest Universal Periodic Review: Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (24 March 2021) <<https://undocs.org/A/HRC/47/8>>.

⁴³ This may raise the question of whether there is an appropriate constitutional head of power. In this respect, see, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 234; Elise Edson, 'Section 51(xxix) of the Australian Constitution and "Matters of International Concern": Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269, 277; Australian Law Reform Commission, 'Scope and Limits of Constitutional Power', *Australian Government* (Web Page, 18 August 2010) <<https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/38-federal-state-issues/scope-and-limits-of-constitutional-power/>>; Dr Sarah Pritchard SC, 'The "Race" Power in Section 51(xxvi) of the Constitution' (2011) 15:2 *Australian Indigenous Law Reporter* 44, 52.

⁴⁴ See, eg, Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2018, s 3 ('*Bill C-262*' and '*Canadian Bill*').

⁴⁵ See, eg, AHRC, *Submission by the Australian Human Rights Commission under the Universal Periodic Review Process*, Australia's Second Universal Periodic Review (2015) 6.

⁴⁶ See, eg, Cabinet Maori Crown Relations – Te Arawhiti Committee, *New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples: Development of National Plan*, Minute of Decision MCR-19-MIN-0003, 5 March 2019, available at Ministry of Maori Development, 'Developing a plan on New Zealand's progress on the UNDRIP' (Web Page, 2019) <<https://www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/develop-plan-on-nz-progress-un/>>.

⁴⁷ It notes that the issue was recently publicly raised by the AHRC: Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Incorporating UNDRIP into Australian law would kickstart important progress', *Canberra Times* (13 September 2021, online) <<https://humanrights.gov.au/about/news/opinions/incorporating-undrip-australian-law-would-kickstart-important-progress>>.

⁴⁸ Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Reflections: Our Health, Our Way Conference' (online, 7 August 2019) <<https://humanrights.gov.au/about/news/speeches/reflections-our-health-our-way-conference>>.

ensure that the lived experiences and views of Aboriginal and Torres Strait Islander peoples direct the work of the Commission. Fostering a strong and ongoing culture of consultation is of course primarily dependent on funding, discussed below.

Funding Review

36. The Law Council is cognisant that the above proposals require the AHRC to have adequate, stable, long-term funding. It has recently called for an increase in the funding and resources available to the AHRC to perform its essential national functions across the board with respect to human rights.⁴⁹
37. Despite new one-off funding injections to establish specific inquiries, the Law Council has been concerned for several years that the baseline funding of the AHRC has been declining over time. Preserving and bolstering the role of the AHRC as a statutorily independent national human rights institution is essential in enabling it to maintain robust advocacy on behalf of minority and marginalised groups and lead public understanding of human rights.
38. Under the Principles relating to the Status of National Institutions (**the Paris Principles**), in order to be effective and granted an 'A status', national human rights institutions must be independent, adequately funded and have a broad human rights mandate.⁵⁰ The United Nations Human Rights Council has, in recent years, expressed its concern about the AHRC's budget cuts, and called on Australia to restore these.⁵¹
39. To this end, the Law Council strongly supports the recent recommendation of AHRC President Rosalind Croucher AM that alignment with the Paris Principles 'should be achieved through a periodic review or 're-baselining' of the Commission's funding to ensure it has an appropriate and adequate resourcing level', which, among other things, should include resourcing and staffing levels to support statutory Commissioners to undertake their mandates and work across the country.⁵²
40. The Law Council is concerned that one of the reasons for the current high level of generality in the Concept Paper may be the Australian Government's inadequate investment in the AHRC.

Response to Concept Paper Proposals

Proposed Guiding Principles

41. The Law Council supports in general the eight guiding principles that have been outlined in the Concept Paper. It makes the following minor suggestions that may improve their terms.

⁴⁹ Law Council of Australia, Submission to Parliamentary Joint Committee on Human Rights, *Religious Discrimination Bill 2021 and Related Bills* (17 December 2021)

<<https://www.lawcouncil.asn.au/resources/submissions/religious-discrimination-bill-2021-and-related-bills>>.

⁵⁰ Principles relating to the Status of National Institutions (**The Paris Principles**), GA Res 48/134, UN Doc E/CN.4/RES/1993/55 (20 December 1993).

⁵¹ HRC, Concluding observations on the sixth periodic report of Australia, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [13]-[14]. This was also included in the recommendations to Australia following the latest Universal Periodic Review: Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (24 March 2021) <<https://undocs.org/A/HRC/47/8>>.

