

8th July 2023

Parliamentary Joint Committee on Human Rights

PO Box 6100

Parliament House

Canberra ACT 2600

Dear Parliamentary Joint Committee,

UNSW LAW SOCIETY SUBMISSION REGARDING HUMAN RIGHTS

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours faithfully,

ALEX NIELSEN

MICHELLE ALIMHAMZAH

IMANDI MUDUGAMUWA

TANIA TOH

Authors

POLICY SUBMISSIONS DIRECTORS

Alex Nielsen, Imandi Mudugamuwa, Michelle Alimhamzah and Tania Toh

POLICY SUBMISSIONS CONTRIBUTORS

Rosalie Lambert, Hashwitaa Maynoor and Jeffrey Chiang

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UNSW LAW SOCIETY CO-PRESIDENTS Shanzeh Malik and Matthew Ng

UNSW LAW SOCIETY VICE-PRESIDENT (SOCIAL JUSTICE) Bhavik Aggarwal

I INTRODUCTION

In the foreword of the 2010 Australian Human Rights Framework ('HRF'), Attorney-General Robert McClelland claimed that 'Australia can be proud of its human rights record'.¹ While the HRF and Human Rights Action Plan ('HRAP') have made positive steps towards greater protection of human rights, it is difficult to reconcile such a strong declaration with a track record which is much more complicated in reality.

II ISSUES WITH AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

The HRF provides a base framework to summarise the goals and processes in place to ensure human rights are respected and protected in Australia. As a surface-level framework, it aims to foster a national responsibility to 'promote and protect human rights', but without any legislative authority, the HRF remains theoretically rather than practically applicable.² The HRF operates via four critical points of action: education, engagement, protection and respect.³ Each of these action points is designed to further reinforce the 'human rights respecting culture', which has allowed Australia to avoid instances of human rights abuse generally.⁴ However, this culture cannot provide the required security and uniformity that a federal Human Rights Act or Charter would guarantee. As such, the HRF does not sufficiently overcome the existing gaps in the Australian body of human rights law, ultimately limiting its scope and effectiveness.

The lack of specific and targeted endeavours to improve human rights issues reflects Australia's hesitation to target pressing human rights concerns. Moreover, the framework's review was slated for 2014 but is only taking place today.

The Human Rights Action Plan (HRAP) has spawned predominantly to allocate funding to different organisations to address these concerns, however, its lack of direction, vague targets, and the actions prescribed to meet those targets have allowed certain crises to worsen or continue.

In particular, Australia is amongst the world's largest carbon emitters per capita and the effects of climate change have caused significant damage to our ecosystems, worsened extreme natural events, and pose an imminent threat to our future. Other examples include the overrepresentation of

¹ Attorney-General's Department, Commonwealth of Australia, *Australian Human Rights Framework* (April 2010) ('HRF').

² HRF (n 1), 1.

³ *Ibid* 3.

⁴ Australian Human Rights Commission, *Human rights education in the national school Curriculum: Position Paper of the Australian Human Rights Commission* (Position Paper, 2 June 2011) 7 ('Curriculum').

Indigenous Australians in the criminal justice system and in deaths in custody, and the homelessness crisis.

Australia is a party to the seven core international human rights treaties:

- the International Covenant on Civil and Political Rights (ICCPR)
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CRC)
- the Convention on the Rights of Persons with Disabilities (CRPD)

However, it is a party to the complaints mechanisms of only five of these treaties. This means that complaints cannot be made to the United Nations (UN) if the violation is against the ICESCR or the CRC. Regardless, complaints to the UN which have found violations have been largely ignored and not remedied.

Australia has also endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) but has not taken steps to implement the UNDRIP into law, policy, and practice. This has similarly been the case with regards to non-refoulement obligations under the ICCPR and the CAT.⁵

III HUMAN RIGHTS ACTION PLAN

One of the key failings of the HRAP is its lack of specialised and measurable performance indicators and timelines. Many actions were ‘continuing’ initiatives already established, with their ‘performance indicator’ described as ‘ongoing’.⁶ Examples include continuing to support AFP Human Trafficking Teams,⁷ continuing to implement the *Fair Work Act 2009*,⁸ and working towards goals in the Federal Government’s 2008 White Paper, ‘The Road Home: A National Approach to Reducing Homelessness’.⁹ Promoting these initiatives as part of the HRAP where they had already been independently established amounts to puffery in place of improvement. Furthermore, a number of

⁵ *Migration Act 1958* (Cth) s 5.

⁶ Attorney General’s Department, Commonwealth of Australia, *Australia’s National Human Rights Action Plan* (2012) (‘HRAP’).

