Human Rights Law Centre

Submission to the Parliamentary Joint Committee on Human Rights

14 July 2023

Human
Rights
Law
Centre

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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Contents

Executive summary

1. Human rights are the basic minimum standards of dignity, equality and respect to which all people are fundamentally entitled. In ratifying seven international human rights treaties, the Australian government has committed to protecting and promoting these minimum standards through its laws, policies and actions. We see every single day in aged care facilities, immigration detention centres and royal commission findings, these commitments alone are not enough to change outcomes.

2. A federal Human Rights Charter or Act **(federal Charter)** is essential to the practical realisation of human rights – to ensuring that human rights ideals and commitments guide government decision-making and empower people. A federal Charter will set out the human rights which the Australian government must consider in law-making, respect in public service delivery and actions, and to which the federal government can be held to account.

3. Enforceable human rights benefit everyone, but they are urgent for people who regularly interact with government to have their basic needs and rights met – be it a roof over their heads, support to attend school, or access to healthcare. Government decisions have a profound, daily impact on the lives of marginalised people and communities, including Aboriginal and Torres Strait Islander people, people experiencing homelessness, and people with disability. Many people rely on government services because of consistent, systemic failures to respect their human rights.

4. The momentum for change should not rely on public scandals. A federal Charter will help prevent systemic rights abuses experienced by marginalised communities and proactively promote the progressive realisation of the rights we all deserve.

5. Human rights are also a vital guide during times of crisis. The COVID-19 pandemic exposed the absence of an enforceable human rights framework in Australia. There was widespread confusion among the public about what human rights were, and how they were to be balanced with one another when they were in conflict. Without a guiding rights-based set of rules, too often crisis response is at the mercy of majority political opinion. A federal Charter would have supported necessary and proportionate health measures and shaped a fair and equitable vaccine rollout, ultimately saving lives.[1]

6. This submission details a series of recent case studies of Australian government decisions which have breached people's human rights, which could have been prevented or redressed by a strong federal Charter.[2] The case studies detail harm experienced by large numbers of people, as well as examples involving the significant suffering of individuals. These harms were avoidable had the relevant public authorities been required to make decisions consistently with human rights, and had people been empowered to take action when their rights were breached.

7. Human Rights are universal standards that apply to all people. Without an avenue to ensure transparency and accountability, people and communities in Australia or affected by its actions are powerless to hold the government to account.

[1] Michael Buckland, Felix Zerbib, Connor Wherett, *Counting the cost of Australia's delayed vaccine rollout*, The McKell Institute (21 April 2021).
[2] Without a draft law to apply to these case studies, the analysis is speculative, but nonetheless demonstrates the kind of impact that a strong federal Charter could have on people's lives in Australia.

Recommendations

1. That the government introduce a federal Human Rights Charter or Act into Parliament.

2. That the government outline a plan to ensure full implementation of all 7 human rights conventions Australia has signed.

3. That the government introduce a broader mandatory human rights due diligence law that applies to all businesses operating within Australia.

4. That the government, following the evidence from Aboriginal and Torres Strait Islander experts to the Senate Standing Committees on Legal and Constitutional Affairs' inquiry, introduce a National Plan to implement the United Nations Declaration on the Rights of Indigenous Peoples in Australia.

5. That the government consolidate and modernise federal anti-discrimination laws.

6. That the government strengthen the human rights oversight function of the Parliamentary Joint Committee on Human Rights by:

    (a) giving it guaranteed time for scrutiny for Bills and Legislative Instruments if they propose to limit human rights;
    (b) giving it the power to conduct 'own-motion' investigations to address systemic issues which come to its notice, rather than only those into which the government wishes to inquire;
    (c) prescribing that Legislative Instruments with implications for human rights be disallowable by default; and
    (d) making internal government advice on Australia's international human rights obligations a routine part of legislative development work.

1. Reasons for an Australian Human Rights Charter

1.1 Ensure everyone in Australia is treated with respect

8. Under international law, Australia is legally obliged to implement the full range of internationally recognised rights it has accepted. It has not done so. A federal Charter will clearly and comprehensively set out in law which human rights Australians' can rely upon government to uphold and protect people from abuse, mistreatment, cruelty, inequality and other violations of their basic rights.

9. In the absence of a federal Charter, when major systemic human rights crises occur in Australia, the government sets up Royal Commissions or similar official inquiries. These Commissions invariably detail experiences of abuse, neglect and harm which, collectively, amount to systemic injustice,[3] and are accompanied by significant media coverage, political condemnation and promises to do better. While some inquiries have led to significant reform, too often detailed recommendations remain unimplemented, and the abuse continues. The failure to provide a remedy for human rights violations causes further harm and compounds the impact of the original abuse for the individuals and communities affected.

10. People with lived experience of institutional harm and abuse shouldn't have to campaign for years to achieve an inquiry, only to reveal what they already know. They shouldn't have to campaign for decades for government to implement recommendations to prevent further harm and abuse to others. They should be able to take legal action and seek justice when (or even before) the abuse happens. Access to justice and an effective remedy is itself a fundamental human right.[4]

11. Charters of human rights, at both federal and state/territory levels, should act as vital safeguards against abuses taking place at all, build a public culture of respect for rights, and provide clear frameworks to hold governments and individuals accountable.

1.2 Provide a holistic approach to protecting human rights

12. Currently, human rights are not given comprehensive and consistent legal protection in Australia. Many basic rights remain unprotected, and others are only haphazardly protected under an assortment of inconsistent and patchwork laws.

13. For example, some key civil and political rights are protected in the Commonwealth Constitution, such as the right to vote,[5] protection against acquisition of property on unjust terms,[6] the right to a trial by jury,[7] freedom of religion[8] and the prohibition of discrimination based on state residency.[9] There are also some civil and political rights which the High Court has implied from the language and

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[3] The Royal Commissions and inquiries referenced in this report are the *Royal Commission into the Robodebt Scheme*, the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, and the *Royal Commission into Aged Care Quality and Safety*.
[4] The right to an effective remedy is contained in article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR).
[5] *Commonwealth Constitution 1901* (Cth) s 41.
[6] *Commonwealth Constitution 1901* (Cth) s 51(xxxi).
[7] *Commonwealth Constitution 1901* (Cth) s 80.
[8] *Commonwealth Constitution 1901* (Cth) s 116.
[9] *Commonwealth Constitution 1901* (Cth) s 117.

structure of the Commonwealth Constitution, such as the implied freedom of political communication[10] and due process.[11]

14. On top of this scattered assortment of constitutionally protected rights, are those protected by legislation, including anti-discrimination legislation. But these rights are piecemeal and often difficult to enforce in practice. Many other rights have no protection under federal law.

15. Nor does the division of rights into different laws and frameworks reflect how people experience human rights breaches. Different aspects of a person's identity, including sexuality, gender or race, can leave them exposed to overlapping forms of discrimination and marginalisation. Comprehensive protection of rights is vital because human rights are interdependent, indivisible and mutually reinforcing.[12] Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation.

16. Further, the enjoyment of many rights is contingent on, and contributes to, the enjoyment of other human rights.[13] For example:

- social inclusion, through the realisation of economic, social and cultural rights, is essential to political participation, and therefore to the maintenance of a truly democratic system;[14]
- meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education;
- the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing; and
- access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

17. As Bill, a person experiencing homelessness, wrote in his submission to the Victorian Charter Consultative Committee, "[h]aving freedom of movement and expression without the right to health and housing is like having icing without a cake".[15]

1.3 Provide a clearer and fairer framework for balancing competing rights

18. A common misconception in current debates on competing rights is that all human rights are inviolable, or that certain rights should automatically "trump" other rights.

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[10] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[11] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[12] United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (12 July 1993).
[13] Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2006) <https://www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Guidelines.aspx> 6.
[14] See Keith Ewing, "Judicial Review, Socio-Economic Rights and the Human Rights Act" (January 2009) 7(1) *International Journal of Constitutional Law* 155.
[15] PILCH Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee* (August 2005) 41.

19. Certain human rights – such as the absolute prohibition on torture or slavery – should not be limited in any circumstances under Australian law.[16] However, as established under international law, many rights can be limited in specific circumstances using a prescribed balancing test. These include where a limitation on the enjoyment of a right is reasonable, necessary and proportionate to protect the rights and freedoms of others, in states of emergency, for national security reasons, or to safeguard public interests such as the health and safety of others. Compliance with human rights standards is not simply an optional policy choice for the government of the day.

20. A federal Charter will provide an appropriate framework for restrictions on rights (other than absolute rights) that are permissible under international law.[17] It is essentially a set of transparent rules to help us navigate our differences. For example, recent debates on striking a fair balance between the right to freedom of thought, conscience, religion and belief and the right to equality and non-discrimination would require both rights to be equally protected in a principled way, and for a proportionality analysis to be taken into account by a court.

1.4 Improve law-making and government policy

21. A federal Charter will ensure that human rights appropriately guide the development of policies and decisions, so that fewer human rights abuses occur. A federal Charter would ingrain a human rights culture in all levels of federal government law-making and policy, while allowing for complex or unusual cases requiring careful interpretation of human rights principles to be determined by the courts, in line with the separation of powers in the Commonwealth Constitution.

1.5 Improve public service delivery and outcomes

22. A federal Charter will ensure people accessing essential public services will have their human rights taken into account and respected, in health, education, aged care, disability services, social security and other sectors.[39] It will require government service delivery to prioritise the rights of the people being served – including the participation duty (detailed further below). In situations where a person is excluded, mistreated or overlooked, people would also have avenues for redress and to ensure that training, policy development and internal cultural change was implemented to address gaps in service delivery frameworks in a responsive and flexible way. A federal Charter would have positive impacts on the work, language and culture of public authorities.[18]

1.6 Improve Australia's human rights knowledge base and culture

23. A human rights culture is essential to creating a society grounded in dignity and respect, a recognition of a common humanity and where substantive equality is valued both for our diverse communities now and for future generations. There is growing international consensus that human rights education is essential to the reduction of human rights violations and building free, just and peaceful societies.[19]

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[16] The rights to freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal laws and the right to recognition before the law, are the only human rights which cannot be restricted under any circumstance: *ICCPR* arts 1, 8 (1) 11 15 & 16.
[17] See e.g. *Human Rights Act 2018* (Queensland) s 23.
[18] Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1.
[19] In 2020 the UN Secretary General launched *The Highest Aspiration: A call to action for human rights,* showing how human rights are part of a social contract between all people, which is essential for collective action to face current and future crises: https://www.un.org/en/content/action-for-human-rights/index.shtml. See also UN General

24. Currently, there are many public misconceptions about human rights in Australia – including what they are, and how they may be limited in a way that is proportionate. This leaves the public vulnerable to the influence of misguided beliefs. For instance, during the height of the COVID-19 pandemic, a minority of people pushed back on the obligation to wear a mask to protect themselves and those around them from the virus, on the basis they had a "human right not to wear a mask". This undermined governments' public health response, and their ability to save lives. Human Rights Charters can be used in moments like these to educate and counter harmful, misinformed public narratives.[20]

Recommendation 1

That the government introduce a federal Human Rights Charter or Act into Parliament.

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2. How the Human Rights Charter should operate

2.1 A Charter, not a Bill, of Human Rights

25. One day in the future, Australians may decide to pursue a constitutionally enshrined form of human rights, as the strongest model available to restrain parliamentary power. However, federal Parliament can seize this moment to pass a Human Rights Charter or Act, which would preserve parliamentary sovereignty while making significant improvements to our laws, policies, and the lives of many people in Australia. As put by Professor George Williams:[21]

> "As an Act of parliament, the charter would not transfer sovereignty from parliament to the courts, but heighten human rights concerns within the political process… it would strengthen and broaden the scope of our democratic system, not transfer key decision-making powers to the judiciary."

2.2 What the federal Charter should cover

26. Ideally, a federal Charter would capture the key, enforceable elements of all the human rights treaties that Australia has ratified – 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**), and the *Convention on the Rights of Persons with Disability*

Assembly, *Report of the Secretary-General: Guidelines for national plans of action for human rights education*, UN Doc A/52/469/Add.1 (20 October 1997) [12].

[20] Human Rights Law Centre, "Explainer: Masks, COVID and human rights" (29 July 2020) available at <https://www.hrlc.org.au/news/2020/7/29/explainer-masks-covid-19-and-human-rights#:~:text=While%20there%20is%20no%20such,and%20ideas%20of%20all%20kinds>.

[21] George Williams, *A Charter of Rights for Australia*, UNSW Press Books (2017), 186.

(**CRPD**). Two additional matters that should be incorporated despite not being treaties, given their primary importance in Australia, are the *United Nations Declaration on the Rights of Indigenous Persons* (**UNDRIP**) and the UN General Assembly's Resolution on the Right to a Clean, Healthy and Sustainable Environment.[22] Collectively these international instruments have elaborated on the content of the Universal Declaration of Human Rights, which Australia played a leading role in drafting seventy-five years ago.

27. The Human Rights Law Centre's recommendation for the scope of a federal Charter is similar to the Australian Human Rights Commission's position paper *Free and Equal: A Human Rights Act for Australia* (**AHRC Position Paper**): we support, as an initial step, the incorporation of all ICCPR and ICESCR rights as the primary focus. In addition to this, given the urgency of the issues in this moment in Australia (and globally), we support the addition of two other substantive rights: the right to self-determination, drawing on UNDRIP, and the right to a healthy environment.

28. The Human Rights Law Centre has benefited from seeing the draft submissions of important organisations doing rights-protecting work in Australia, including People with Disability Australia and Women's Legal Service NSW, which are asking for substantial parts of the remaining treaties to be included in a federal Charter. While our focus remains narrower, we support their positions and the objectives they are designed to achieve.

Recommendation 2

That the government outline a plan to ensure full implementation of all 7 human rights conventions Australia has signed.

2.3 Interpretation of a federal Charter

1. A federal Charter should include a provision requiring courts and tribunals to consider international law when interpreting it. This includes all seven core treaties to which Australia is a signatory, as well as UNDRIP. This will significantly increase the relevance of instructive and important international human rights jurisprudence in our courts, and help ensure Australia keeps pace with advances in human rights standards globally.

29. Consistent with the AHRC Position Paper, a federal Charter should include an interpretive clause which requires courts and tribunals to interpret all Commonwealth laws in a way that is compatible with human rights, *so far as is reasonably possible*.[23] Such a provision may require courts to depart from settled rules of statutory construction, where it is reasonably possible, in a way that is consistent with human rights. If a provision cannot be interpreted and given effect to in a way that is compatible with human rights, the provision should be interpreted and given effect to in a way that is most compatible with human rights.

2. Acts or provisions found incompatible with human rights should not lead to their invalidity – at least in this first permutation of a federal Charter. However, statutory instruments deemed incompatible with human rights may be struck down for going beyond what is required by the empowering Act.

[22] UNGA Res, UN Doc A/76/L.75 (26 July 2022).
[23] Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (2022) (AHRC Position Paper), 319.

2.4 Parliamentary scrutiny

30. While a federal Charter would not prevent federal parliament from passing laws that are inconsistent with human rights, it should require parliamentarians to be transparent and publicly accountable for when they do. A federal Charter should include provisions requiring parliamentarians to include a Statement of Compatibility with Human Rights (**Statement of Compatibility**) with all bills tabled in parliament and legislative instruments.

31. This is the case currently, under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Statements of Compatibility outline the relevant parliamentarian's, and most importantly the government's, official view on the compatibility of measures in the proposed law with Australia's international human rights obligations. Statements of Compatibility then go to this Committee to assess the compatibility claims independently, and report to Parliament on any human rights risks presented by proposed legislation.