⁵² Australian Human Rights Commission, *A Reform Agenda for Federal Discrimination Laws* (December 2021) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>> 306.

42. The Law Council suggests that Guiding Principle 2 could be revised as follows: ‘Acknowledge and recognise *Australia’s migrant heritage*, and the complex *and dynamic* nature of the cultural diversity of modern Australia’ (emphasis added). Removing the explicit reference to ‘British’ would recognise the British history as a migrant history, in that, as the High Court has recognised, the land now called Australia was not terra nullius upon British arrival.⁵³ The addition of the adjective ‘dynamic’ would also focus attention on the complexities of cultural diversity as well as the fact that diversity is not a stagnant concept but something that is continually evolving in Australia, both demographically and discursively.
43. In addition, Guiding Principles 5 – ‘protect and promote the right of equality before the law and equal opportunity to enjoy all areas of life’ – could also include an explicit reference to access to legal advice and representation. As acknowledged elsewhere in the Concept Paper, access to justice can be disproportionately affected where people’s experience with race intersects with other attributes such as socio-economic status, age, gender, sexual orientation, disability and citizenship. Equality before the law in relation to race will be meaningless if those affected by racism are unable to exercise their rights and participate meaningfully in the legal system, undermining their right to an effective remedy under article 2(3) of the International Covenant on Civil and Political Rights⁵⁴ (ICCPR) and article 6 of the Convention on the Elimination of all forms of Racial Discrimination⁵⁵ (CERD).
44. The Law Council has long been concerned by the underfunding of legal assistance services and in its most recent submission to Treasury estimated that the current shortfall is likely in the range of \$400 million.⁵⁶ Publicly funded legal assistance services have faced underfunding for many years, with the practical result that services must impose strict eligibility criteria.⁵⁷ The inadequacy of public funding for civil law services is of particular concern, with Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services being required to prioritise funding for serious criminal cases, at the expense of civil and family law matters.⁵⁸ This is despite the fact that areas of civil law, such as anti-discrimination, in Australia are complex and require legal assistance to navigate successfully. Such access to justice issues are easily compounded by other developments, such as the recent increase in the Federal Circuit Court filing fees from \$690 to \$3,330 for migration litigants through the passage of the *Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020*, which may further prevent vulnerable persons from accessing the courts.⁵⁹
45. Highlighting access to justice as part of the National Anti-Racism Framework’s guiding principles is consistent with the Law Council’s advocacy on the need for long-term and substantive funding increases to accessible legal assistance services. The Law Council notes that a reference to accessible and affordable protection and remedies is referred to in the key actions and strategies to support National Outcome 2,

⁵³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁵⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵⁵ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁵⁶ Law Council of Australia, Submission to the Treasury, *2022-23 Pre-Budget Submission* (28 January 2022).

⁵⁷ See, eg, Law Council of Australia, ‘Addressing the legal needs of the missing middle’ (Position Paper, November 2021) <<https://www.lawcouncil.asn.au/publicassets/d8ff81b4-7558-ec11-9444-005056be13b5/2021%2011%2030%20-%20PP%20-%20Addressing%20the%20legal%20needs%20of%20the%20missing%20middle.pdf>>.

⁵⁸ *Ibid.*

⁵⁹ See *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth), sch 1, pt 2, 201A; Law Council of Australia, ‘Unfair hike to FCC migration fees’ (media release, 17 November 2020) <<https://www.lawcouncil.asn.au/media/media-releases/unfair-hike-to-fcc-migration-fees>>.

meaning that such an inclusion in Guiding Principle 5 would be consistent with the rest of the Concept Paper.

46. The Law Council further suggests that Guiding Principles 6 to 8 be rephrased to clearly evince the AHRC's ongoing intention to build a culture of proactive and practical human rights protection in Australia. For example, Guiding Principle 6, 'Recognise intersectional experiences of racial discrimination', might be rephrased as 'Recognise and build greater public awareness of the intersectional experiences of racial discrimination, including through a preliminary audit of legal and policy frameworks for how such intersectional experiences are currently addressed'. The Law Council strongly supports the explicit reference in the framework through this standalone Guiding Principle 6 to the experience of intersectional discrimination and the diversity both between and within minority groups, including older persons, LGBTIQ+ people, persons with disabilities, migrants, and women, among others.

Proposed National Outcomes

47. Subject to the above general comments, the Law Council supports in general the eight proposed national outcomes, but provides the following comments for consideration.