⁷ *Ibid* 18, Action 56.

⁸ *Ibid* 21, Action 71.

⁹ *Ibid* 53, Action 217.

actions were negligible or so minor they were virtually inconsequential. Examples include efforts to reduce national carbon emissions by 5-15%,¹⁰ thorough investigation of complaints regarding the Australian Federal Police within benchmark timeframes,¹¹ and support for health service providers to better meet the needs of diverse communities.¹² Consistently monitoring action items is necessary to attain material progress by regularly reassessing and readjusting targets when specific goals have been met.

Lastly, many of the actions recorded in the HRAP are either yet to occur or were enacted years after they were scheduled to be. This is prominently seen in Australia's obligations under international human rights law. For instance, an action to ratify *Optional Protocol to the Convention Against Torture* by 2013 was ratified four years late in 2017,¹³ while an action to formally consider position on the *International Convention for the Protection of All Persons from Enforced Disappearances* by 2013 has not yet been completed.¹⁴ Action to formally consider the position of the Third Optional Protocol to the *Convention on the Rights of the Child* by mid-2013 has also not yet been decided,¹⁵ while an action to formally consider position on *International Labor Organisation Convention 169* concerning Indigenous Australians has not yet been ratified.¹⁶ An action to introduce legislation to consolidate anti-discrimination laws by 2012 only had an exposure draft released, only for the bill to be shelved in favour of a lesser amendment in 2013.¹⁷

The HRAP should be fluid and dynamic, evolving as actions are taken and ensuring accountability for failed actions. As such, the government should take further measures to ensure consistent monitoring and supervision of the framework by oversight bodies such as the Australian Human Rights Commission.

IV INFLUENCE OF CASE LAW ON AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Legislation of human rights acts at the state level have been complemented by a number of significant developments in case law since 2010, demonstrating a positive direction for human rights in Australia. The recent decisions on human rights case law provide insight into the unpredictability and issues of Australia's Human Rights Framework. This case law thus shows the need for a uniform federal Human Rights Act to ensure consistency across different jurisdictions. In *Cemino v Cannan and Ors*, the Victorian Supreme Court confirmed that courts must consider the cultural rights of Indigenous

¹⁰ Ibid 22, Action 73.

¹¹ Ibid 17, Action 50.

¹² Ibid 82, Action 354.

¹³ *HRAP* (n 6) 7, Action 1.

¹⁴ Ibid 8, Action 3.

¹⁵ Ibid 8, Action 4.

¹⁶ Ibid 8, Action 5.

¹⁷ Ibid 41, Action 157.

Australians under their Charter when an Indigenous Australian requests access to the Koori Court.¹⁸ In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*,¹⁹ the Queensland Land Court recommended that the mining lease and environmental authority to develop a thermal coal mine in the Galilee Basin as requested by Waratah should be rejected whilst in *Binsaris v Northern Territory of Australia*, the High Court found that prison officers' use of tear gas on Aboriginal children in a youth detention centre was unlawful.²⁰

However, decisions continue to be made which interpret human rights law in a way that has garnered critique from the United Nations and other human rights agencies. Such decisions include those of *Sharma v Minister for the Environment*, where it was determined that human safety was not an implied mandatory statutory consideration for the Minister when she approved an expansion for the Whitehaven coal mine in New South Wales,²¹ and *Deng v Australian Capital Territory (No 3)*, where it was determined that the fifty-eight days the plaintiff spent in custody before the dismissal of charges against him was a 'failure of the system' but did not constitute arbitrary detention.²² Additionally, it was found in *Thoms v Commonwealth of Australia* that a New Zealand citizen and Aboriginal Australian applicant bringing the case were not unlawfully imprisoned despite the introduction of a precedent that stated Indigenous Australians could not be deported as 'aliens'.²³ The lack of comprehensive human rights legislation means that the court shoulders the heavy burden of law-making, which provides little consistency in an area that should be dependable.

There have been several cases since 2010 wherein the Australian government has been tried by the UN Human Rights Committee and shown to be in breach of our human rights obligations, and no action has been taken to remedy this, specifically in regards to arbitrary detention, poor detention conditions, and arbitrary interference with family.²⁴ In 2023, the UN Subcommittee on Prevention of Torture terminated its visit to Australia, which was suspended in October of 2022 due to obstacles in carrying out its mandate, specifically restrictions against accessing certain places of deprivation of liberty.²⁵ This legacy of non-compliance is not one that should be met with the vacuous optimism of an action plan left to go stale.

¹⁸ [2018] VSC 535.

¹⁹ [2022] QLC 21.

²⁰ [2020] HCA 22.