32. Statements of Compatibility are an important mechanism by which federal Parliament can increase parliamentary debate and scrutiny of proposed laws by reference to human rights principles. This level of discussion of human rights issues has an important instrumental and normative value in acculturating human rights in government processes. As noted by the Human Rights Law Centre and RMIT University in a report released late last year, this Committee has at times provided the only forum by which serious human rights implications of proposed legislation has been debated. [24]

33. This process alone has had limited success in preventing the passage of laws which undermine people's human rights.[25] The work of this Committee is vital but insufficient to achieve the level of accountability and culture change needed to ensure Australian politicians respect human rights in their law-making.

3. A federal Charter should provide a stronger foundation for the process and work of this Committee, as well as ensure that human rights are applied by courts, tribunals and public authorities. Further recommendations on improving this Committee's process are made in section 16 below.

2.5 Positive duty

34. One of the biggest impacts a federal Charter will have, is to impose a positive duty on public authorities to give proper consideration to human rights when making decisions, and to act compatibly with human rights. This duty will both reduce the likelihood of human rights being breached in the first place, and give people the ability to challenge decisions or seek other remedies when public authorities fail to (a) adequately consider human rights; or (b) act consistently with them.

35. "Public authority" should be defined relatively broadly, to include:

- a government agency, department, office, court, tribunal, police force, defence force, commission or statutory corporation) with powers or functions under a law of the Commonwealth or which is involved in the delivery of Commonwealth programs or performing functions of a public nature;

[24] Adam Fletcher, *Human Rights Scrutiny in the Australian Parliament*, RMIT University and the Human Rights Law Centre (December 2022), 24.
[25] Adam Fletcher, *Human Rights Scrutiny in the Australian Parliament*, RMIT University and the Human Rights Law Centre (December 2022), 24.

- private entities when exercising functions of a public nature;
- individuals when exercising powers or functions under a law of the Commonwealth, delivering Commonwealth programs or performing functions of a public nature; and
- Commonwealth Ministers.

36. As indicated above, Parliament, except when acting in an administrative capacity, should be excluded from the definition.

37. A number of functions are inarguably public and should be explicitly listed as they are in the ACT Charter,[26] including aged-care services; immigration detention; disability services; public housing services; public education, including public tertiary education; and emergency services. The definition of a public authority must focus on the nature of the function being undertaken by the entity. As stated by Justice Bell in *Metro West v Sudi*, the matter of determining whether an entity is exercising a "public function'" should be "approached as a matter of substance and not form or legal technicality".[27]

38. When deciding whether other functions are of a "public nature", potential public authorities and courts should take account of a number of considerations, including:

(a) whether the function is conferred under a statutory provision;

(b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;

(d) whether the function is publicly funded; and

(e) whether the entity is a government owned corporation.

39. As the AHRC notes, the implications for public authorities are significant: many will be required to introduce permanent internal departmental teams with human rights expertise, develop human rights action plans and guidelines, and adequately resource departments to make human rights-compliant decisions.[28]

2.6 Extending rights obligations beyond public authorities

4. Australia must move beyond voluntary regulation of business to respect human rights, towards a legally binding framework that requires business to respect human rights throughout their operations.

5. While the AHRC proposal to include an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility under a federal Charter is a welcome development, the National Human Rights Framework must go much further to ensure that Australian companies, and companies operating in Australia, respect human rights in their operations and throughout their value chains.[29]

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[26] *Human Rights Act 2004* (ACT), section 40A(3).
[27] *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).
[28] AHRC Position Paper, 22.
[29] In particular because opt-in regimes have not proven effective: to date only seven entities have opted into the ACT Human Rights Act, all of them being not-for-profit organisations: see Louis Schetzer, 'Voluntarily 'opting-in' – the

6. Under the *UN Guiding Principles on Business and Human Rights*, Australia has a duty to protect against human rights abuse within its jurisdiction by business enterprises.[30] While a patchwork of laws regulate aspects of corporate activity with regard to human rights,[31] there is currently no overarching framework that applies. By contrast, several European jurisdictions have enacted or are actively considering enacting comprehensive human rights protections that regulate business conduct, notably including the European Union which is soon to pass its *Directive on Corporate Sustainability Due Diligence*.[32]

7. To complement a federal Charter, Australia must consider enacting a broader mandatory human rights due diligence law that applies to all businesses operating within Australia (including their activities overseas). This would involve requiring businesses to undertake due diligence to identify, prevent and mitigate human rights and environmental harms, and to provide access to remedy for affected individuals and communities wherever harm occurs.

Recommendation 3

That the government introduce a broader mandatory human rights due diligence law that applies to all businesses operating within Australia.

2.7 Participation duty

40. In addition to the positive duty to consider and act in accordance with human rights, we support the AHRC's position that there should be an overarching participation duty included in the Charter.[33] Such a duty would ensure that the people who stand to be most impacted by decisions and laws have a say through effective consultation and participation with decision-makers. It is a way of executing a core principle of human rights – that there should be "nothing about us without us".

41. The AHRC has recommended there be provisions elaborating on how Aboriginal and Torres Strait Islander peoples, children and people with disability can participate in decisions affecting them.[34] UNDRIP should form the basis of participation processes with Aboriginal and Torres Strait Islander people, and include a standard of free, prior and informed consent.[35] As per the CRC, when assessing

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Australian approach to seeking human rights compliance from non-government entities' (2021) 27(3) *Australian Journal of Human Rights* 402.

[30] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,* UN Doc A/HRC/17/31 (21 March 2011) annex *('Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'*),UNGP 1.

[31] Allens Linklaters, *Stocktake on Business and Human Rights in Australia* (April 2017), available at: https://humanrights.wbcsd.org/project/stocktake-on-business-and-human-rights-in-australia/, 8.

[32] Laws requiring businesses to undertake mandatory human rights due diligence have already been enacted in France, Germany, the Netherlands, Norway and Switzerland, and are currently under active consideration in the European Union, Belgium, Austria, Finland, Luxemburg, Denmark, Italy, Spain, Sweden and Switzerland. See Business & Human Rights Resources Centre, "National & regional movements for mandatory human rights & environmental due diligence in Europe" Web Page (22 April 2022) <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>.

[33] AHRC Position Paper, 23.

[34] AHRC Position Paper, 24.

[35] UNGA Res, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007) (UNDRIP), art 19.

what is in a child's best interests, the child should be heard and their views given due weight in accordance with their age and maturity.[36] Under the CRPD, people with disability should be supported to make their own decisions in all aspects of their lives, no different to able-bodied people with capacity.

42. What qualifies as compliant, meaningful participation should be detailed in a federal Charter to give sufficient guidance to public authorities, including objective criteria regarding the timing and means of participation.

2.8 Equal access to justice duty

43. Access to justice is a fundamental component of the right to a fair hearing and a critical element of the promotion, protection and fulfilment of other human rights. Accordingly, in addition to education and awareness raising, various practical resources are required to develop a stronger human rights culture by supporting individuals to enforce their legal rights. This includes the availability and accessibility of appropriate and affordable legal advice, representation and advocacy services.

2.9 Implications of a federal Charter for state laws

44. A federal Charter should protect all people in Australia, and people who are outside its territory but are otherwise subject to its jurisdiction, including people within its power or effective control; and people to whom Australia has obligations under international law.

45. The AHRC has proposed that a Human Rights Charter apply to federal public authorities only.[37] It then goes on to say that "federal-state cooperative schemes… [and] state authorities that exercise public functions on behalf of the Federal Government… could be dealt with on a case-by-case basis".[38]

46. The Human Rights Law Centre broadly agrees, but at minimum federal Charter rights should extend to services which receive federal funding to perform a public function. This includes, for example, disability care, schools and hospitals.

47. The federal Charter should not override state Human Rights Charters. Under section 109 of the Commonwealth Constitution, state laws found to be incompatible with federal laws are invalid to the extent of the inconsistency. This risk can be avoided by the use of a "concurrency provision": that is, a provision that makes clear that the federal Charter does not cover the field and is intended to operate concurrently with state law, similar to those found in federal anti-discrimination legislation.[39]

48. Under this approach, aspects of government decision-making which impact people's human rights will remain within the domain of state governments. For instance, decisions by state public authorities regarding a person's rights in a state prison may not be reviewable under a federal Charter.[40]

49. This situation is ultimately undesirable: it will leave people in those states that do not have a Human Rights Charter or Act with fewer rights and worse outcomes than those who do. Nonetheless, limiting the application of the federal Charter in this way is justifiable as a "cautious first step" to achieving

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[36] *Convention on the Rights of the Child*, art 12(1).
[37] AHRC Position Paper, 310.
[38] AHRC Position Paper, 311.
[39] For example, see the *Racial Discrimination Act 1975* (Cth), section 6A.
[40] There may be exceptions to this, for instance, where prison services are provided under federal-state cooperative schemes, or with federal funding.

greater respect for human rights in Australia.[41] But the journey must continue to full implementation of ambitious and consistent Human Rights Acts or Charters in every jurisdiction in Australia. The federal Charter should be drafted with a view to becoming the gold standard, which every other state and territory jurisdiction should meet.

2.10 Cause of action and remedies

2.10.1 Including a freestanding, direct cause of action

50. A free-standing cause of action will ensure that, when unlawful actions and decisions in relation to human rights have been made, individuals are able to access effective remedies.

51. Guidance can be gleaned from the *Human Rights Act 2006* (ACT) (**ACT HRA**) and the *Human Rights Act 1998* (UK), both of which provide for an independent cause of action. These pieces of legislation enable individuals to:

    (a) initiate proceedings directly against public authorities who they claim have breached their human rights; or

    (b) rely on human rights in any legal proceedings.

52. The evidence and experience in jurisdictions which have enacted an independent cause of action for human rights violations is that this has not led to a significant increase in litigation or been costly for the government and public authorities as a result of awards of compensation against them.[42] In many instances, the rights in the Charter will likely be treated as an additional basis for judicial review to those routinely used in administrative law.

53. By contrast, section 59 of the *Queensland Human Rights Act 2019* (Queensland) (**Queensland HRA**) and section 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) requires individuals to establish an existing cause of action before being able to rely on the protected human rights in legal proceedings. Section 39 is unnecessarily complex. The result is that for some individuals, access to appropriate remedies for infringements of their rights remains illusory.[43]

54. The requirement in section 39 of the Victorian Charter to establish an existing cause of action in order to bring a complaint has led to much confusion and unnecessary complication. The complexity of establishing a cause of action for a breach, particularly for individuals who may not be able to access legal advice or representation, often acts as a barrier to such individuals being able to access an effective remedy for a breach of their rights. International best practice from comparable jurisdictions confirm that remedies must be accessible, affordable, timely and effective.[44]

55. The lack of an available and accessible remedy thereby limits the effectiveness of the Victorian Charter in addressing human rights breaches and enforcing human rights obligations. It also has the effect of creating an impression that human rights will not be treated with the seriousness and

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[41] Justin Gleeson, "A federal Human Rights Act -- What Implications for the state and territories?" (2010) *UNSW Law Journal* 33(1), 113.
[42] Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australian National University, 2, available at http://acthra.anu.edu.au/publications/index.html.
[43] For a comprehensive analysis and criticism of section 39 of the Victorian Charter, see Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 *MULR* 105. Gans argues that the provision is entirely unsatisfactory and that it should be replaced with the remedies provision that was adopted in the ACT's Human Rights Act.
[44] Scottish Human Rights Commission, Adequate and Effective Remedies for Economic, Social and Cultural Rights (December 2020).

importance that they deserve. This misperception limits the potential impact of the Victorian Charter because:

(a) many individuals whose rights may have been infringed do not end up using the Victorian Charter because they mistakenly believe that there is no remedy available to them; and

(b) some public authorities do not give appropriate consideration to human rights because they may assume that no legal action will be taken to challenge their decision.

56. A separate cause of action would avoid such complexity and confusion and create a simpler way for aggrieved individuals to be able to access the AHRC, a tribunal, or a court.

2.10.2 Overview of remedies

57. Different types of remedies may be appropriate in different circumstances. Accordingly, it is essential that there be a range of judicial and non-judicial remedies for breaches of the federal Charter.

58. Remedies for a person whose human rights have been infringed should range from:

(a) seeking redress with the relevant public authority (for example, by seeking internal review of a decision); to

(b) lodging a complaint and engaging in dispute resolution processes such as conciliation and mediation; to

(c) seeking redress in the courts.

2.10.3 The role of the AHRC and non-judicial remedies

59. Non-judicial processes play an important role in ensuring that individuals are able to seek redress where their human rights may not have been appropriately considered, without the costs, time and stress involved in bringing a complaint to a court or tribunal. An accessible complaints process would also reduce the impact of a federal Charter on the judicial system.

60. Consistent with the AHRC Position Paper, the AHRC's role should be extended beyond its current conciliation function, to be empowered to receive and conciliate complaints under a federal Charter. As acknowledged by the AHRC, some complaints will not be appropriate for conciliation. Such situations include risk of imminent harm, where a court injunction is needed to prevent or stop the harm; or where the public importance of a matter makes it more appropriate for adjudication by a court.[45]

2.10.4 Judicial remedies

61. Access to judicial remedies is a matter of last resort where other mechanisms and processes are inappropriate, or have failed to adequately remedy human rights breaches. In these instances, access to an effective remedy is an essential aspect of protecting and promoting human rights, including by operating as an incentive and deterrent for public authorities to ensure that human rights breaches do not occur in the first place.

[45] Similar to the AHRC's jurisdiction under the *Australian Human Rights Commission Act 1986* (Cth), section 46PH.

62. Courts should have full discretion to grant the relief they consider just and appropriate in the circumstances. Available remedies may include declarations, injunctions, orders requiring action, damages and the setting aside of administrative decisions.

2.11 Standing

63. A Charter should take a broad and inclusive approach to who can bring proceedings or rely on their rights under a Charter, including:

    (a) a person who is affected by the conduct or who would be affected by the proposed conduct;

    (b) a person acting on behalf of another person who cannot act in their own name and who is affected by the conduct or who would be affected by the proposed conduct;

    (c) a person acting as a member of, or in the interest of, a group or class of persons who is affected by the conduct or who would be affected by the proposed conduct; and

    (d) an association acting in the interest of one or more members who are affected by the conduct or who would be affected by the proposed conduct.

64. In addition, in appropriate cases public interest bodies and organisations should be granted standing to initiate proceedings, as well as to intervene or act as amicus in proceedings brought by other persons.

Substantive rights to be included

3. Civil and political rights

3.1 Approach to ICCPR rights

65. The ICCPR was adopted by the United Nations General Assembly in 1966, and ratified by Australia in 1980. The Covenant sets out important civil and political rights that underpin healthy democracies, and protect people from state violence and arbitrary interference with their liberty.

66. The ICCPR includes:

    (a) the right to liberty and safety; [46]

    (b) the right to life;[47]

    (c) the right to vote;[48]

    (d) freedom of expression;[49]

    (e) right of peaceful assembly; [50]

    (f) the right to a fair trial; [51]

    (g) the right to be treated with humanity in detention;[52] and

    (h) the right to privacy.[53]

67. Australia's compliance with civil and political rights standards is further advanced in comparison with economic and social rights obligations. Many are already protected to some degree under existing Australian laws – some of them are partially protected by the Commonwealth Constitution – and their protection has, generally, been subject to less controversy.

