

Human  
Rights  
Law  
Centre.

Submission to Parliament of South Australia  
Social Development Committee

1 March 2024

# Human Rights Law Centre

Arif Hussein  
Senior Lawyer

Aalishna Alag  
Seconded Lawyer

Human Rights Law Centre Ltd  
Level 17, 461 Bourke Street  
Melbourne VIC 3000

**T:** + 61 3 8636 4450

**F:** + 61 3 8636 4455

**E:** arif.hussein@hrlc.org.au

**W:** www.hrlc.org.au

## 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.

Follow us at <http://twitter.com/rightsagenda>

Join us at [www.facebook.com/HumanRightsLawCentreHRLC/](http://www.facebook.com/HumanRightsLawCentreHRLC/)

# Contents

|           |   |           |
|-----------|---|-----------|
| <b>1.</b> | <b>Executive summary .....</b>  | <b>5</b>  |
| <b>2.</b> | <b>Recommendations.....</b>   | <b>6</b>  |
| <b>3.</b> | <b>Impact of existing state and territory human rights legislations .....</b>   | <b>7</b>  |
| 3.1       | Key features of the ACT Human Rights Act.....   | 7         |
| 3.2       | Key features of the Victorian Charter .....   | 8         |
| 3.3       | Key features of the Queensland Human Rights Act .....   | 9         |
| <b>4.</b> | <b>Reasons for a South Australian Human Rights Act .....</b>  | <b>10</b> |
| 4.1       | Giving effect to South Australian values .....  | 10        |
| 4.2       | A need for a comprehensive human rights framework in South Australia.....   | 10        |
| 4.3       | A clear framework for balancing competing rights .....  | 11        |
| 4.4       | A South Australian Human Rights Act would improve law-making and government policy .....  | 11        |
| 4.5       | A South Australian Human Rights Act would improve public service delivery and outcomes.....   | 12        |
| 4.6       | A South Australian Human Rights Act would improve human rights knowledge base and culture in South Australia.....                               | 13        |
| <b>5.</b> | <b>How would a South Australian Human Rights Act operate .....</b>  | <b>14</b> |
| 5.1       | What should a South Australian Human Rights Act cover .....   | 14        |
| 5.2       | How should a South Australian Human Rights Act be interpreted .....   | 14        |
| 5.3       | A South Australian Human Rights Act should include a parliamentary scrutiny process for proposed new laws for compliance with human rights..... | 15        |
| 5.4       | A South Australian Human Rights Act should impose a positive duty on public authorities to consider human rights .....                          | 15        |
| 5.5       | The participation duty should be included in the South Australian Human Rights Act.....   | 16        |
| 5.6       | A South Australian Human Rights Act should include an equal access to justice duty .....  | 17        |
| 5.7       | A South Australian Human Rights Act should include a freestanding, direct cause of action.....  | 18        |
| 5.8       | A South Australian Human Rights Act should include non-judicial and judicial remedies .....   | 19        |
| 5.9       | A South Australia Human Right Act should include a broad and inclusive standing .....   | 19        |
| 5.10      | A South Australian Human Rights Act should include an independent statutory human rights authority .....  | 20        |
| <b>6.</b> | <b>Substantive rights to be included .....</b>  | <b>21</b> |
| 6.1       | Civil and political rights .....  | 21        |
| 6.2       | Economic, social, and cultural rights.....  | 26        |
| 6.3       | Right to a healthy environment .....  | 35        |

7. **Conclusion**.....37

# 1. Executive summary

South Australia has a proud history of leading the country on human rights law reform. In 1876, South Australia became the first colony in Australia to legalise trade unions.<sup>1</sup> In 1894 South Australia was the first colony in Australia and the fourth place in the world to grant women, including Indigenous women, the right to vote, and the right to stand for public office.<sup>2</sup> In 1975, South Australia became the first state or territory in Australia to decriminalise homosexuality.<sup>3</sup>

The South Australian government has an opportunity to continue this history.<sup>4</sup> Currently, South Australians' human rights are poorly and inconsistently protected through an incomplete patchwork of laws. We welcome the South Australian Social Development Committee's (the Committee) inquiry into the potential for a South Australian Human Rights Act (South Australian Human Rights Act).