²¹ [2021] FCA 560.

²² [2022] ACTSC 262.

²³ [2022] HCA 20.

²⁴ *FJ et al. v Australia* (HRC, 2016); *Nasir v Australia* (HRC, 2016); *Zoltowski v Australia* (HRC, 2015); *Leghaei et al. v Australia* (HRC, 2015); *M.G.C v Australia* (HRC, 2015); *Blessington & Elliot v Australia* (HRC, 2014).

²⁵ United Nations Human Rights Office of the High Commissioner, 'UN torture prevention body terminates visit to Australia, confirms missions to South Africa, Kazakhstan, Madagascar, Croatia, Georgia, Guatemala, Palestine, and the Philippines' (Press Release, 2023).

One case of significance which has irrevocably denied human rights at the federal level was *Plaintiff M1/2021 v Minister for Home Affairs*, which overturned over 20 decisions in the Federal Court.²⁶ *Plaintiff M1* concerned a South Sudanese national who entered Australia on a visa,²⁷ and the High Court decided that the Minister for Home Affairs had no obligation to consider unenacted international refoulement obligations in deciding whether to revoke a visa cancellation decision following section 501 of the *Migration Act 1958* (Cth). The Minister's delegate cancelled the visa due to the applicant's imprisonment sentence from an unlawful assault conviction,²⁸ and the applicant applied to revoke the cancellation decision and claimed that removal to South Sudan would result in persecution, torture and death.²⁹ The Minister's delegate was not satisfied that any reason needed to be considered in revoking the cancellation decision because the applicant could make a valid application for a protection visa.³⁰ However, the High Court found it unnecessary to determine whether non-refoulement obligations were owed.³¹

This is demonstrative of the inconsistency present within Australian case law on human rights, with a 'patchy' amalgamation of common law doctrine, scattered legislation and limited Constitutional protection.³² Ensuring greater predictability within this area requires establishment of a federal Human Rights Act to consolidate differing stances across the states and territories and create greater accessibility to citizens.

V NATIONAL HUMAN RIGHTS ACT

Fundamental issues with human rights protection in Australia cited by the Australian Human Rights Commission include the lack of a cohesive body of national legislation, inconsistency within common law doctrines, and lack of binding legal remedies.³³ Further, the Australian Capital Territory, Victoria and Queensland are exclusively protected by human rights acts that operate at the state and territory levels.³⁴ Since the current human rights law does not operate consistently across the nation, the HRF's ability to do so is also undermined.

In Australia, a treaty is not binding domestically unless it is incorporated through domestic legislation.³⁵ There is no legally binding mechanism to ensure Australia's compliance with the

²⁶ (2022) 96 ALJR 497 ('*Plaintiff M1*').

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*, Sophie Rigney and George Williams, 'Some rights, some of the time' (2021) 92(1) *Australian Institute of Policy and Science* 32, 33.

³³ Australian Human Rights Commission and Free + Equal, *A Human Rights Act for Australia* (Position Paper, December 2022) 11-12.

³⁴ *Ibid.* 34.

³⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 123-4.

international human rights treaties it has signed, unless one resides in a state or territory with a human rights act in force.³⁶ This means that the human rights protections available to individuals are dependent on where they reside, which is both unjust and prevents the accessibility of legislation to individuals and groups across Australia³⁷ It further conflicts with the goal of the HRF that human rights ‘[unite], rather than [divide], our community’.³⁸ Since the scope of the framework is limited to encouraging awareness of human rights, it offers little guidance on the practical steps available when a right is breached. The conjunction of both these issues and the HRF’s inability to address them diminishes the framework’s practical utility.

Hence, Australia urgently needs a new Human Rights Framework and an action plan that involves steps to implement human rights legislation at the federal level. Current complaints processes are difficult to follow and confusing. Streamlining the international human rights treaties into one human rights act will make the system more user-friendly and reduce compliance costs similar to what was done with anti-discrimination legislation in the 2010 Human Rights Framework. This will bring Australia in line with international human rights standards.

VI HUMAN RIGHTS EDUCATION

Human rights education is one of the four action points detailed in the HRF.³⁹ The HRF aims to increase funding to primary and secondary schools, NGOs and the Australian Human Rights Commission to ensure information about human rights, their purpose and their protection is available to the entire community.⁴⁰ However, human rights education in the national school curriculum is focused on ensuring students understand what human rights are and their importance rather than how these rights exist in legislation and how they are enforced.⁴¹ The curriculum provides lesson plans embedding examples of human rights in Science, Mathematics, History and English subjects, but minimal information is given on how these rights can be taught practically.⁴² This may be due to the lack of a national legal framework, which can then be implemented into a national curriculum. Due to this gap in education, many Australians take their human rights for granted, with over 50% of those surveyed by Amnesty International believing a National Human Rights Act is already in effect.⁴³

³⁶ Ibid.