68. That being said, over the last decade Australia has experienced a concerning incursion of anti-democratic laws which undermine people's civil and political rights. People seeking safety in Australia continue to be locked up indefinitely without charge. We have also witnessed a proliferation of anti-protest laws enacted by Australian states, attacks on free speech through the prosecution of whistleblowers, and raids on media outlets. Under the last Coalition government, union members experienced sustained attacks on their freedom of association through the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* (Cth).

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[46] *International Covenant on Civil and Political Rights* (ICCPR), art 9.
[47] ICCPR, art 6.
[48] ICCPR, art 25.
[49] ICCPR, art 19.
[50] ICCPR, art 21.
[51] ICCPR, art 14.
[52] ICCPR, art 10.
[53] ICCPR, art 17.

4. Right to privacy

4.1 Introduction to the right to privacy

69. Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. Everyone in Australia should be able to communicate privately, enjoy public spaces and go about their lives – including participating in political discourse – free from indiscriminate monitoring, surveillance and interference by the government. Privacy has central democratic significance in its own right: privacy "fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy".[54]

70. Intrusions on privacy can also have a chilling effect on the exercise of other human rights, including freedom of expression and freedom of association. In the United States, the right to privacy arises as an "emanation" derived from the right to liberty in the Bill of Rights.[55]

4.2 The right to privacy under federal law

71. There is no constitutional protection for privacy, and at present no common law or statutory tort to address invasions of privacy. The *Privacy Act 1988* (Cth) is the principal federal legislation protecting the handling of personal information about individuals, and covers how information may be collected, stored and disclosed by both government entities and corporations. It does not, however, provide for a direct cause of action for individuals who have suffered intrusions to their privacy.

72. This regime was the subject of a recent major review by the Attorney-General's Department, which proposed broadening the rights of individuals to gain transparency and control over how their personal information is collected, stored and used.[56] The report also considered the establishment of a statutory tort to provide redress when privacy is violated.[57]

4.3 The right to privacy under State and Territory law

73. At state and territory level, only WA and SA do not have specific privacy legislation.[58] The right to privacy is also protected by section 12 of the ACT HRA, section 25 of the Queensland HRA, and section 13 of the Victorian Charter.

4.4 Why it is important to protect the right to privacy in a federal Charter

74. As our lives increasingly move online, privacy is fast becoming one of the most casually and frequently breached, but immeasurably important, human rights. Breaches of privacy at-scale are leading to a more dangerous world – be it online disinformation inciting violence, the use of biometric surveillance technologies by police and companies, or identity theft.

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[54] Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89 *Yale Law Journal* 455.
[55] *Whalen v Roe* (1977) 429 US 589.
[56] Attorney General's Department, *Privacy Act Review: Report 2022*, 166.
[57] Attorney General's Department, *Privacy Act Review: Report 2022*, 281.
[58] For other jurisdictions, see *Privacy and Data Protection Act 2014 (Vic), Privacy and Personal Information Protection Act 1998* (NSW), *Information Act 2002* (NT), *Information Privacy Act 2009* (Queensland), *Personal Information and Protection Act 2004* (Tas).

75. Privacy concerns are greatly heightened for communities and people who have historically been over-surveilled, overpoliced and subjected to government intrusion. In particular, Aboriginal and Torres Strait Islander communities, racialised communities (including migrant communities), and LGBTQIA+ communities have a long history of state monitoring, oppression and violence.

76. In addition, the surveillance of journalists, whistleblowers and protesters can have a chilling effect on the freedom of expression, which has troubling democratic ramifications. More broadly than this, the right to privacy is vital at a societal level, to protecting a strong sense of civic space, an open culture and ultimately, our democracy. As one expert described: [59]

> "One of the greatest dangers of unfettered mass surveillance – particularly mass covert surveillance such as communications monitoring – is the potential chilling effect on political discourse, and on the ability of both individuals and groups to express their views through comment, protest and other forms of peaceful civil action."

77. In the past two decades there has simultaneously been a rise of technologically-enabled surveillance and the passage of dozens of surveillance-related national security laws. Laws providing for the use of facial recognition technology (**FRT**) by government actors,[60] metadata retention,[61] the surveillance and disruption of online activities[62] and provision for decryption of encrypted communication[63] have all been proposed and, in the large part, passed by federal parliament with few safeguards and oversight. The increased deployment, by government and non-government actors, of FRT and artificial intelligence is particularly alarming.[64]

The Australian Federal Police's use of Clearview AI

Between 2 November 2019 and 22 January 2020, the Australian Centre to Counter Child Exploitation, led by the Australian Federal Police (**AFP**), trialled an FRT tool offered by Clearview AI, which allowed access to a database of more than three billion images taken from social media platforms and other publicly available websites (**the FRT Tool**). Using the FRT Tool, law enforcement uploaded photos of persons of interest in active investigations, alleged offenders, victims and members of the public.[65]

The Australian Information Commissioner and Privacy Commissioner made a Determination that the AFP had failed to comply with its privacy obligations in using the FRT Tool. She found that the AFP had handed over the biometric data of victims and suspects to a third part located overseas, without having assessed the security practices or accuracy of the FRT Tool.[66] The Commissioner concluded that the AFP had handled personal information in a way that could have serious consequences for the individuals, including exposing them to wrongful arrest, reputational damage, and identity fraud using their biometric data (biometric data, once stolen, cannot be retrieved or changed).[67]

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[59] Benjamin Goold, "How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy" in DW Schartum (ed), *Overvåkning i en rettsstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 43.
[60] *Identity-matching Services Bill 2019* (Cth).
[61] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth).
[62] *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth).
[63] *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).
[64] Professor Nicholas Davis, Lauren Perry and Professor Edward Santow, *Facial Recognition Technology: Towards a Model Law* (Human Technology Institute, September 2022) 5.
[65] Office of the Australian Information Commissioner, 'Clearview AI breached Australians' privacy' Web Page (3 November 2021), available at < https://www.oaic.gov.au/newsroom/clearview-ai-breached-australians-privacy#:~:text=Commissioner%20Falk%20found%20that%20Clearview,personal%20information%20by%20unfair%20means>.
[66] *Commissioner Initiated Investigation into the Australian Federal Police* (Privacy) [2021] AICmr 74 (26 November 2021).
[67] *Commissioner Initiated Investigation into the Australian Federal Police* (Privacy) [2021] AICmr 74 (26 November 2021).

Had a federal Charter been in force at the time, the AFP officers likely would have been more alive to the privacy rights concerns, and potentially wouldn't have used the FRT Tool on active cases. If they had, the decision to upload people's photos into the Clearview FRT tool very likely would have been found a breach of the federal Charter, and the people impacted could have had recourse to justice by making a complaint to the AHRC initially, and then the courts. This would likely have a stronger deterrent effect than the unenforceable determination by the Commissioner.

5. Freedom of assembly and freedom of expression

5.1 Introduction to the freedom of assembly and freedom of expression

78. The freedom to assemble and the freedom of expression allow Australians to express their views collectively on issues important to them, and to press for legal and social change. The right to protest is a valuable tool that is used for the realisation of a wide range of other human rights. These rights are especially important for marginalised groups who often rely on collective public action to be heard. A failure to recognise the right to participate in peaceful assemblies is a marker of state repression.[68]

79. In addition, protecting the freedom of expression in a federal Charter would further strengthen protection for press freedom, journalists and whistleblowers. In Europe, the freedom of expression clause in the *European Charter of Human Rights* has given rise to extensive press freedom-protecting jurisprudence.[69] The importance of public interest journalism in upholding human rights and providing accountability for human rights violations means such protection is critical to the wider effectiveness of a human rights framework.

80. The European Court of Human Rights (**ECtHR**) has repeatedly emphasised the special status of the media in Article 10 cases, given its 'watchdog' role.[70] A federal Charter could also serve to protect whistleblowers in their whistleblowing to the media, in situations where orthodox whistleblower protections might not apply – with numerous ECtHR cases holding that whistleblowers who suffered retaliation for speaking up about government wrongdoing had suffered a rights violation.[71] Human rights laws in other jurisdictions have also been used as a tool of source protection and to ensure access to government information.[72]

81. The *ICCPR* supports an approach to freedom of expression recognising the special significance of press freedom. In 2011, in a general comment to the *ICCPR*, the United Nations Human Rights

[68] United Nations Human Rights Committee, General comment No. 37 (2020) on the right of peaceful assembly (article 21), 2.
[69] See, eg, Hava Yurttagül, *Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union: An Emerging Consensus* (Springer, 2021); Yusepha Polidano, 'The Protection of Journalistic Sources under Article 10 of the European Convention' (MA Thesis, University of Malta, September 2021); Wouter Hins and Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights' (2007) 3 *European Constitutional Law Review* 114.
[70] Dirk Voorhoof, 'The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society' (Working Paper RSCAS 2014/12, Robert Schuman Centre for Advanced Studies Centre for Media Pluralism and Media Freedom).
[71] See, eg, *Guja v Moldova*, Grand Chamber, 12 February 2008, Case No 14277/04.
[72] *Társaság A Szabadságjogokért v Hungary*, Second Section, 14 April 2009, Case No 37374/05, 9.

Committee noted that the instrument "embraces a right whereby the media may receive information on the basis of which it can carry out its function".[73] It added that the communication of information and ideas among citizens implies a free press, and a corresponding right of the public to receive media output.[74] The Committee added that "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights".[75]

5.2 The freedom of assembly and freedom of expression under federal law

82. The freedoms of assembly and expression are not explicitly protected under Australian federal law, but they do receive limited protection under the Commonwealth Constitution. The High Court has implied a limited freedom of political communication from the provisions of the Commonwealth Constitution which establish a representative system of government in Australia.[76] Political communication includes both verbal and non-verbal communication, such as demonstrations and other protest activity. As such, laws which disproportionately or unjustifiably limit political communication by restricting protest actions have been found to be constitutionally invalid.[77]

83. The High Court, however, has been at pains to make clear that the implied freedom of political communication is not a personal right, and the test and scope of the implied freedom is markedly different to the ICCPR freedoms of assembly and speech. There is also significant uncertainty about the application of the implied freedom to non-statutory executive action.[78] This ongoing uncertainty is particularly acute where the restriction on protest rights is caused not by a law but by the manner of its application, for example restrictions imposed by regulations, public health orders, or actions taken by police.

5.3 The freedom of assembly and freedom of expression under state and territory laws

84. The implied freedom of political communication limits state governments under both the Commonwealth Constitution and each of their respective constitutions. The broader freedoms of assembly and expression are also included in the Victorian Charter, the ACT HRA and the Queensland HRA.

5.4 Why it is important to protect the freedom of assembly and freedom of expression in a federal Charter

85. Australians' freedom of assembly and expression have been under sustained attack by state parliaments for the last ten years. Political sensitivity to climate protesters in particular has prompted a rolling wave of draconian penalties which undermine people's right to protest in Australia.

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[73] Human Rights Committee, *General Comment No 34 – Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc UCCPR/C/GC/34 (12 September 2011) 3–4.
[74] Human Rights Committee, *General Comment No 34 – Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc UCCPR/C/GC/34 (12 September 2011) 3–4.
[75] Human Rights Committee, *General Comment No 34 – Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc UCCPR/C/GC/34 (12 September 2011) 3–4.
[76] *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58.
[77] For instance, see *Brown v Tasmania* [2017] HCA 43.
[78] *Cotterill v Romanes* [2023] VSCA 7 (8 February 2023).

86. These state laws would likely not be impacted by the Human Rights Law Centre's proposal for a federal Charter. But it would limit the ability of federal public authorities to make decisions which are inconsistent with the freedom.

The Morrison government's crackdown on charities

In mid-2021 the Morrison Government introduced a new governance standard into the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth). It was designed to discourage charities from promoting and having a presence at peaceful protests. It would also have made it much harder for charities to share their resources with community groups to support their advocacy.

The regulations, which were narrowly disallowed by the Senate, provided that charities could be deregistered (and effectively shut down) if their staff committed very minor and inadvertent breaches of the law in connection with a protest, or if the organisation merely failed to keep documentation proving its compliance. Minor breaches such as protesting without a permit or blocking a footpath, would have been sufficient to trigger the regulation. The regulation also exposed charities to pre-emptive punishment if the Australian Charities and Not-for-profits Commissioner (**Charities Commissioner**) believed a charity was likely to breach the regulation in the future.

Had a federal Charter been in place at the time, one of three outcomes likely would have followed. First, the proposed regulation likely would have been reviewed by this Committee for its compliance with the freedoms of expression and assembly. This would have increased scrutiny and political accountability for the regulation. Second, the regulation may have been struck down by a court by virtue of being outside the power of the *Charities Act*, properly construed consistently with human rights. Third, had the regulation survived challenge, the Charities Commissioner would have been required to interpret the regulation consistently with the freedoms of expression and assembly. This could have dramatically reduced the number of occasions on which charities might have been investigated and deregistered.

87. Furthermore, under a federal Charter, the right to freedom of expression would inform how decisions are made with respect to journalists and whistleblowers. Crucially, it could save whistleblowers from criminal prosecution,[79] and journalists from police raids and investigation.[80]

The decision to prosecute Bernard Collaery and Witness K

Witness K, a former intelligence officer, and his lawyer Bernard Collaery, a former ACT Attorney-General, were being prosecuted in the ACT Supreme Court by federal authorities for their alleged role in raising awareness about Australia's wrongdoing in Timor-Leste in the 2000s. At a time when our neighbours were recovering from decades of Indonesian repression, trying to build a new nation, Australian spies were allegedly bugging Timor's cabinet to give Australia the upper hand in oil and gas negotiations. This conduct was profoundly immoral and possibly contrary to international law.

The decision of the Commonwealth Director of Public Prosecutions to prosecute Collaery and Witness K for these alleged offences, and the decision of the then-Attorney-General Christian Porter to consent to the prosecutions, were, in the Human Rights Law Centre's view, infringements of the freedom of expression,

[79] In the last few years, the federal government has decided to prosecute four high profile whistleblowers in connection with public interest whistleblowing: Witness K, Bernard Collaery, David McBride and Richard Boyle. Witness K pleaded guilty after protracted criminal proceedings; the Labor Attorney-General intervened to drop the case against Bernard Collaery after the 2022 federal election; David McBride and Richard Boyle remain on trial.
[80] In June 2019, the Australian Federal Police raided the home of journalist Annika Smethurst, and the ABC offices in Sydney, following public interest reporting on "national security information", regarding a leaked plan by the federal government to spy on Australian citizens, and alleged human rights violations by Australian soldiers in Afghanistan, respectively.

and disproportionate with the purpose of protecting national security. It follows that these decisions could have been successfully challenged under a federal Charter. This would have saved both Witness K and Collaery years of unnecessary, extraordinary stress, and prevented the chilling effect these cases had on whistleblowing and transparency in Australia. The cases also raised concerns about open justice and fair trial rights, given the extraordinary secrecy imposed upon the prosecutions under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). Witness K ultimately pleaded guilty and was given a suspended sentence; the current Attorney-General, Mark Dreyfus KC, discontinued the prosecution of Collaery in July 2022.

6. Right to liberty and safety

6.1 Introduction to the right to liberty and safety

88. Liberty is precious. The right to personal liberty and freedom from arbitrary arrest and detention is well founded as a fundamental human right and is included in article 9 of the ICCPR. The Magna Carta in 1215 provided for the right, providing that "no freeman shall be taken or imprisoned… but… by the law of the land", and it has been replicated in all other general rights instruments since.[81]

89. Human rights law recognises that the right to liberty is not absolute and that deprivation of liberty can be justified in some situations – for example in connection with the enforcement of criminal laws. The right arises in all forms of detention, be it criminal justice, administrative detention for immigration processing, or the detention of people experiencing mental illness to prevent serious and imminent harm.