The South Australian government should join the Australian Capital Territory (ACT), Victoria, and Queensland in enacting a Human Rights Act. In doing so, it would have the opportunity to learn from and build on over 20 years of experience from the existing state and territory human rights legislation.

A Human Rights Act would benefit all South Australians; however, these protections are more urgent for marginalised people, including Aboriginal and Torres Strait Islander people, people experiencing homelessness, and people with disability. People who regularly interact with government in order to have their basic needs met stand to gain the most from protections of the rights to health, education and an adequate standard of living. It will help prevent systemic rights abuses experienced by marginalised communities and proactively promote the rights that all South Australians deserve.

---

<sup>1</sup> 'About Parliament' *Parliament South Australia* (Webpage, 23 February 2024) <<https://www.parliament.sa.gov.au/About-Parliament/Timelines-for-SA-Firsts>>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

## 2. Recommendations

1. That the South Australian government introduce a Human Rights Act that proactively promotes and protects human rights in the state, and that is accessible and enforceable.
2. That the South Australian government introduce a Human Rights Act incorporates rights protected by the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as the primary focus of a South Australian Human Rights Act and the right to self-determination, drawing on United Nations Declaration on the Rights of Indigenous People (UNDRIP), and the right to a healthy environment given the urgency of the issues in this moment in South Australia and globally.

### 3. Impact of existing state and territory human rights legislations

The ACT, Victorian and Queensland human rights legislation share similar core features, including preserving parliamentary sovereignty, but also differ in important respects. The common thread underlying the existing state and territory human rights acts is that they are making real improvements to people's lives by improving laws, policies and service delivery, and by empowering people when their rights are threatened or breached. The concrete improvements made to people's lives by the ACT Human Rights Act, the Victorian Charter, and the Queensland Human Rights Act were detailed in a report published by the Human Rights Law Centre in 2022 called *Charters of Human Rights Make Our Lives Better*.<sup>5</sup> South Australia now has the opportunity to benefit from the experiences of legislated human rights protections in each jurisdiction, and introduce a Human Rights Act that benefits all South Australians

#### 3.1 Key features of the ACT Human Rights Act

In 2004, the ACT became the first Australian jurisdiction to legislate a human rights Act, with the *Human Rights Act 2004* (ACT) (**ACT Human Rights Act**). Most of the rights and freedoms protected by the ACT Human Rights Act are drawn from the *International Covenant on Civil and Political Rights 1966* (**ICCPR**). The ACT Human Rights Act also protects the cultural rights of Aboriginal and Torres Strait Islander people drawn from the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).<sup>6</sup> Since coming into force, several amendments have been made to the ACT Human Rights Act aimed at improving scope, access and enforcement of the Act, including; the introduction of a stand-alone cause of action,<sup>7</sup> the addition of the right to education,<sup>8</sup> and the right to work.<sup>9</sup> More recently, the ACT Government is in the process of adding conciliation of human rights complaints to the ACT Human Rights Commission and the right to healthy environment to the ACT Human Rights Act.

Key features of the ACT Human Rights Act include:

- Requiring human rights compatibility statements to accompany proposed legislation;
- Parliamentary scrutiny of proposed bills and subordinate laws by the relevant assembly committee;
- A stand-alone cause of action in the ACT Supreme Court for breaches of human rights;
- An independent statutory human rights authority; and
- Regular mandated reviews.

In providing evidence to the Queensland Legal Affairs and Community Safety Committee during the inquiry into a possible human rights Act for Queensland, the then ACT Human Rights Commissioner, Dr Helen Watchirs stated that the ACT Human Rights Act has made "a genuine

---

<sup>5</sup> Human Rights Law Centre, *Charters of Human Rights make our lives Better: 101 Cases showing how (2022)* <<https://www.hrlc.org.au/reports-news-commentary/2022/6/2/charters-of-human-rights-make-our-lives-better>>.