³⁷ Ibid.

³⁸ HRF (n 1).

³⁹ Ibid.

⁴⁰ Ibid 3.

⁴¹ *Curriculum* (n 20) 5.

⁴² Ibid 4.

⁴³ Amnesty International, ‘Amnesty International Australia Human Rights Barometer Report 2021’ (Web Page, 19 August 2021)

[4].<<https://www.amnesty.org.au/amnesty-international-australia-human-rights-barometer-report-2021/?cn=trd&>

Furthermore, this gap in human rights education is exacerbated by the fact that it is often the people most vulnerable to human rights violations whose access to education is compromised. For example, the incarceration rate for Indigenous children is 20 times higher than the rate for non-Indigenous children.⁴⁴ Currently, First Nations children constitute 6% of the youth population, but they make up 50% of children in youth detention.⁴⁵ There have been several instances of Indigenous children being transferred to adult prisons where their human rights were consequently violated.⁴⁶ Thus, Indigenous children are in need of practical human rights education, specifically in regard to the legislation and enforcement of their rights. However, by the time they leave school, Indigenous students are 2.5 years behind their non-Indigenous peers.⁴⁷

VII RECOMMENDATIONS

1. The submission recommends that the Human Rights Framework regarding accountability implements:
 - a. Measurable and specific performance indicators spread across an established timeline;
 - b. Key focus groups implemented solely to research, consult, and oversee each action, where the groups provide scheduled reports and updates on the action's progression that are easily accessible to the public; and
 - c. Regular forums with key groups relating to specific human rights concerns broadcast publicly to evaluate the progress of the action plan.
2. The submission recommends that the Human Rights Framework regarding legislature:
 - a. Prioritises the ratification of human rights treaties under international law;
 - b. Monitors the efficacy of and reviews all current human rights legislation;
 - c. Commissions thorough consideration of a national Human Rights Act for Australia using the 2022 proposal by the Australian Human Rights Commission as a starting point;
 - d. Grants the Parliamentary Joint Committee on Human Rights remit to revoke bills that violate international law obligations;

[mc=click&pli=23501504&PluID=0&ord={timestamp}&gclid=CjwKCAjwvpCkBhB4EiwAujULMrPpYz1TJxhGlGR1t5sxnHGDsl-JIB2nl-cpa8Rjz_ZA-TSg9fsIBhoCoq4QAvD_BwE](https://www.hrw.org/world-report/2023/country-chapters/australia) >.

⁴⁴ Human Rights Watch, 'Australia Events of 2022' (Web Page, 26 January 2022) [14]

<<https://www.hrw.org/world-report/2023/country-chapters/australia> >.

⁴⁵ Amnesty International, 'Australia' (Web Page, 2023) [8]

<<https://www.amnesty.org/en/location/asia-and-the-pacific/south-east-asia-and-the-pacific/australia/report-australia/> >.

⁴⁶ Ibid [9].

⁴⁷ Glenn Fahey, *Mind the Gap: Understanding the Indigenous education gap and how to close it* (Research Report, June 2021) 1, 1.

- e. Drafts legislation ensuring monitoring requirements are met under international law;
and

VIII CONCLUSION

Australia's human rights legislation and record requires significant improvement in order for global minimum standards to be met. Australia was, after all, radically transformed by the British colonisation beginning in 1788 and the subsequent genocide, cultural destruction and imprisonment of Indigenous people which has enduring impacts today. It is our duty to ensure that these atrocities do not fade into the background; that we are accountable for each and every one, and acknowledge how far we have to go.

Additionally, Australia must uphold its humanitarian obligations to all peoples. This requires the adoption of a more robust Human Rights Framework that has regard for Australia's non-refoulement obligations, anti-discrimination obligations, and is more responsive to the evolving nature of human rights needs, including climate change. Given Australia's involvement in major intergovernmental forums with a concern for human rights, including the G20 and OECD, it is imperative that Australia takes active steps towards human rights reform in order to instigate a greater global movement towards renewed human rights models, tailor made for today's world.

As examined, we believe legislative authority in the form of a federal Human Rights Act or Charter is best suited to bridge the current fundamental gaps left in Australian human rights law. A national human rights act would not only provide a cohesive and authoritative structure for the HRF to operate alongside, but it would also allow basic human rights to be enforceable across the nation.⁴⁸

⁴⁸ Rigney and Williams (n 5) 39.