90. Deprivation of liberty must not be arbitrary.[82] The UN Human Rights Committee has stated that detention that initially complies with article 9 can become arbitrary if it continues beyond the period for which it can be appropriately justified.[83] Where a person has initially been detained for a specific purpose, there must be an appropriate justification to continue detention once the original purpose no longer applies. Where there are less invasive measures than detention available that can achieve the same end, they should be used.[84]

91. Arbitrary arrest or detention includes situations where, even if permitted by an applicable law, the detention is not justified as reasonable, necessary and proportionate, in light of the available alternatives.[85]

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[81] Richard Clayton, Hugh Tomlinson, *The Law of Human Rights*, (Oxford University Press, 2009) Vol 1, 574.
[82] ICCPR, art 9.
[83] *Shams & Ors v Australia,* HRC, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007).
[84] *Baban v Australia* U.N. Doc. CCPR/C/78/D/1014/2001 (2003), para. 7.2
[85] See eg UN Human Rights Committee*, General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014). The UN Human Rights Committee has stated that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary: UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Session, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; UN Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, 39th Sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990); UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997),.

92. Human rights standards also require people to be treated humanely when they are deprived of their liberty, regardless of the lawfulness of their detention. In addition, there are important protections against forms of treatment or punishment that are inhuman or degrading, and torture is not permitted under any circumstances.[86] This body of rules reflects that people who are arrested, detained or imprisoned are uniquely vulnerable to mistreatment.

6.2 The right to liberty and safety under federal law

93. There is no explicit right to liberty and safety in the Commonwealth Constitution, but in the 1992 decision of *Chung Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[87] three Justices of the High Court recognised a constitutional immunity arising from being imprisoned without conviction.[88] The justices held that detention, being punitive in nature, only existed as an incident of the "exclusively judicial function of ajudging and punishing guilt".[89]

94. The High Court has since taken a more restricted position on this principle, having narrowed its application to criminal detention only,[90] even though other forms of administrative detention – most relevantly immigration detention – can be equally punitive.

95. With respect to detention to enforce criminal laws, various federal legislation, such as the *Crimes Act 1914* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth), provide protections such as arrest upon a warrant only, and provide guidelines for proportionate sentencing. Other laws, such as the *Evidence Act 1995* (Cth), govern how criminal trials are to be conducted to ensure the process is fair and open.

96. The *Migration Act 1958* (Cth) provides for very virtually no procedural rights for people in immigration detention, for being in Australia or travelling to Australia without a valid visa.

6.3 The right to liberty and safety under state and territory laws

97. Every state and territory has its own legislation setting out the requirement that police obtain a warrant before detaining a person for the purposes of investigation or prosecution for an offence, and ensuring trials are open and fair. On top of this, the core human rights obligations in relation to liberty and security in the ICCPR are reflected in the Charters of the Australian Capital Territory, Victoria and Queensland.[91] Crucially, in those jurisdictions, the charters require prison staff to treat people in prison with dignity and respect.

98. Mental Health Acts in each jurisdiction enable the involuntary admission of people suffering acute psychiatric illness, in circumstances where no less restrictive care is appropriate or reasonably available.

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[86] ICCPR, art 7.
[87] (1992) 176 CLR 1.
[88] *Chung Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-29, per Brennan, Deane and Dawson JJ.
[89] *Chung Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27, per Brennan, Deane and Dawson JJ.
[90] *Al-Kateb v Godwin* (2004) 219 CLR 562; *Commonwealth v AJL20* (2021) 273 CLR 43.
[91] *Human Rights Act* (ACT) s 18-19, 13, 10, 26; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21-22, 12 10, 11; *Human Rights Act 2019* (Queensland) s 29-30, 19, 17, 18.

6.4 Why it is important to protect the right to liberty and safety under a Charter

99. As well as in criminal contexts, people are deprived of their liberty by federal public authorities in immigration detention centres, mental health facilities and aged care facilities. Each of these areas would greatly benefit from a federal Charter.

100. People in aged care can face limits on their liberty by virtue of various restraints, including chemical and physical restraints. The Royal Commission into Aged Care Quality and Safety heard evidence of older people being subject to excessive physical and chemical restraints, which can deprive them of their dignity and autonomy and result in serious physical and psychological harm.[92]

101. Australia's immigration policies see people deprived of their liberty indefinitely, for no other reason than that they do not have a valid visa. The detention of anyone in Australia without a valid visa is mandatory. Release can often only be achieved through the involvement of the relevant Minister. Mandatory or automatic detention in this way is arbitrary because it is not based on a consideration of the necessity or proportionality of the detention in the individual case.[93] Australia's treatment of people subject to immigration detention, including people seeking asylum, has repeatedly been found to breach international human rights obligations.[94]

The long-term detention of the Biloela family

Nades Murugappan and Priya Nadesalingam met in Australia after arriving in 2012 and 2013, seeking asylum from persecution. They settled in Queensland and their daughters Kopika and Tharnicaa were born in 2015 and 2017 respectively.

In March 2018, after their protection visa applications were refused and their bridging visas had expired, Australian Border Force and Serco guards arrived at the family's front door at 5am, giving them just 10 minutes to pack before taking them into custody.

Nades, Priya and their two young children would be subsequently held in immigration detention for the next three years, as part of a more than four-year dispute that drew international attention. Decisions by the federal government demonstrated a political obsession with imprisoning this family, seemingly at any cost to their human rights.

After commencing legal action in relation to their refugee claims, the family were detained in Melbourne until 29 August 2019, when an attempt by the Australian Government to take the family to Sri Lanka was

[92] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, Volume 2 (February 2021), 97-99.
[93] See eg *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee, 3 April 1997; *C v Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee, 13 November 2002.
[94] See eg UN Committee Against Torture, *Concluding observations on the sixth periodic report of Australia,* CAT/C/AUS/CO/6, 5 December 2022, [27]-[30], available at https://digitallibrary.un.org/record/3996411/files/CAT_C_AUS_CO_6-EN.pdf?ln=en; UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 9 November 2017, [37]-[38], available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/INT_CCPR_COC_AUS_29445_E.pdf; UN Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017*, Opinion No. 71/2017 (Australia) A/HRC/WGAD/2017/71, available at http://www.ohchr.org/EN/Issues/Detention/Pages/Opinions80thSession.aspx; UN Human Rights Committee, *FJ et al v Australia*, CCPR/C/116/D/2233/2013 (2 May 2016), available at http://www.refworld.org/pdfid/5a7b11694.pdf; UN Human Rights Committee, *C v Australia*, CCPR/C/76/D/900/1999 (13 November 2002), available at http://www.refworld.org/cases,HRC,3f588ef00.html

interrupted by a court injunction leading to a further legal dispute about the fairness of the processes for considering their refugee status.

The family was transferred to Christmas Island where they remained in immigration detention for two years. Both Priya and Tharnicaa experienced such serious health problems that they had to be brought to Perth for medical treatment. After sustained public outcry and international attention, the Minister exercised his powers to allow the family to live in the community in Perth, but prevented them from returning to Queensland.

Following federal election in May 2022, the relevant Minister exercised powers to free the family from community detention and allow them to return to Biloela. Each member of the family was later granted a permanent visas, ending the ten-year ordeal for this couple and their children, including several years of detention in violation of their human rights.

At multiple stages of this process, the federal government failed to comply with its international obligations to protect human rights, including the right to freedom from arbitrary detention; the right to protection from torture and other cruel, inhuman or degrading treatment; and the rights of the child.

While a federal Charter would not have disturbed the provisions of the *Migration Act 1958* (Cth) that authorise mandatory immigration detention in Australia, key decisions in relation to the detention of this family may have been very different if a federal Charter had been in force.

A federal Charter would have required the government to ensure that human rights were reflected in policies guiding the referral of cases to the Minister, such that the family's situation would have been brought to the attention of the Minister sooner, after it became clear that timely removal of the family from Australia could not occur. This may have led to a much earlier decision to allow them to live in community detention while their legal position was clarified, and prevented several years of unnecessary detention.

While the family remained in detention, a federal Charter would have also required immigration officers' decisions, such as the location and conditions of the family's detention, to be consistent with their human rights.

7. Right to vote

7.1 Introduction to the right to vote

102. Article 25 of the ICCPR recognises and protects the right of every adult citizen to take part in public affairs and vote in elections without distinctions of any kind. The right to vote is one of the better understood rights in Australia, and has been the basis of some of the human rights wins now lauded as among the most significant in Australian history: the right to vote for all Aboriginal and Torres Strait Islander adults in 1962;[95] and the right to vote for all women in South Australia, won in 1894.

103. And yet the right to vote is still not enjoyed equally by all Australians. There remains significant barriers to voting for Aboriginal and Torres Strait Islander people living on homelands, people with

[95] Only in 1965 were Aboriginal and Torres Strait Islander people granted the right to vote in Queensland.

disability and people experiencing homelessness. Many people in prison have been disenfranchised outright.[96]

7.2 The right to vote under federal law

104. In *Roach v Electoral Commissioner*[97] the High Court found that sections 7 and 24 of the Commonwealth Constitution, which require that the Houses of Parliament be "directly chosen by the people", enshrine the right to vote in the Commonwealth Constitution.[98]

105. The right to vote in Commonwealth elections is implemented by the *Commonwealth Electoral Act 1918,*[99] which requires citizens over the age of 18 to vote at federal elections. There are exceptions: people serving a prison sentence of three years or more; people deemed "of unsound mind"; and people convicted of treason or treachery are not permitted to vote.[100]

7.3 The right to vote under state and territory laws

106. At state and territory level, voting rights are extended along broadly similar lines. Section 17 of the ACT HRA, section 18 of the Victorian Charter and section 23 of the Queensland HRA all replicate the right to take part in public affairs and vote.

7.4 Why it is important to protect the right to vote in a federal Charter

107. Since 1962, Australian federal governments have continued to make decisions that deprioritise Aboriginal and Torres Strait Islander people's democratic participation. Such decisions include drastically reducing Australian Electoral Commission (**AEC**) staff in majority Aboriginal electorates;[101] and cutting funding for programs designed to increase voter enrolment and education where Aboriginal and Torres Strait Islander people are living on homelands;[102] and implementing a system of automatic enrolment using addresses that was unworkable for many people living on homelands.[103] As a result of these decisions, only 79 per cent of Aboriginal and Torres Strait Islander people of voting-age were enrolled to vote prior to the 2022 federal election.[104] This was significantly

[96] People in prison people serving a sentence of more than three years cannot vote in elections in the Northern Territory, Queensland or Tasmania. In New South Wales and Western Australia, people in prison serving a sentence of 12 months or more are disenfranchised. In Victoria, an imprisoned person serving a sentence of more than five years is disenfranchised. The ACT and South Australia do not have laws disenfranchising people in prison.
[97] *Roach v Electoral Commissioner* [2007] HCA 43
[98] *Roach* at 7.
[99] Section 93
[100] Section 93 *Commonwealth Electoral Act 1918* (Cth).
[101] Staffing cuts – from 16 to three staff members – and funding cuts to the AEC's Indigenous Electoral Participation Program and the AEC's Darwin office in the 2017/18 Federal Budget impacted Aboriginal and Torres Strait Islander enrolment and turnout.
[102] In 1996, the Aboriginal and Torres Strait Islander Education and Information Service was abolished. This service aimed for Aboriginal and Torres Strait Islander self-management in electoral matters: Australian Institute of Aboriginal and Torres Strait Islander Studies, *'The right to vote',* <https://aiatsis.gov.au/explore/right-vote>.
[103] The Federal Direct Enrolment Program was introduced in 2012, however the program was not suitable to automatically enrol or update the enrolment of anyone who did not have a gazetted street address, like Aboriginal and Torres Strait Islander people living on homelands.
[104] Australian Electoral Commission, 'Indigenous enrolment rate', 6 February 2023, <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>; Australian Electoral Commission, 'Size of the electoral roll and enrolment rate 2021', 7 February 2022, <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/national/2021.htm>.

lower than the national population enrolment rate of 96.3 per cent. Voter turnout was even worse – just 67 per cent of those enrolled.[105]

108. Many of these decisions, including budget decisions, would not be open to challenge under a federal Charter.[106] But failures on the part of the AEC to facilitate voting on homelands, as a result of poor resourcing, may nonetheless raise rights-based causes of action. This could help provide upward pressure on future governments to properly fund the AEC to run elections in more remote parts of the country.

Facilitating voting for Aboriginal and Torres Strait Islander communities on homelands

Before the Joint Standing Committee on Electoral Matters' inquiry into the 2022 federal election, the Aboriginal Peak Organisation of the Northern Territory reported that the AEC did not turn up to a number of communities it had previously committed to reach:[107]

… in East Arnhem, the polling centres didn't turn up to some communities, even though the communities were advised that the polling centre was coming for certain hours of the day, an hour or two. ***There were quite a few homelands where they didn't turn up.*** *People are very busy out there and they have their own business to sort out. A lot of our people do want to vote; they wait around for the teams and they didn't turn up. Apparently one of the helicopters ran out of fuel, so they couldn't turn up. There was no contact with the communities. No-one from the AEC or the team contacted the communities to say they couldn't turn up. Then they were looking at rescheduling. This is a big problem about how the AEC engages with these communities to make sure these polls are set up, that people know what is going on.*

The AEC, in response, emphasised the resourcing challenges and logistical complexity of arranging for voting on homelands.[108] Nonetheless, resourcing decisions have been repeatedly made which have left homelands under-served. In 2019, the AEC allegedly opened polling booths in Maningrida, Wadeye and Galiwin'ku in the Northern Territory, for just one hour. These decisions, among others, were the subject of a racial discrimination complaint by Matthew Ryan, the Mayor of the West Arnhem Regional Council, and Ross Mandi, Chairman of the Yalu Aboriginal Corporation in Galiwin'ku on Elcho Island off the coast of Arnhem Land.[109]

Under a federal Charter, decisions by AEC public authorities which led to the no-show of polling booths or booths that were open for very brief periods could be challenged by people who were denied their right to vote. Ensuring there are consequences for public authorities like the AEC when they fail to uphold people's human rights, will lead to better decision-making with regards to resourcing and engagement. It can also help put pressure on federal governments to allocate adequate budget for resourcing Aboriginal and Torres Strait Islander people's right to vote.

109. Similar outcomes could follow for people with disability who have been inadequately supported to vote in federal elections,[110] including people who have been unjustly excluded from voting by virtue of

[105] Australian Electoral Commission, 'Indigenous enrolment rate', 6 February 2023, <https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm>.
[106] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.
[107] Aboriginal Peak Organisation of the Northern Territory, *Committee Hansard*, 23 November 2022, 4.
[108] Australian Electoral Commission, *Committee Hansard*, 8 March 2023, 10.
[109] Sarah Collard, "NT men lodge discrimination complaint against Australian Electoral Commission", *NITV News*, 19 June 2021.
[110] Human Rights Law Centre, *Submission to the Joint Standing Committee on Electoral Matters*, 14 October 2022, submission 418.

the archaic and offensive "unsound mind" provisions (although a much better solution would be to remove the exclusion from the *Commonwealth Electoral Act* altogether).[111]

8. Economic, social and cultural rights

8.1 Approach to economic, social and cultural rights

110. Economic, social and cultural rights represent the minimum standards that need to be respected for people to live a dignified life. The relevance of these rights to Australians is undeniable – one in eight people are living in poverty,[112] and many are without access to housing, education or adequate health care. As successive *Closing the Gap* reports have made abundantly clear, unequal wealth distribution impacts Aboriginal and Torres Strait Islander people the most.