National Outcome 1 – The nature, prevalence, and incidence of racism in Australia is understood

48. Increased data collection and racial equality audits would be a welcomed approach to identifying systemic and institutional racism. As the Law Council has noted above, it may be necessary to undertake a data assessment/collation/collection process as a preliminary stage to development of the National Anti-Racism Framework, in order that specific goals might be articulated and pursued, based on robust and current evidence, and the resources of the AHRC be directed to acute areas of concern.
49. While developing a national strategy would provide an opportunity for the better sharing of data that contributes to decision-making, it is important to highlight the privacy implications in sharing data involving personal information amongst various entities. The Law Council trusts that the AHRC is well aware of the safeguards necessary, and the existing tools such as for anonymous reporting already available and utilised to good effect across jurisdictions.⁶⁰

National Outcome 2 – Australia has an effective legal framework to protect people from racial discrimination and racial hatred

50. Per its general comments, the Law Council strongly supports the focus of National Outcome 2. It supports review and reform of Australia's legal and policy framework to fill concerning 'implementation gaps' in human rights protections.
51. 2025 will mark the 30th anniversary of the passage of the RDA in Australia. The lead-up period to this year provides an important opportunity to assess the extent to which the RDA is working well for persons who are subject to racism across public life – whether people are aware of and willing and able to utilise its protections effectively. This will involve assessing complaints made, but also considering practical and systemic barriers which impede individuals from making complaints and accessing the RDA's vital protections and making complaints – including due to poverty, lack of

⁶⁰ See, eg, Victorian Equal Opportunity & Human Rights Commission, *Community Reporting Tool* (online) <<https://www.humanrights.vic.gov.au/get-help/community-reporting-tool/>>.

legal knowledge or advice, rural or remote status, language barriers and other intersectional factors such as gender or age.

52. As recognised by the AHRC in its recent position paper on anti-discrimination reforms,⁶¹ and previously raised by the Law Council, the current framework is complaint-driven, placing the burden on individuals and overlooking the power imbalances involved. To counteract this, the Law Council supports the AHRC's proposal of a positive duty on organisations to take reasonable and proportionate measures to eliminate unlawful discrimination. The value of this proposal should be carefully considered from a perspective of combating racism (alongside other harms), noting that many individuals may have difficulties in speaking up about racism eg, in the workplace but positive and proactive action by their employers may be empowering.
53. The Law Council considers that the Concept Paper should include a further emphasis under National Outcome 2, namely, to ensure that Australia's legal framework to protect people from racial discrimination and racial hatred is consistent with international law and practice.
54. A reference to the international legal framework would highlight issues the Law Council has advocated as pressing for Australia's human rights framework, including enactment of a federal human rights act.
55. It also would assist focusing the attention of the National Anti-Racism Framework on the need for Australia to strengthen legislative scrutiny processes to ensure the compatibility of its legislation with international human rights treaties, as recommended in the most recent remarks by the UN Committee on the Elimination of Racial Discrimination.⁶² Strengthened scrutiny processes, including for the PJCHR and for Statements of Compatibility, at the Commonwealth level may help to achieve this.⁶³
56. The Law Council further suggests that the concluding sentence under National Outcome 2 could be amended as follows: 'The legal framework has the capacity to address *and does not serve to entrench* systemic and institutional discrimination' (emphasis added). The Law Council considers that the addition of this language would mean the National Strategy acknowledges the legal framework and the policing and enforcement of laws can on occasion entrench discrimination against minority groups. This may occur through the content of the law itself, such as legislation which, although neutral on its face, disproportionately impacts certain groups, including because of an intersection between race and compounding attributes such as homelessness, mental illness and disability. A second factor involves the discriminatory manner in which laws are enforced differently for different groups.
57. An example of the first factor is mandatory sentencing, paperless arrest laws, and public drunkenness offences, which are known to disproportionately affect Aboriginal and Torres Strait Islander peoples. In terms of the second factor, the Australian Law

⁶¹ Australian Human Rights Commission, *A Reform Agenda for Federal Discrimination Laws* (December 2021) <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>>

⁶² UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, CERD/C/AUS/CO/18–20, 2017.

⁶³ The Law Council has previously put forward a range of suggestions for how this may be achieved: see Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) <<https://www.lawcouncil.asn.au/publicassets/01171551-eb0b-ea11-9400-005056be13b5/3712%20-%20Free%20and%20equal%20An%20Australian%20conversation%20on%20human%20rights.pdf>> 55-56.