111. State protection of these rights is critical to ensuring people who are most at risk of having their economic, social and cultural rights breached by public authorities, have recourse to action. Enshrining these rights in a federal Charter will also lead to policy development and decision-making by government that is more in line with these human rights and, as a result, play an important role in addressing disadvantage and achieving greater substantive equality among people in Australia.

112. Further, economic and social rights are prioritised by people in Australia, and a failure to include them in a federal Charter would be to ignore the democratic will of the people. To quote the AHRC, "a failure to include ICESCR rights in a Human Rights Act would represent a failure to uphold key values held by the Australian community".[113]

113. Many economic, social and cultural rights should be familiar to Australian law makers. Some socio-economic rights, like the right to work, form trade unions and access social security were protected by statute long before civil and political rights were recognised.[114] Others include the right to:

    (a) an adequate standard of living, including adequate housing;[115]

    (b) the enjoyment of the highest attainable standard of physical and mental health;[116]

    (c) take part in cultural life;[117]

    (d) just conditions of work and wages sufficient to support a minimum standard of living;[118]

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[111] Australian Lawyers for Human Rights and People with Disability Australia, Open Letter to the Prime Minister, 21 April 2022 accessed 9 July 2023, <https://alhr.org.au/wp/wp-content/uploads/2022/04/OPEN-LETTER-_-RIGHT-TO-VOTE-1.pdf>.
[112] The Australian Council of Social Services has estimated that one in eight people live in poverty; and one in six children: "Poverty in Australia 2023: Who is affected", Web Page, <https://povertyandinequality.acoss.org.au/poverty-in-australia-2023-who-is-affected/#:~:text=Poverty%20was%20highest%20among%20younger,and%2014%25%20among%20older%20people>
[113] AHRC Position Paper, 126.
[114] Ben Saul, David Kinley, Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014), 2.
[115] *International Covenant on Economic, Social and Cultural Rights* (ICESCR), art 11.
[116] ICESCR art 12.
[117] ICESCR, art 15.
[118] ICESCR, art 7.

(e) equal remuneration for equal work and equal opportunity for promotion;[119] and

(f) free primary education for all and accessible education at all levels.[120]

114. By way of example only, this submission considers in further detail the rights to health, education, housing and the right to enjoy and benefit from culture.

8.2 Australia's obligations under ICESCR

115. Australia ratified ICESCR without reservation on 10 December 1975, so by law, it must take steps to respect, protect and fulfill the economic, social and cultural rights contained in the Covenant.[121] Practically, this means that Australia must:

(a) not interfere with an individual's enjoyment of these rights;

(b) prevent third parties from infringing on these rights; and

(c) ensure that these rights are fully realised.[122]

116. Additionally, Australia must guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in ICESCR.[123]

117. Australia has further specific obligations with regard to the rights contained in ICESCR that are set out in the Convention itself:

(a) *Minimum core obligations of an immediate nature:* Each of the rights provided for in ICESCR attracts what is known as a "minimum core obligation".[124] The Office of the United Nations High Commissioner for Human Rights (**OHCHR**) has published examples of minimum core obligations. For instance, the minimum core obligation in relation to the right to education includes ensuring access to free and compulsory primary education for all.[125] By law, Australia must take steps to realise these minimum core obligations immediately.

(b) *Progressive realisation:* At international law, Australia also has an obligation to take appropriate steps to fully realise ICESCR rights and make continual progress with respect to these rights over time. [126] Any steps that deliberately diminish ICESCR rights would be considered contrary to the principle of progressive realisation and would need to be appropriately justified.

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[119] ICESCR, art 7(a)(i) & (c).
[120] ICESCR, art 13.
[121] Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (ICESCR arts 11,12)*, UN Doc E/C.12/2002/11 (20 January 2003) [20]; Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12)*, UN Doc E/C.12/2000/4 (11 August 2000) [33].
[122] General Assembly, Report of the United Nations High Commissioner for Human Rights, *Social and Human Rights Questions*, UN Doc E/2015/59 (July 2015) [17]-[19].
[123] CESCR Committee, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (July 2009) [7].
[124] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations* (art 2, para 1 of the Covenant), 5th session, UN Doc E/1991/23 (14 December 1990) 3 [10].
[125] Office of the United Nations High Commissioner for Human Rights, "Frequently Asked Questions on Economic, Social and Cultural Rights" (Fact Sheet no 33, 2008), 17 <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet33en.pdf>.
[126] ICESCR art 2.1.

(c) *Use of maximum available resources:* Article 2(1) of ICESCR requires that Australia take necessary steps "to the maximum of its available resources" to progressively realise ICESCR rights, recognising that the progressive realisation of rights may be limited by the financial resources that are available to a State Party.

8.3 Economic, social and cultural rights are justiciable

118. A key barrier to the recognition of ICESCR rights in Australia has been debate concerning whether the rights can be framed in a way that ensures they are justiciable. Arguments against ICESCR rights were primarily preoccupied with concerns that judicial review of progressive realisation obligations (in categories (b) and (c) of paragraph 117 above) would – impermissibly – require courts to determine matters that relate to the appropriate allocation of resources.[127] Stephen Gageler SC (the then Commonwealth Solicitor-General) and Henry Burmester QC called into question the constitutionality of these rights in September 2009, arguing that the vague nature of economic, social and cultural rights did not contain judicially manageable standards.[128]

119. But this position was contentious. Shortly after that legal opinion, the Human Rights Law Centre obtained a Memorandum of Advice from Peter Hanks QC, Debbie Mortimer SC, Associate Professor Kristen Walker and Graeme Hill.[129] The advice is appended to this submission, and in summary concludes:

(a) there is no necessary constitutional objection to including economic and social rights in a federal Charter;

(b) economic and social rights are no more broadly expressed than civil and political rights, which are capable of being interpreted and applied in the exercise of federal judicial power;

(c) decisions about social and economic rights may have implications for the allocation of budgetary resources, however the same is true for almost all human rights; and

(d) it is an overstatement to say that ICESCR rights do not contain judicially manageable standards.[130]

120. Crucially, the Memorandum of Advice noted that a number of civil and political rights are also broadly expressed, and the courts have been able to "apply judicial techniques to very general provisions, by giving content to these provisions on a case-by-case basis and by requiring the criteria to be satisfied by evidence".[131]

121. The debate regarding the justiciability and enforceability of economic, social and cultural rights can be put to rest. We know from burgeoning international jurisprudence that many aspects of economic, social and cultural rights are immediately applicable and capable of judicial application.[132] Successful

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[127] Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of Advice, 2009) 3 [5.1].
[128] Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of Advice, 2009) 3 [5.1].
[129] Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of Advice, 2009) 3 [5.1].
[130] Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of Advice, 2009), 15-16 [33].
[131] Peter Hanks, Debbie Mortimer, Kristen Walker and Graeme Hill, *Proposed Commonwealth Human Rights Act: Justiciability of Economic and Social Rights* (Memorandum of Advice, 2009) 9 [20].
[132] Ben Saul, David Kinley, Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014), 1.

adjudication of these rights has taken place now for decades, debunking the assertion that ICESCR rights cannot be legitimately justiciable.[133] Courts have a role to play in actively monitoring and assessing whether states are fulfilling their obligations to protect and promote ICESCR rights.

122. The Human Rights Law Centre agrees with the AHRC's position that progressive realisation principles are not inherently non-justiciable.[134] Nonetheless, as a first step for legislating these rights, we believe that economic, social and cultural rights should be framed in the federal Charter so as to give them specific content, and confining the court's role to the consideration of whether the government's action was reasonable within the available resources.[135]

8.4 Implementation of ICESCR rights at the state and territory level

123. Queensland and the ACT's respective human rights legislation extends protection to a limited range of economic and social rights, including the right to education,[136] the right to access healthcare[137] and, in the ACT, the right to work.[138] Victoria is the only jurisdiction that does not extend protection to economic and social rights (although it does include cultural rights, see below).

124. A 2010 review of the ACT HRA by the Australian National University recognised that it was no longer a question of *if* ICESCR rights should be protected in Australia, but *how* they should be protected.[139] To address exaggerated concerns about the justiciability of ICESCR rights, the 2010 report recommended a narrow drafting of ICESCR rights that ensured judicial adjudication on ICESCR rights corresponded to the difference between immediate and progressive obligations.[140] The ACT HRA was amended in 2012 to include the right to education[141] and in 2020 to include the right to work.[142]

125. In accordance with the recommendations of the 2010 report, the ACT legislation distinguishes between immediate and progressive obligations. The ACT HRA requires the Government to take steps to immediately realise the minimum core obligations of the right to education by ensuring the right to free primary education for all.[143] However, the ACT Government is not obliged to take steps to progressively realise the right to education in full.

126. The right to education and healthcare were included in the Queensland HRA when the bill first passed in 2019,[144] again giving them a narrow expression. In the case of the right to healthcare, the Queensland HRA's section 37 is arguably even narrower than the core minimum obligations.

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[133] For example, see *Cemino v Cannan and Ors* [2018] VSC 535. In this decision, the Victorian Supreme Court considered the relationship between the plaintiff's cultural rights under the Victorian Charter of Human Rights and the *Magistrates' Court Act 1989* (Vic). See also *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507, in which the Victorian Civil and Administrative Tribunal considered the plaintiff's right to freedom from discrimination in the practise of his religion, in breach of the *Equal Opportunity Act 2010* (Vic).
134 Australian Human Rights Commission, *A Human Rights Act for Australia* (Position Paper, December 2022), 128.
[135] Ibid 16 [33.2].
[136] *ACT HRA s 27A; QUEENSLAND HRA s 36.*
[137] *Human Rights Act 2019 (QUEENSLAND) s 37.*
[138] *ACT HRA s 27B.*
[139] Hillary Charlesworth, Andrew Byrnes, Renuka Thilagaratnam and Katharine Young, *Australian Capital Territory Economic, Social and Cultural Rights Research Project* (Report, September 2010) 94 [6.15].
[140] Ibid 121 [9.12].
[141] *Human Rights Amendment Act 2012* (ACT).
[142] *Human Rights (Workers Rights) Amendment Bill 2019* (ACT).
[143] ACT HRA s 27A(3).
[144] Queensland Human Rights Commission, *Right to* Education, Fact Sheet (July 2019) <https://www.qhrc.Queensland.gov.au/__data/assets/pdf_file/0006/19905/QHRC_factsheet_HRA_s36.pdf>;

9. Right to social security and adequate living standards

9.1 Introduction to the right to adequate living standards

127. Article 11 of the ICESCR provides that every person has the right to adequate living standards, including food, water, clothing and housing. As noted by the AHRC, the right to adequate living standards fundamentally upholds a basic standard of living and dignity, to ensure survival through the prevention of destitution, homelessness and starvation.[145]

128. Article 9 of the ICESCR provides for the related right to social security, which plays an important role "through its redistributive character … in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion".[146]

129. The simultaneous cost of living and housing crises have put many millions of people in Australia under enormous pressure. Record high rents in capital cities are pushing more people into homelessness.[147] In 2022, an estimated 3.3 million people (13.4%) were living below the poverty line, including 761,000 (16.6%) children.[148]

130. Challenges in accessing adequate and stable accommodation are reinforcing existing inequalities. Women and children fleeing family violence, Aboriginal and Torres Strait Islander people, people with disability and people seeking asylum are at a disproportionately high risk of homelessness.

131. The increasing impact of the climate crisis has also underscored the absence of robust protections for housing rights in Australia. The climate crisis is directly impacting the adequacy of public housing, particularly regional and remote communities. Increasing temperatures over summer are also leaving many tenants facing health risks due to the inadequacy of cooling mechanisms in much housing supply, including in Western Sydney where heat stress is predicted to increase significantly in the coming decades.[149] Most acutely, major natural disasters such as floods and bushfires are leaving Australians without homes, and in many cases facing a years-long wait to rebuild.[150]

9.2 The right to social security and adequate living standards in federal law

132. No federal legislation expressly protects the right to adequate living standards and social security. However the federal government is primarily responsible for social security payments and pensions through the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Federal public authority Centrelink is the main decision-maker with respect to people's ability to make social security claims.

Queensland Human Rights Commission, *Right to Health Services*, (July 2019) <https://www.qhrc.Queensland.gov.au/__data/assets/pdf_file/0007/19906/QHRC_factsheet_HRA_s37.pdf>.

[145] AHRC Position Paper, 371.

[146] UN Committee on Economic, Social and Cultural Rights *General Comment No. 19: The right to social security (Art 9 of the Covenant),* 39th session, UN Doc E/C.12/GC/19 (4 February 2008), [3].

[147] Norman Hermant, "'Cascade effect' pushing people into homelessness after rental prices, property scarcity hit records" ABC News, 4 May 2023.

[148] Australian Council of Social Services, *Poverty in Australia 2022: A Snapshot*, October 2022, 11.

[149] Hannah Melville-Rea and Rhiannon Verschuer, 'HeatWatch: Extreme Heat in Western Sydney', *The Australia Institute* (2022).

[150] Kathryn Magann, "Flood victims protest slow recovery and reconstruction" *The Canberra Times* (30 June 2023) <https://www.canberratimes.com.au/story/8254277/flood-victims-protest-slow-recovery-and-reconstruction/>.

133. Under the *Housing Assistance Act 1996* (Cth), the federal government provides financial assistance to the states to ensure people can obtain secure housing. The division of responsibilities between governments is recognised in agreements such the National Affordable Housing Agreement and the National Partnership Agreement on Social Housing.

9.3 The right to social security and adequate living standards in state and territory law

134. Not one of the three state and territory Human Rights Charters protect the right to adequate living standards or the right to social security. The absence of the right to adequate living standards is particularly troubling, given social housing and services for people experiencing homelessness are primarily administered by the states.

9.4 Why it is important to protect the right to social security and adequate living standards in a federal Charter

135. People experiencing poverty are exposed to vastly more decisions by public authorities, and the risk to them of poor decision-making is much more serious than people on middle or high incomes. It is critically important that people have a pathway to pursue their rights when government decisions leave them further exposed to poverty and homelessness.

Robodebt and the right to social security and adequate living standards

A striking example of the Australian government's failure to comply with the rights to social security and adequate living standards, was the Department of Human Service's creation of the Centrelink Debt Program – an automated system of computer-generated debt recovery letters, colloquially known as "Robodebt". Many of the debts were incorrectly calculated and provided limited avenue for review. The scheme put enormous financial strain on many people who were already experiencing hardship.[151]

In its 2017 submission to the Senate Community Affairs References Committee, the AHRC raised a number of human rights issues arising from the Robodebt scheme, and concluded that "there are real concerns that a number of human rights, including the right to social security, may have been impermissibly limited by the deployment of the Centrelink Debt Program".[152]

The Robodebt scandal is a perfect case-study in how poor political leadership, dysfunctional bureaucracy[153] and the prioritisation of economic efficiency over the rights of people, can lead to decisions with demonstrably bad outcomes on an enormous scale. Decisions like this can be prevented in the first place, by mandating that they be made consistently with people's human rights. And even when made, they can be challenged far more quickly and effectively through the AHRC or a court using a federal Charter.

[151] Australian Council of Social Service, *Senate Standing Committee on Community Affairs inquiry into the Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System Initiative*, Submission 31, 21 March 2017, 1.
[152] Australian Human Rights Commission, *Senate Standing Committee on Community Affairs inquiry into the Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System Initiative*, 19 September 2019, 7.
[153] Luke Henrique-Gomes, "Robodebt: top bureaucrat admits 'significant oversight' led to cabinet being misled" *The Guardian*, 7 March 2023, available at <https://www.theguardian.com/australia-news/2023/mar/07/robodebt-royal-commission-inquiry-top-bureaucrat-cabinet-misled>.

10. Right to healthcare

10.1 Introduction to the right to healthcare

136. Article 12 of ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

137. In 2000, the United Nations' Committee on Economic, Social and Cultural Rights (**CESCR**) issued General Comment 14 providing further clarification on what the right entailed, including that the right:

(a) is not constrained to the right to access health care;[154]

(b) should not be understood as the right to be *healthy*, but rather the right to a system of health protection providing equality of opportunity for people to enjoy the highest attainable level of health;[155] and

(c) in all its forms and levels contains the interrelated and essential elements of availability, accessibility, acceptability, and of good quality.[156]

138. Core obligations under ICESCR[157] in relation to the right to health go beyond the provision of health care, to include the underlying determinants of health. The right includes the provision of healthcare on a non-discriminatory basis, ensuring access to minimum essential food, access to basic shelter, housing, sanitation, and water, as well as the provision of essential drugs.[158] It also includes the right to control one's health and body, including sexual and reproductive freedom.[159]

10.2 The right to healthcare in federal law

139. No federal legislation expressly protects the right to health. However, a range of Commonwealth laws address matters directly relevant to the right, such as the *Health Insurance Act 1973* (Cth),[160] which underpins Australia's Medicare scheme by providing for accessibility of medical and hospital services. Similarly, non-legislative mechanisms exist which are aimed at protecting the right to health, including the *Australian Charter of Healthcare Rights*, which incorporates a guiding principle that

[154] United Nations Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12), Doc No E/C.12/2000/4 (11 August 2000), art 4.
[155] United Nations Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12), Doc No E/C.12/2000/4 (11 August 2000), art 7.
[156] United Nations Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12), Doc No E/C.12/2000/4 (11 August 2000), art 12.
[157] The right to health has been recognised in subsequent international human rights instruments, including: article 5(e)(iv) of the *International Convention on the Elimination of All Forms of Racial Discrimination*; articles 11(1) and 12 of the *Convention on the Elimination of All Forms of Discrimination Against Women*; and article 24 of the *Convention on the Rights of the Child*. A number of regional instruments have also recognised this right, including article 11 of the *European Social Charter*[157] and article 16 of the *African Charter on Human and Peoples' Rights*.
[158] OHCHR, *The Right to Health* (Fact Sheet no 31, June 2008) <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>.
[159] United Nations Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health (art 12), Doc No E/C.12/2000/4 (11 August 2000), [9].
[160] *Health Insurance Act 1973* (Cth).

"everyone has a right to the highest possible standard of physical and mental health",[161] although it is not enforceable.[162]

10.3 The right to healthcare in state and territory law

140. Neither the ACT HRA nor the Victorian Charter include the right to health. The Queensland HRA includes certain components of the right: section 37 provides for the right to healthcare on a non-discriminatory basis, and the right not to be refused emergency medical treatment necessary to save a person's life or prevent serious impairment to the person.[163]

10.4 Why it is important to protect the right to healthcare in a federal Charter

141. The importance of protecting the right to healthcare in a federal Charter cannot be overstated. By way of example only, due to the inconsistent and incomplete recognition of the right to healthcare, there currently exists no express legal protection of an individuals' access to medicines; or express protection of the availability, accessibility, acceptability and quality of health services.

142. The Aged Care Royal Commission's Final Report, tabled in Parliament on March 2021, provides many examples of failures to respect the rights of older people to universal access to the supports and services they need. The Aged Care Royal Commission identified breaches of informed consent and failures to provide adequate healthcare and palliative care in many case studies,[164] and details instances in which people attempting to seek aged care experienced the process as "time-consuming, overwhelming, frightening and intimidating".[165] It has concluded that people "too often [did] not receive quality respite care when they [needed] it".[166] The Aged Care Royal Commission recommended that ICESCR rights, in particular the right to health, be enshrined in a new Act, so that "it may be invoked by individuals seeking protection from neglect, and its effects, by providers or governments".[167]

Deploying police to respond to mental health incidents in aged care homes

Two shocking incidents of police force against elderly women experiencing dementia, leading to the death of one, has prompted questions as to whether police are appropriate first responders to people experiencing mental ill-health in aged care facilities.[168]

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[161] Australian Commission on Safety and Quality in Healthcare, *Australian Charter of Healthcare Rights* (2020) <https://www.safetyandquality.gov.au/publications-and-resources/resource-library/australian-charter-healthcare-rights-second-edition-a4-accessible>.
[162] Claudia Harper et al, 'The Right to Health: Implications for the Funding of Medicines in Australia' (2017) 24(3) *Journal of Law and Medicine* 646.
[163] Section 37 does not appear to have been the subject of meaningful judicial consideration.
[164] Refer Aged Care Royal Commission, *Volume 4A: Hearing overviews and case studies* (Final Report, 1 March 2021), specifically the Brian King Gardens case study, pages 113-121, and the Alkira Gardens case study, pages 207-221. The conduct alleged included failures to provide medical treatment, causing elderly persons considerable pain and discomfort. Such conduct is clearly in breach of such persons' rights to health, in particular their rights to accessible and good quality healthcare.
[165] Aged Care Royal Commission, *Final Report - Executive Summary* (Final Report, 1 March 2021), 65.
[166] Aged Care Royal Commission, *Final Report - Executive Summary* (Final Report, 1 March 2021), 66.
[167] Aged Care Royal Commission, *Final Report – Summary and Recommendations* (Final Report, 1 March 2021) 14.
[168] Age Care Commissioner Dr Kay Patterson has called for a review into whether a mental health team would be more appropriate first responders in incidents involving mental ill-health: Jordyn Beazley, Josh Butler, "Review needed of police deployment to aged care after 95-year-old woman Tasered, says age discrimination commissioner" *The Guardian*, 24 May 2023, < https://www.theguardian.com/australia-news/2023/may/24/95-year-old-woman-tasered-age-discrimination-commissioner-review-nsw-police-deployment-to-aged-care-homes>.

On 31 October 2020, six NSW police officers responded to a call for assistance after 81 year old Rachel Grahame took a lanyard and an electronic device from the desk of a nursing home staff member. Ms Grahame had advanced dementia, and weighed just 45kg. NSW police restrained her using two pairs of handcuffs, causing Ms Grahame significant distress and pain. Ms Grahame's family received compensation from NSW police the following year.

On 17 May this year, another NSW police officer tasered 95 year old Clare Nowland in the chest. Ms Nowland had dementia, weighed 43kg and was using a walking frame as she "slowly" approached the officers with a small serrated knife. Ms Nowland died a week later, having sustained serious head injuries from falling after being tasered. The police officer responsible, Kristian White, has been charged with recklessly causing grievous bodily harm.

Former CEO of Aged and Community Care Providers Association Paul Sadler described calling police into aged care homes as "common protocol" when staff were struggling to control a situation.[169] Under a federal Charter, protocols involving decisions to call police to respond to acute incidents involving mental ill-health, would need to be justified in light of people's right to health and right to liberty. The duty will be on the aged care providers to explore alternatives to deal with moments like these in a safer way, such as providing better training for staff, rostering on more staff, and finding alternative responders to help people in crisis. A federal Charter requiring aged care providers to make decisions consistently with the rights of the people in their care, could have saved the life of Ms Nowland and kept Ms Grahame safe from harm.

11. Right to education

11.1 Introduction to the right to education

143. Article 13 of ICESCR recognises the right to education. States Parties to ICESCR have agreed that education "shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen respect for human rights and fundamental freedoms".[170]

144. The right to education has been described as an "empowerment right" and the "primary vehicle" for economically and socially marginalised people to lift themselves out of poverty and obtain the means to participate fully in the community.[171]

145. As a State Party to ICESCR, Australia has committed to recognising, with a view to achieving full realisation, that:[172]

- primary education is to be compulsory and free to all;[173]

[169] Lia Harris, Adriane Reardon, "Police officers being called to aged care homes is 'standard protocol', industry expert says" 21 May 2023, ABC News, accessed 24 May 2023, available at< https://www.abc.net.au/news/2023-05-21/nsw-police-called-to-nursing-homes-not-rare-industry-expert-says/102373032>.
[170] ICESCR, art 13.
[171] See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 13: Implementation of the International Covenant on Economic, Social and Cultural Rights,* 21st session, UN Doc E/C 12/1999/10 (8 December 1999) para 1.
[172] ICESCR, art 13.2.
[173] See also ICESCR art 14: "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."

- secondary education (including technical and vocational secondary education) is to be made generally available and accessible to all, in particular through the progressive introduction of free education;

- higher education is to be made equally accessible to all, on the basis of capacity, in particular through the progressive introduction of free education;[174]

- fundamental education is to be encouraged or intensified as far as possible for people who have not received or completed the whole period of their primary education; and

- development of a systems of schools at all levels are to be actively pursued, an adequate fellowship system established, and the material conditions of teaching staff are to be continuously improved.

146. The right to education under ICESCR also protects the freedom of parents and legal guardians to choose schools outside the public school system, which conform to minimum educational standards set by the State Party, and to ensure religious and moral education for their children.[175]

147. The right to education is not designed to be construed as interfering with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set out above and to the requirement that education given in such institutions conforms to minimum standards as may be set by the State Party.[176]

148. The Committee has remarked that the right to education should exhibit the following "interrelated and essential features":[177]

(a) availability – functioning education institutions and programs should be available in sufficient quantity;

(b) accessibility – educational institutions and programs should be physically and economically accessible to all, and without discrimination;

(c) acceptability – the form and substance of education should be acceptable (ie, relevant, culturally appropriate and of good quality); and

(d) adaptability – education should be flexible so it can adapt to changing societies and communities.

11.2 The right to education in federal law

149. There is no federal legislation that expressly enshrines the right to education. It is important to note however, that federal anti-discrimination laws do make it unlawful for an educational authority to

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[174] 'Capacity' of an individual should be assessed by reference to all their relevant expertise and experience: see United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 13: Implementation of the International Covenant on Economic, Social and Cultural Rights,* 21st session, UN Doc E/C 12/1999/10 (8 December 1999) para 19.
[175] ICESCR, art 13(3).
[176] ICESCR, art 13.4.
[177] United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 13: Implementation of the International Covenant on Economic, Social and Cultural Rights,* 21st session, UN Doc E/C 12/1999/10 (8 December 1999), para 6–7.

discriminate against a student on the grounds of age and disability by denying access or limiting access to any benefit provided by the educational authority.[178]

11.3 The right to education in state and territory law

150. The right to education sits more squarely within the states and territories' purview. There is legislation in each state and territory of Australia which makes school attendance compulsory from generally age six to 15.[179]

151. Some aspects of the right to education are expressly recognised in both the Queensland HRA and the ACT HRA.[180] Both enshrine the rights of children to have access to education which is "appropriate to their needs",[181] and the rights of every person to have access to further education and vocational education.

11.4 Why it is important to protect the right to education in a federal Charter

152. Australia's education system is one of the most unequal in the OECD.[182] Inequality of education is particularly exacerbated for students in remote communities who do not have access to the same quality of education as students in urban areas.[183]

153. Many Australian schools and educational institutions do not sufficiently tailor education to cater for particular needs including for students who are in detention, experience or are at risk of homelessness, work in paid employment or have caring responsibilities. Students from non-English speaking backgrounds and Aboriginal and Torres Strait Islander students are also disadvantaged through lack of bilingual or culturally sensitive education.[184] The experience of segregation imposed on children with disability continues, despite non-discrimination laws.

An opportunity to end segregated education as common practice for children with disability

In October 2019, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability released an issues paper into the experience of people with disability in education and learning, and noted that over the last decade, the segregation of children with disability into special education classes

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[178] See *Age Discrimination Act 2004* s 26; *Disability Discrimination Act 1992* (Cth) s 22; *Racial Discrimination Act 1975* (Cth) s 3(1); *Sex Discrimination Act 1984* (Cth) s 21.
[179] See *Education Act 2004* (ACT) s 10(3); *Education Act 2015* (NT) s 38; *Education and Training Reform Act 2006* (VIC) s 2.1.1; *Education Act 1990* (NSW) s 21B; *Education (General Provisions) Act 2006* (QUEENSLAND) s 9; *Education Act 2016* (TAS) s 11(1); *Education and Children's Services Act 2019* (SA) ss 3(1), 68(1); *School Education Act 1999* (WA) s 6(1).
[180] See QUEENSLAND HRA s 36; ACT HRA s 27A
[181] The language "appropriate to the child's needs" concerned some Queensland disability rights advocates, who believed that it could be read as a qualification to justify different education standards for children with a disability: Queensland Human Rights Commission, *Right to Education Factsheet*. An alternative interpretation, is that it provides an additional obligation on public authorities to ensure children's education is appropriately adapted to meet each of their needs, be it because english is not their first language, or mainstream education does not take account of the child's learning difficulties. Any such drafting or explanatory memorandum to a federal Charter would need to make clear that the latter is intended.
[182] Meera Varadharajan, Jack Noone, "Australia's education system is one of the most unequal in the OECD. But we know how to fix it" *The Conversation,* 16 February 2022.
[183] See Australian Human Rights Commission, *Education in Remote and Complex Environments: Submission to the House Standing Committee on Employment, Education and Training* (Submission, 13 February 2020), at page 10.
[184] See Australian Human Rights Commission, *Education in Remote and Complex Environments: Submission to the House Standing Committee on Employment, Education and Training* (Submission, 13 February 2020), at pages 23-28.

or schools had increased.[185] It further noted that students with autism were disproportionately impacted, and that Aboriginal and Torres Strait Islander students with disability were over-represented in segregated schooling.

General Comment 4 No. 4 on Article 24 of the UN Committee on the Rights of Persons with Disabilities makes clear that inclusive education is the international standard by which State Parties must comply. "Inclusion", the General Comment elaborates, means "a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences".[186]

In short, children with disability are entitled to be educated in mainstream classrooms, with all necessary adaptations needed to support their learning. The importance of this is underwritten by not only a rights analysis, but by reference to evidence showing that inclusive education benefits all children, and leads to better education, social and employment outcomes for children with disability.[187]

154. Schools in Australia are funded by both state and federal governments. A federally enshrined right to education should require the federal, state and territory governments to better recognise and address the educational challenges of all students and, in turn, ensure governments are accountable in their legislative and policy decision-making as regards education.

The right to free primary education for asylum seekers

In the ACT, the Human Rights and Discrimination Commissioner raised concerns with the ACT Education and Training Directorate (**ETD**) with respect to its policies requiring international students on various visa subclasses to pay to attend public schools. Among those affected were children and young people granted refugee status, and those seeking asylum while living in Canberra.

The absence of an enforceable federal right to education means that the right to education is not included in the rights that bodies such as the ACT Education and Training Directorate must consider when acting and making decisions – it is only applicable to the interpretation of legislation under section 30 of the ACT HRA. Nonetheless, the Commissioner worked with the Directorate over two years to develop policies to ensure the Directorate's human rights obligations were met, including policies confirming that public education in the ACT was free for asylum seekers.[188]

Under a federal Charter, it would be unlawful for public authorities running Commonwealth programs *not* to consider and apply the right to free education for all young people in Australia. It would also confer an actionable right on parents to take action against public authorities responsible for decisions like this.