Reform Commission found that, in 2016, Aboriginal and Torres Strait Islander peoples were seven times more likely to be charged with a criminal offence and appear before the courts, 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment following conviction.⁶⁴ Changing the wording of National Outcome 2 in the manner proposed would therefore, for example, provide scope to advocate further as a matter of national urgency on the incarceration rates of Aboriginal and Torres Strait Islander peoples.

58. The importance of National Outcome 2 in norm-setting across jurisdictions was highlighted to the Law Council through the input received from the Law Society Northern Territory, which stated:

The Society notes that one of the identified Actions in the Northern Territory Aboriginal Justice Agreement 2021-2027 is to 'Identify and eliminate systemic racism in government agencies and contracted service providers that directly or indirectly discriminate against Aboriginal Territorians engaged in the justice system'.

In Australia, the Northern Territory is the only jurisdiction that has no legislative provisions covering race hate speech or race vilification.⁶⁵ Therefore, until such local changes are made, having a National Anti-Racism Framework would have a significant local impact.

National Outcome 3 – All Australian Governments commit to eradicating racism and racial discrimination through their actions

59. While a commitment to eradicating racism by each federal, state and territory government would be commendable, centralised approaches and consistency in the legislation across jurisdictions and intersecting legal and policy areas are crucial for efficacy.
60. As alluded to above, the Law Council has existing policy positions calling for a federal human rights act⁶⁶ and consolidation of federal discrimination laws,⁶⁷ two major steps that would help achieve uniformity and make the legal framework easier to understand for all Australians.
61. As well as governments, a commitment to eradicating racism and racial discrimination through action should extend to private and public organisations. The Law Council supports the introduction of a positive obligation on all organisations to prevent against discrimination, including racial discrimination.⁶⁸ Consideration should also be given to developing norms across the public and private sectors under which the

⁶⁴ Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Executive Summary, Overview of the Report* (online, 9 January 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/overview-of-the-report-3/>>.

⁶⁵ Note that the reference here is to Northern Territory law, and not federal provisions.

⁶⁶ Law Council of Australia, *Federal Human Rights Charter* (Policy Position, November 2020) <<https://www.lawcouncil.asn.au/media/media-releases/lets-talk-about-a-federal-human-rights-act>>.

⁶⁷ Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (Policy Statement, March 2011) <<https://www.lawcouncil.asn.au/resources/policies-and-guidelines/policy-statement-consolidation-of-commonwealth-anti-discrimination-laws>>.

⁶⁸ Law Council of Australia, Submission to the Australian Human Rights Commission, *Priorities for Federal Discrimination Law Reform* (20 December 2019) <<https://www.lawcouncil.asn.au/resources/submissions/response-to-discussion-paper-priorities-for-federal-discrimination-law-reform>> 32-33.

senior leadership of organisations have a clear role and accountability in implementing this obligation.

62. In addition, it is important for 'commitments' to be backed by accountability measures. The Law Institute Victoria informs the Law Council that reform of the Victorian Charter of Human Rights and Responsibilities is long overdue, for example. In 2015, the Victorian Government commissioned a review of the Charter to be undertaken by Mr Michael Brett Young, which put forward 52 recommendations including the removal of the 'piggyback' requirement and the introduction of an alternative dispute resolution function. While 46 of these recommendations were supported by the Victorian Government, since 2015, no amendments have been made. The Law Institute Victoria urges the Victorian Government to review these recommendations.

National Outcome 4 – There is broad based community understanding of racism and racial discrimination, and how to counter it

63. Per its general comments, the Law Council suggests this is part and parcel of a requirement for renewed national leadership to foster a proactive culture of human rights for all Australians, through a robust legal and policy framework underpinned by a federal human rights act, consolidated federal discrimination laws, and centring the experiences of Aboriginal and Torres Strait Islander peoples in all responses.

National Outcome 5 – All sectors of society commit to countering and preventing racism, and community partnerships are formed; and

National Outcome 6 – All sectors of society commit to ensuring communities vulnerable to racism and racial discrimination are adequately represented and have effective participation in all areas of public life