[185] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, "Issues Paper: Education and Learning", 30 October 2019.
[186] UN Committee on the Rights of Persons with Disabilities, *General comment No. 4 on Article 24 - the right to inclusive education*, 25 November 2016, CRPD/C/GC/4, [11].
[187] Thomas Hehir, Silvana and Christopher Pascucci, *A Summary of the Evidence on Inclusive Education*, Alana Institute, August 2016.
[188] ACT Human Rights and Discrimination Commissioner, *Priceless: The Right to Education* (28 October 2015) 17.

12. Right to enjoy and benefit from culture

12.1 Introduction to cultural rights

12.1.1 General right to enjoy and benefit from culture

155. Article 15 of ICESCR recognises the right of everyone to take part in cultural life. This right is also reflected in the article 1 right to self-determination which, amongst other things, recognises a person's freedom to pursue their cultural development as a component of self-determination[189] and is related to other civil and political rights, including for example, freedom of religion.[190]

156. The CESCR has characterised the right as "essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world."[191] This is important in Australia, which is home to over 7 million people born overseas, representing 27.6% of our total population.[192]

157. The Committee has identified that the right to enjoy and benefit from culture has three key components:

    (a) the right to access cultural life;

    (b) the right to take part in cultural life; and

    (c) the right to contribute to cultural life.[193]

158. The right to enjoy and benefit from culture includes the right to practice one's religion and speak one's language. Laws, policies, acts or decisions made must not affect the right to enjoy and benefit from culture by, for example, coercing an individual to do something that interferes with their distinct cultural practices or discriminates against them based on cultural practices or religion.

12.1.2 Aboriginal and Torres Strait Islander people's distinct cultural rights

159. The Human Rights Law Centre has benefited from seeing a draft submission to this Committee from the Indigenous Law and Justice Hub, and endorses its recommendation that enforceable cultural rights, which adequately acknowledge the "unique cultural, spiritual, and historical connections that Indigenous people have with their Country and heritage" should be included in a federal Charter.

160. Special attention has been given to the cultural rights of Indigenous people internationally through UNDRIP.[194] As explained in the submission of the Indigenous Law and Justice Hub, "While all people have cultural rights, Aboriginal and Torres Strait Islander peoples cultural rights manifest in specific

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[189] ICESCR, art 1.
[190] ICCPR, art 18.
[191] Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21, 43rd session (21 December 2009) 1.
[192] Australian Bureau of Statistics, *Cultural Diversity of Australia* (20 September 2022) <https://www.abs.gov.au/articles/cultural-diversity-australia>.
[193] Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21, 43rd session (21 December 2009) 4.
[194] See, eg, UNDRIP, arts 5, 8, 25, 29 and 31.

ways based on the elements of their cultural life as custodians of the oldest living culture on earth, such as rights relating to caring for and maintaining relationship to Country".[195]

161. For example, the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully, in the political, economic, social and cultural life of the State[196] or right not to be subjected to forced assimilation or destruction of culture.[197]

162. UNDRIP was developed as an acknowledgement of the systemic oppression, marginalisation and exploitation suffered by Indigenous peoples throughout the world and establishes a universal framework of minimum standards for the survival, dignity and wellbeing of Indigenous peoples.[198]

12.2 The right to culture in federal law

12.2.1 General right to enjoy and benefit from culture

163. At a federal level, the Commonwealth Constitution prohibits Parliament from restricting religion or the free exercise of religion.[199] However, beyond this broad statement, protection of the right to enjoy and benefit from culture is ad hoc and incomplete. Federal laws do not provide a clear or broad commitment to the right as articulated in ICESCR which would see all Australian people have the right to: (a) enjoy their culture, (b) practice their religion, and (c) speak their language.

12.2.2 Aboriginal and Torres Strait Islander people's distinct cultural rights

164. Similarly, with respect to Aboriginal and Torres Strait Islander peoples, ad hoc protections exist under federal native title and heritage protection legislation.[200] For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) allows for the Minister for Environment and Water to make a declaration to protect an area, object or class of objects of particular significance to Aboriginal and Torres Strait Islander peoples' in accordance with their culture and traditions.[201]

165. In March 2022, Senator Lidia Thorpe introduced the *United Nations Declaration on the Rights of Indigenous Peoples Bill 2022* (Cth) (**UNDRIP Bill**). This bill follows the form of Canadian legislation which came into force on 21 June 2021. In essence, the Australian UNDRIP Bill would establish a framework for the implementation of UNDRIP in Australian law, including a right to culture. The Bill is currently before the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs for review.

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[195] Indigenous Law and Justice Hub, "Inquiry into Australia's Human Rights Framework", 1 July 2023, 14.
[196] UNDRIP, art 5.
[197] UNDRIP, art 8.
[198] United Nations, Department of Economic and Social Affairs, *Historical Overview* <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>.
[199] *Commonwealth of Australia Constitution Act 1901* (Cth) s 116 (*Constitution*).
[200] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Native Title Act 1993* (Cth); *Racial Discrimination Act 1975* (Cth).
[201] See *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 11, s 12.

12.3 The right to culture in state and territory law

12.3.1 General right to enjoy and benefit from culture

166. The broad right to enjoy and benefit from culture, distinct to the cultural rights of Aboriginal and Torres Strait Islander peoples, has received very limited consideration across Australian jurisdictions.

167. The Victorian Charter, Queensland HRA and ACT HRA[202] all state, in effect, that people of ethnic, religious or linguistic minorities must not be denied the right, with other members of the minority, to enjoy their culture, practise their religion and use their language.

Using cultural rights to achieve better outcomes in Victoria

Case study 1

In Victoria, a woman with a cognitive disability contested the decision of her guardian to have her moved into a residential facility where no workers spoke her language, understood her cultural and religious beliefs or would prepare food in a way which was required by her religion. The woman and her family wanted her to stay primarily with them in her family home. The Public Interest Law Clearing House assisted her to challenge the guardian's decision. Her advocates argued that the decision breached her Charter rights to the protection of families and children, to enjoy her culture and to freedom of religion. The tribunal decided to revoke the guardianship.[203]

Case study 2

A woman seeking assistance from a crisis accommodation service advised that, as a practising Muslim, she could not reside in a premises with men. The service proceeded to refer her to a backpacker's hostel where most residents were men. The woman felt intimidated and harassed having to share bathrooms and kitchen facilities with men, and it was Ramadan at the time. She contacted the Homelessness Advocacy Service at the Council of Homeless Persons for assistance. The advocacy service contacted the crisis accommodation service raising the woman's cultural and religious rights under the Charter. As a result, the service agreed to find appropriate crisis accommodation and ultimately found her a long-term place in a women's rooming house.[204]

12.3.2 Aboriginal and Torres Strait Islander peoples' distinct cultural rights

168. As well as a general protection for minorities to practice culture, each of the Victorian Charter, Queensland HRA and ACT HRA further detail the cultural rights of Aboriginal and Torres Strait Islander people.[205] These rights make explicit reference to the importance of kinship ties, traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings. Crucially, Aboriginal and Torres Strait Islander people's connection to Country – both land and waters – is explicitly recognised.

169. The Queensland HRA, in recognition of Australia's historical and ongoing colonial history, further states that "Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture".

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[202] ACT HRA, s 27; Victorian Charter, s 19; Queensland HRA s 27.
[203] Public Interest Law Clearing House, *Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (Case Study 77).
[204] Victorian Equal Opportunity & Human Rights Commission, *2014 report on the operation of the Charter of Human Rights and Responsibilities* (June 2015), 31.
[205] ACT HRA, s 27; Victorian Charter, subs 19(2); Queensland HRA, s 28.

170. Beyond this, the primary responsibility for protecting Aboriginal culture and heritage lies in other state and territory legislation. For example, Victoria introduced the *Aboriginal Heritage Act 2006* (Vic), which acknowledges and seeks to protect Aboriginal cultural heritage in line with international human rights standards. Similarly, the Northern Territory has the *Heritage Conservation Act 1991*, which recognises the cultural rights and interests of Aboriginal peoples. The WA Government's beleaguered *Aboriginal Cultural Heritage Act 2021* (WA) came into force on 1 July this year.

12.4 Why it is important to protect cultural rights in a federal Charter

171. The current federal, state and territory frameworks for identifying and protecting cultural rights is piecemeal and incomplete, comprising of several pieces of legislation, each of which employ a different understanding of the scope and meaning of cultural rights and heritage.[206] There often remains no clear avenue for people to take action when their rights have been violated.

172. The Australian government recently recognised "the importance of putting First Nations peoples at the heart of decision-making for issues that affect Aboriginal and Torres Strait Islander peoples".[207] One way of achieving this aim – of the many needed – is to embed cultural rights in a federal Charter. This would be a powerful, and enforceable, way of ensuring the Australian government makes good on its word to respect Aboriginal and Torres Strait Islander culture, heritage and Country. It would also clearly signal that cultural rights are part of the broader human rights framework.

The destruction of Juukan Gorge rockshelters by Rio Tinto

On 24 May 2020, iron ore mining giant Rio Tinto blew up two rockshelters in the Juukan Gorge. The rockshelters held cultural knowledge stretching back 46,000 years, and were of profound cultural and historical significance to the Puutu, Kunti Kurrama and Pinikura (**PKKP**) Traditional Land Owners and Aboriginal and Torres Strait Islander communities. In their words, "The destruction of Juukan 1 [rockshelter] and Juukan 2 [rockshelter] has caused immeasurable cultural and spiritual loss and profound grief to the PKKP People. The PKKP People are deeply hurt and traumatised by the desecration of a site which is profoundly significant to us and future generations."[208]

The parliamentary inquiry found multiple failures led to the destruction of the Juukan caves: in the case of Rio Tinto, the Committee detailed poor management and repeated failures to consult with the PKKP peoples, in breach of various standards. The Committee concluded that it presented "a case study in, at best, corporate incompetence or, at worst, deliberate corporate misdirection leading to the deception of a group of Aboriginal peoples and the destruction of their sacred heritage".[209] The PKKP concluded that "the Juukan Gorge disaster tells us that Rio Tinto's operational mindset has been driven by compliance to minimum standards of the law and maximisation of profit".[210]

The Committee also criticised WA legislation, in particular the *Aboriginal Heritage Act 1972* (WA), for permitting the destruction of the rockshelters. The Committee described it as a "a law with stated good

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[206] In respect to cultural heritage: *Aboriginal Land Rights Act 1976* (Cth); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Protection of Movable Cultural Heritage Act 1986* (Cth); *Native Title Act 1993* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Underwater Cultural Heritage Act 2018* (Cth).
[207] Australian Government, *Response to the destruction of Juukan Gorge* (November 2022), 8.
[208] Puutu Kunti Kurrama People and Pinikura People, *Submission to the Joint Standing Committee on Northern Australia Inquiry into the Destruction Of 46,000-Year-Old Caves at the Juukan Gorge in the Pilbara Region Of Western Australia*, Submission 129, [1] and [2].
[209] Joint Standing Committee on Northern Australia, *Inquiry into the destruction of the 46,000 year old caves at Juukan Gorge in the Pilbara Region of Western Australia*, Final Report (October 2021), [2.126]
[210] Puutu Kunti Kurrama People and Pinikura People, *Submission To The Joint Standing Committee On Northern Australia Inquiry Into The Destruction Of 46,000-Year-Old Caves At The Juukan Gorge In The Pilbara Region Of Western Australia*, Submission 129, [9].

intentions [that] became, in practice, a mechanism through which the disturbance, damage and destruction of both physical and intangible Aboriginal cultural heritage has repeatedly taken place".[211]

Finally, at federal level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) enables Aboriginal and Torres Strait Islander peoples to apply to the Commonwealth Minister of the Environment for protection of threatened significant sites, but only after state and territory avenues have been exhausted. That the Act requires a proactive application (rather than protecting significant sites by default), made it an inadequate avenue for the PKKP people, and the federal government is considering strengthening the federal Minister's powers under the Act.[212]

Crucially, with a federal Charter, any such decisions by the federal Minister will by law need to be consistent with the relevant Aboriginal and Torres Strait Islander people's cultural rights. Any failure to do so could be enforced by the Aboriginal and Torres Strait Islander people concerned through the courts, including through an injunction to stop the destruction of significant sites. As well as a long-overdue overhaul of state, territory and federal cultural heritage laws, a federal Charter could be used as a meaningful avenue for protecting Country.

Additional Rights

13. Right to self-determination

13.1 Introduction

173. The Human Rights Law Centre supports the Indigenous Law and Justice Hub's position that extending a participation duty to Aboriginal and Torres Strait Islander people, while desirable, is fundamentally different to conferring the right to self-determination on Aboriginal and Torres Strait Islander people. The Human Rights Law Centre endorses the Indigenous Law and Justice Hub's recommendation that a federal Charter include a standalone right to self-determination.

174. It's important to acknowledge that no Charter of Rights can undo the effects of colonialism, and adequately honour the right to determination of Aboriginal and Torres Strait Islander people. But it can go some way to restraining ongoing and future interventions by governments into the lives and affairs of Aboriginal and Torres Strait Islander people.

175. UNDRIP is the authoritative standard on how governments across the world should engage with and respect the rights of Indigenous peoples. Australia formally announced its support for the UNDRIP on 3 April 2009, but only after voting against it (together with Aotearoa/New Zealand, Canada and the United States) when it was first adopted by the UN General Assembly in 2007. Its objection was primarily to article 3, which details that Aboriginal and Torres Strait Islander people globally have a right to self-determination.[213]

176. The right to self-determination includes the right for Indigenous peoples globally to "freely determine their political status and freely pursue their economic, social and cultural development". Article 4

[211] Joint Standing Committee on Northern Australia, *Inquiry into the destruction of the 46,000 year old caves at Juukan Gorge in the Pilbara Region of Western Australia*, (Final Report, October 2021) [4.125]
[212] Australian Government response to the destruction of Juukan Gorge, November 2022, 9.
[213] Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (*LexisNexis,* 2009), 719.

elaborates that "in the exercise of their right to self-determination, the indigenous populations have the right to autonomy or self-government in everything that concerns their internal and local affairs as well as ways and means to finance their autonomous activities". Various principles of self-determination are then further articulated throughout UNDRIP.

177. The right to self-determination "is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed".[214] The right to free, prior and informed consent in UNDRIP, included in articles 19 and 32, is inextricably linked to the right to self-determination.[215]

13.2 The right to self-determination under federal law

178. Australia is the only Commonwealth country where there is no treaty between the government and Indigenous peoples. There is no recognition of Aboriginal and Torres Strait Islander people's right to self-determination in Australian federal law.

179. Attempts are being made to address this. As mentioned above, Senator Lidia Thorpe (when of the Greens) introduced the UNDRIP Bill into Parliament, and the Senate Committee on Legal and Constitutional Affairs has now run an inquiry into the application of UNDRIP in Australia.

180. The federal Labor Government is, in the meantime, focused on achieving constitutional change to enshrining a Voice to Parliament. While an important step, it is not mutually exclusive from recognising the right of self-determination as an enforceable human right.

13.3 The right to self-determination under state and territory laws

181. None of the existing state and territory human rights laws recognise the right of Aboriginal and Torres Strait Islander people to self-determination.

182. Each state and territory is at a very different stage of treaty negotiation with Aboriginal and Torres Strait Islander nations within their borders. Victoria has progressed the furthest, with formal treaty negotiations to commence this year. Treaty discussions are underway in Tasmania, and Queensland recently passed a bill to set up a treaty body and truth-telling inquiry. The treaty negotiation process was halted in South Australia in 2018, and has not yet recommenced. In NSW, the process is at the earliest stages after a change in government, and in the Northern Territory the government has been accused of delaying treaty negotiations after abolishing the Treaty Commission. The government in Western Australia has not been taking any steps to progress a state-wide treaty.

13.4 Why it is important to include the right to self-determination in a federal Charter

183. In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz visited Australia. In her report, she observed:[216]

> "While Australia has adopted numerous policies aiming to address the socioeconomic disadvantage of Aboriginal and Torres Strait Islander peoples, **the failure to respect their rights to self-**

[214] James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedom of Indigenous Peoples: The Situation of Indigenous Peoples in Australia, UN Doc A/HRC/15 (4 March 2010) 41.
[215] Expert Mechanism on the Rights of Indigenous People, Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making, UN Doc A/HRC/18/42, (17 August 2011) annex.
[216] *Report of the Special Rapporteur on the rights of indigenous peoples in her visit to Australia*, UN Doc A/HRC/36/46/Add.2, Human Rights Council, 36th Session (8 August 2017), [36].

determination and to full and effective participation is alarming. The compounded effect of those policies has contributed to the failure to deliver on the targets in the areas of health, education and employment in the "Closing the Gap" strategy and has contributed to aggravating the escalating incarceration and child removal rates of Aboriginal and Torres Strait Islanders."

184. As described by Dr Eddie Cubillo, Director of the Indigenous Law and Justice Hub:[217]

"It is already well understood within our communities that when Indigenous peoples make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governance, natural resource management, economic development, health care, and social service provision."

185. A lack of respect for the right to self-determination of Aboriginal and Torres Strait Islander people has led to an extraordinary level of federal government intervention in people's lives. For instance, Aboriginal and Torres Strait Islander people living on homelands continue to be punished for the ongoing consequences of colonisation and by federal Government's own economic policy failings. This in turn sees people living in remote communities caught in a web of stigmatising and discriminatory social policy trials, such as the Government's disastrous remote work-for-the dole program and income management schemes.

186. The process of developing a right to self-determination must, itself, respect the position of Aboriginal and Torres Strait Islander people to advise on this right. As stated by the Indigenous Law and Justice Hub:

"Consultation with Aboriginal and Torres Strait Islander peoples will identify what self-determination should look like in the federal Charter and the institutional architecture supporting it. Consultation must be widespread, culturally appropriate, and deliberate. A Charter which is nurtured through First Nations Communities will be a more effective instrument."

8. As well as including the right to self-determination in a federal Charter, it is important that UNDRIP be implemented through a National Plan, as recommended by the AHRC Position Paper.[218] The Human Rights Law Centre endorses the recommendations made by the North Australian Aboriginal Justice Agency to the Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, for:

    (a) The development by all levels of government of an adequately resourced National Plan that provides for the establishment of a compatibility model for UNDRIP implementation, consistent across each level of government. The compatibility model would provide mechanisms for ensuring that all policies, laws and practices are scrutinised for compliance with UNDRIP.

    (b) The requirement for free, prior and informed consent of Australia's' Indigenous people to be realised in the development of the National Plan and the implementation of the compatibility model at all levels of government. This must include formal mechanisms for consultation with key Aboriginal stakeholders (eg, Traditional Owners, Elders Groups) in the implementation of the UNDRIP, with consultation to be undertaken in a culturally safe manner which pays deference to local cultures and decision-making structures.

[217] Eddie Cubillo, "What Does 'Self-Determination' Mean in the Context of Legal Service Provision for Aboriginal and Torres Strait Islander Legal Services" Thesis (2021), 69.
[218] AHRC Position Paper, 132.

(c) The compatibility model include public reporting of all findings of noncompliance with the principles set out in the UNDRIP.

(d) All levels of government provide a consistent approach to the establishment of an accessible and effective complaints mechanism for noncompliance of policy, laws and practice with the UNDRIP principles, available to both impacted individuals and representative groups.

Recommendation 4

That the government, following the evidence from Aboriginal and Torres Strait Islander experts to the Senate Standing Committees on Legal and Constitutional Affairs' inquiry, introduce a National Plan to implement the United Nations Declaration on the Rights of Indigenous Peoples in Australia.

14. Right to a healthy environment

14.1 Introduction

187. In July 2022, a landmark resolution by the UN General Assembly recognised people have a right to a clean, healthy and sustainable environment.[219]

188. The realisation of all human rights is deeply interwoven with healthy environments. Rights to life, health, housing, water, food, self-determination, culture and non-discrimination among others cannot be realised if there is no environment that allows for it. Our laws need to recognise the deeply interdependent and intertwined relationship between a healthy environment and strong and healthy communities and people – an interdependency long recognised and honoured by Aboriginal and Torres Strait Islander people.

189. Our current laws are failing to protect the environment and in doing so, failing communities. Governments across Australia should be doing everything they can, following the leadership of Aboriginal and Torres Strait Islander peoples, to rectify this in the face of the extraordinary threat that climate change, biodiversity loss and pollution pose to humanity and to human rights.

14.2 The right to a healthy environment under federal law

190. Federal laws do not recognise the right to a healthy, clean and sustainable environment. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides a legal framework to protect and manage unique plants, animals, habitats and places, including heritage sites, marine areas and wetlands.

[219] United Nations General Assembly, *Resolution adopted by the General Assembly on 28 July 2022,* GA Res 76/300, 76th sess, Agenda item 74(b), UN Doc A/RES/76/300 (28 July 2022).

14.3 The right to a healthy environment under state and territory laws

191. In November last year, the ACT government announced it would introduce a right to a healthy environment in the ACT HRA. The drafting for the right has not yet been released, but the ACT government committed to consultation with the ACT community with respect to how it is worded.

192. No other state or territory jurisdiction has yet followed suit.

14.4 Why it is important to include the right to a healthy environment in a federal Charter

193. The Intergovernmental Panel on Climate Change's (**IPCC**) Sixth Assessment Report warns that human-induced climate change will have irreversible impacts, with natural and human systems being pushed beyond their ability to adapt.[220] In our region, the cascading and compounding impacts on natural and human systems have included water shortages and insecurity, heat stress, floods and drought, climate-sensitive air pollution, and natural disasters like bushfires.[221] A recent review of Australia's *Environment Protection and Biodiversity Conservation Act* also warned that the environment in Australia is "not sufficiently resilient" to withstand these effects of climate change, and the environmental trajectory is currently unsustainable.

194. The threats and impacts on Aboriginal and Torres Strait Islander peoples' connection to Country, culture and wellbeing are particularly acute and disproportionate, exacerbating the racialised environmental, social and economic injustices that are the foundation of the Australian settler state. As the Lowitja Institute has explained:[222]

> *Colonisation created disparities in health and wellbeing between Aboriginal and Torres Strait Islander and non-Indigenous Australians through dispossession of traditional land and waterways, suppression of culture and disempowerment. Climate change is compounding these historical injustices, increasing inequities and feelings of powerlessness as communities despair over the desecration of their land, water and seascapes.*

195. The right to a clean, healthy and sustainable environment is inseparable from the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander people. All of them must be protected to fully realise Aboriginal and Torres Strait Islander people's rights. The drafting of the right in a federal Charter, should explicitly recognise this relationship for Aboriginal and Torres Strait Islander people.

196. The right to a healthy environment, in its various permutations, has been recognised by at least 155 countries around the world, through regional human rights treaties and/or national constitutions or laws (representing over 80% of UN member states).[223] The Special Rapporteur on Human Rights and the Environment has noted that in a number of countries that have recognised this right in their

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[220] Intergovernmental Panel on Climate Change, Summary for Policymakers (Sixth Assessment Report, Intergovernmental Panel on Climate Change, 28 February 2022) 13 [B.1] available at <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf>.
[221] See generally Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability (Sixth Assessment Report, Intergovernmental Panel on Climate Change, 28 February 2022) Chapter 11: Australasia available at <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter11.pdf>.
[222] Heal Network & CRE-SRIDE 2021, 'Climate Change and Aboriginal and Torres Strait Islander Health' (Discussion Paper, Lowitja Institute, November 2021), 9 available at <https://www.lowitja.org.au/content/Image/Lowitja_ClimateChangeHealth_1021_D10.pdf>.
[223][223] United Nations General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,* 73rd sess, Agenda Item 74(b) of the preliminary list, UN Doc A/73/188 (19 July 2018), 13 [36].

constitutions, it has become "one of the fundamental principles shaping, strengthening and unifying the entire body of environmental law".[224] As the Special Rapporteur observes, "as a result of the legal recognition of their right to a healthy environment, many millions of people are breathing cleaner air, have gained access to safe drinking water, have reduced their exposure to toxic substances and are living in healthier ecosystems".[225]

197. Australia voted in support of the UN General Assembly's July 2022 resolution, however it remains one of a handful of nations in the world without explicit legal protection for the right to a healthy environment, at either the federal or state/territory level.

15. Equality before the law and non-discrimination

15.1 Introduction

198. The principle of equality provides that individuals are born free and equal before the law, and have access to the same rights without any discrimination. Non-discrimination ensures that no individual is denied the right of equality because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth.

199. Under article 2 of both ICCPR and ICESCR, discrimination of "any kind" is prohibited.[226] This right to equality and non-discrimination includes both positive and negative obligations which create a framework to address direct and indirect forms of discrimination. States have a duty to abstain from engaging in discriminatory practices or actions that undermine the right to equality and to safeguard and promote the realisation and enjoyment of these rights for all individuals.

Australia's international obligations require that:

(a) laws, policies and programs should not be discriminatory;

(b) public authorities should not apply or enforce laws, policies and programs in a discriminatory or arbitrary manner;

(c) the law should provide protection against discrimination; and

(d) laws, policies and programs should promote equality.

15.2 The right to equality before the law and non-discrimination under federal law

200. Federal legislation makes it unlawful to discriminate against people on the basis of protected attributes including age, disability, race, sex, intersex status, gender identity and sexual orientation.

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[224] United Nations General Assembly, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 73rd sess, Agenda Item 74(b) of the preliminary list, UN Doc A/73/188 (19 July 2018), [36], [40].
[225] United Nations General Assembly, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 73rd sess, Agenda Item 74(b) of the preliminary list, UN Doc A/73/188 (19 July 2018), [44].
[226] ICESCR, art 2.2.

The relevant legislation is the *Racial Discrimination Act 1975* (Cth), the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth).

201. Further to this, under the *Australian Human Rights Commission Act 1986* (Cth), people are protected from discrimination on the basis of discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital or relationship status, impairment, mental, intellectual or psychiatric disability, physical disability, nationality, sexual orientation, and trade union activity. The *Fair Work Act 2009* (Cth) also protects employees from adverse actions by their employers on the basis of different protected attributes again.

202. The various federal anti-discrimination laws provide important safeguards for people in certain circumstances, but the regime is complex and deals with different grounds of discrimination in different ways. The difference in treatment is neither principled, nor accommodating of complaints from people experiencing intersectional discrimination (that is, the common experience of people experiencing overlapping forms of discrimination, for instance on the basis of the person's gender *and* race).

15.3 The right to equality before the law and non-discrimination under state and territory law

203. In Australia, the right to equality before the law and non-discrimination is protected under various state and territory laws, each having its own legislation with differing approaches to ensuring equal treatment and providing protection against discrimination. A number of anti-discrimination laws contain an exemption for actions undertaken pursuant to legislation or specific types of instruments (such as modern awards), so that governments may avoid liability under anti-discrimination laws in certain circumstances.[227]

15.4 Why it is important to include the right to equality before the law and non-discrimination in a federal Charter

204. It is widely recognised that federal anti-discrimination laws are limited, fragmented and difficult to use in practice.[228] Federal anti-discrimination laws rely on a fault-based system of individual complaints rather than incorporating measures to promote substantive equality. Attempts to reform the piecemeal laws into one consolidated, federal Act have thus far failed – the Human Rights Law Centre encourages this federal government to modernise and consolidate federal anti-discrimination laws to bring them in line with our international human rights obligations as recommended by the UN Human Rights Committee in 2017.[229]

Recommendation 5

[227] See, eg, *Sex Discrimination Act 1984* (Cth) s 40; *Disability Discrimination Act 1992* (Cth) s 47; *Anti-Discrimination Act 1977* (NSW) s 54; *Equal Opportunity Act 2010* (Vic) ss 6, 75.
[228] UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [17]-[18]; Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws*, December 2021, 20.
[229] UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [18].

That the government consolidate and modernise federal anti-discrimination laws.

205. The importance of having a broad non-discrimination right included in a federal Charter, is aptly summarised by the AHRC: the incorporation of non-discrimination rights, without the incorporation of other human rights, "creates a 'lopsided' legal framework".[230] The current practice of singling out some attributes for protection while ignoring others, and applying different standards of protection to each attribute, can lead to perverse outcomes.

206. A well-known example of this, was the Morrison government's failed *Religious Discrimination Bill 2021* (Cth). The proposed laws went well beyond protecting people of faith from discrimination, to permitting the unfair treatment of women, LGBTIQ+ people and people with disability.[231] The Bill even went so far as to permit people of faith to discriminate against people of a different faith.[232]

207. Human rights are indivisible and have equal status. They cannot be positioned in a hierarchical order. It is important that human rights are not protected in isolation, or that one right is automatically privileged over other rights.

16. Broadening the remit of the Parliamentary Joint Committee on Human Rights

208. In 2022 the Human Rights Law Centre partnered with RMIT University to publish a report assessing this Committee's effectiveness, and reforms to improve it.

209. The full report is annexed to this submission, and recommendations repeated below.

Recommendation 6

That the government strengthen the human rights oversight function of the Parliamentary Joint Committee on Human Rights by:

(a) enact a federal Charter to strengthen and complement the scrutiny regime;

(b) give this Committee guaranteed time for scrutiny for Bills and Legislative Instruments if they propose to limit human rights;

[230] AHRC Position Paper, 48.
[231] Human Rights Law Centre, *Protect, Don't Privilege: Submission on the Religious Discrimination Bills – Second Exposure Drafts* (31 January 2020).
[232] Human Rights Law Centre, *Protect, Don't Privilege: Submission on the Religious Discrimination Bills – Second Exposure Drafts* (31 January 2020), 12.

(c) give this Committee the power to conduct 'own-motion' investigations to address systemic issues which come to its notice, rather than only those into which the government wishes to inquire;

(d) prescribe that Legislative Instruments with implications for human rights be disallowable by default; and

(e) make internal government advice on Australia's international human rights obligations a routine part of legislative development work.

17. Conclusion

210. The power of a federal Charter is in the accumulation of better government decisions, better consultation, better education and better access to justice across sectors, over years, across the country. The Human Rights Law Centre commends the establishment of this parliamentary inquiry and urges the Committee to recommend the introduction of a Charter as a priority in 2024.

211. December 2023 will mark the 75th anniversary of the Universal Declaration of Human Rights. Australians have waited far too long for clear legal implementation of all that is contained in that groundbreaking document. Australia is lagging far behind our peers in failing to ensure comprehensive human rights protections across the country. The Human Rights Law Centre stands ready to provide technical input and assistance to the development of a draft, and offers support to the Committee's further discussions on a draft model Charter at an appropriate time.