64. Adequately resourced programs, which are place- and evidence-based, will be central to the effectiveness of the National Anti-Racism Framework in combatting racism, particularly institutional and systemic racism. It is crucial to understand the different needs within each community, who needs to be supported, who needs to be educated, what is required for each of those groups, and who will drive support and education programs – including ensuring the traditional authority, knowledge and cultural competency of providers.
65. The Law Council supports strategies to increase cultural and linguistic diversity (**CALD**) in membership and particularly leadership roles across the public and private sectors. In addition to improving the quality of decision-making through a greater diversity of perspectives offered by lived experiences of racism and racial discrimination, this would also have the effect of increasing public confidence in institutions such as the justice system, with which CALD groups have traditionally been reluctant to engage due to previous negative interactions both in Australia and other countries.
66. The Law Institute Victoria has suggested that a concrete commitment to increase representation and participation that organisations may wish to consider adopting is cultural diversity targets (in a similar vein to gender equality targets), pursuant to the 'special measures' exception outlined in section 8(1) of the RDA (which refers to paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination). The form of any such targets needs to be carefully considered, so as to accurately capture the complexity and nuances of individuals' cultural backgrounds and identities. Further, such targets should not be merely tokenistic or 'tick the box' exercises favouring form over substance and should be implemented in such a way as not to detract from the achievements of those from

CALD communities. In addition, such targets might be underpinned by consideration of data reporting frameworks for employers,⁶⁹ although the privacy and levels of personal comfort with disclosing ethnic data to their employers that employees have should be carefully factored into any reporting requirement.

67. Further to the above, the formation of community partnerships and engaging directly with stakeholders on the ground – that is, undertaking ‘two-way learning’ approaches – is crucial to fostering culturally safe organisations, businesses and services, giving those in CALD communities, who are well attuned to the needs of their communities and best-placed to advocate for their interests, the ability to provide input into crafting strategies to counter and prevent racism. Such a process of co-production is also likely to increase buy-in from community groups by increasing the legitimacy of strategies.⁷⁰
68. These recommendations are also relevant to National Outcomes 7 and 8, discussed below.

National Outcome 7 – All Australian Governments commit to addressing racial inequality and adopt targeted and appropriate measures to address it

69. The Law Council supports the key actions outlined in National Outcome 7, including that data collection across all national frameworks be disaggregated by ethnicity to identify unequal outcomes based on ethnic background or race, but suggests this links to intersecting attributes such as age, gender, disability, and socio-economic status. The Law Council considers this important for research and reform of pertinent legal and policy areas, such as in discrimination law and criminal law, considering that attributes influence outcomes across different areas of social and economic life (health, education, employment), and both directly intersect with experience with the justice system. In addition, the Law Council supports continuing work across government to measure and strengthen wellbeing, as the ultimate goal counterpoint to addressing disadvantage.⁷¹

National Outcome 8 – Measures to address racism, racial discrimination and racial inequality complement measures to strengthen multiculturalism, social inclusion, and Indigenous reconciliation

70. Per its general comments, the Law Council considers that any National Anti-Racism Framework must properly centre the experiences of Aboriginal and Torres Strait Islander peoples, and their political, economic, social and cultural aspirations. It sees

⁶⁹ See, eg, Sam Pandya, *Positive Action, Lasting Change* (December 2020): Neeraj Nanda, ‘Law Institute of Victoria Bats for Ethnic Diversity in Legal Profession’, *South Asia Times* (online, 23 December 2020) <<https://www.southasiatimes.com.au/world-australia/law-institute-of-victoria-bats-for-ethnic-diversity-in-legal-profession/>>.

⁷⁰ An example from the sporting sector would be the Western Bulldogs Community Foundation (‘**Foundation**’), being the community arm of the corresponding football club. Given the role that sport plays in bringing together and connecting people, the Foundation leverages the club’s reputation and works with government, corporate and community agencies to deliver programs to over 3,500 people annually. Further, through a partnership with Victoria University, the programs are consistently evaluated to ensure content and delivery methods are run according to best practice and meeting the needs of the community. Given the varied demographic composition of Victoria’s western suburbs, cultural diversity is a key area of focus, as demonstrated by the Foundation’s recent partnership with Amnesty International, which will see the joint delivery and facilitation of The Culture Exchange program, which is designed to build culturally inclusive workplaces and communities, and to tackle racism through allyship.

⁷¹ See, eg, efforts directed towards wellbeing underway in Indigenous legal and policy areas: National Indigenous Australians Agency, *Health and Wellbeing* (website) <<https://www.niaa.gov.au/indigenous-affairs/health-and-wellbeing>>; Australian Government, Australian Institute of Health and Welfare, *Indigenous Health and Wellbeing* (23 July 2020) <<https://www.aihw.gov.au/reports/australias-health/indigenous-health-and-wellbeing>>.

the measures referred to in National Outcome 8 as being two sides of the same issue. Such measures should take outcome-driven approaches to ensure accountability. It is important to note again that adequate funding is required in order to ensure proper implementation of the measures.