<sup>6</sup> *Human Rights Act 2004* (ACT), ss 8 – 27.

<sup>7</sup> *Human Rights Act 2004* (ACT), s 40C.

<sup>8</sup> *Human Rights Act 2004* (ACT), s 27A.

<sup>9</sup> *Human Rights Act 2004* (ACT), s 27B.

cultural difference to the way the ACT Legislative Assembly goes about its work."<sup>10</sup> On 1 July 2023, in a submission to the federal Parliamentary Joint Committee for Human Rights Inquiry (**PJCHR**) into Australia's human rights framework, the ACT Human Rights Commission provided that:

"The Introduction of the ACT Human Rights Act twenty years ago has been a positive experience for the ACT...Our experience is that the ACT Human Rights Act reflects a balanced approach to introduction of rights protection and demonstrates an effective way of achieving cultural change, expressing the ACT Government's commitment to international human rights obligation."<sup>11</sup>

### 3.2 Key features of the Victorian Charter

Victoria was the second jurisdiction in Australia to introduce human rights law, with the *Victorian Charter of Human Rights and Responsibilities Act 2006* (VIC) (**Victorian Charter**). The Victorian Charter contains 20 civil and political rights that are mostly drawn from the ICCPR. The Victorian Charter promotes and protects these rights through:

- Requiring human rights compatibility statements to accompany proposed legislation;
- Requiring a dedicated parliamentary committee to scrutinise new Bills with respect to their impact on human rights;
- Providing remedies through court for breaches of human rights;
- Establishing an independent statutory human rights authority; and,
- Mandating review of the operation and effectiveness of the Victorian Charter after 4 years of operation, and again after 8 years of operation.

The last review of the Victorian Charter was conducted in 2015 by Michael Brett Young, former CEO of the Law Institute of Victoria. This review found that the Victorian Charter had helped to promote and protect human rights in Victoria,<sup>12</sup> and made recommendations to strengthen the Charter. The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) has also observed that:

"Since the Charter came into full effect on 1 January 2008, the Commission has seen tangible evidence of its ability to protect the human rights of all people in Victoria. It has improved the quality of government services and decisions, reduced discrimination, resulted in fairer laws and policies, and provided avenues (albeit limited in nature) for redress and remedies when rights are breached."<sup>13</sup>

---

<sup>10</sup> ACT Human Rights & Discrimination Commissioner, *ACT Human Rights Commission*, submission 434.

<sup>11</sup> ACT Human Rights Commission, *Submission to the Parliamentary Joint Committee Human Rights Inquiry into Australia's Human Rights Framework*, 1 July 2023, Available at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/HumanRightsFramework/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions)>.

<sup>12</sup> Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006: Summary report*, September 2015. p. iii.

<sup>13</sup> Victorian Equal Opportunity and Human Rights Commission, *Submission to Australian Human Rights Commission, Free and Equal: An Australian conversation on human rights* (November 2019).

### 3.3 Key features of the Queensland Human Rights Act

Queensland is the most recent jurisdiction in Australia to pass a legislated human rights Act, the *Human Rights Act 2019* (QLD) (**Queensland Human Rights Act**). The Queensland Human Rights Act was modelled on the ACT Human Rights Act and the Victorian Charter, and as such has a similar focus on civil and political rights. However, the Queensland Human Rights Act also includes two social, economic and cultural rights found in the International Covenant on Economic Social and Cultural Rights (**ICESCR**): the right to education, and the right to health services.

Key features of the Queensland Human Rights Act include:

- Requiring human rights compatibility statements to accompany proposed legislation;
- Parliamentary scrutiny of Bills and statement of compatibility for compatibility with human rights by portfolio committee;
- Establishment of an Independent Statutory Human Rights Authority – Queensland Human Rights Commission (**QHRC**);
- Ability to make complaints directly to public entities;
- Ability to make complaints to the QHRC 45 days after complaint is made to the public entity; and
- Mandated review of the Queensland Human Rights Act including consideration of whether additional human rights should be added to the Act.

Despite the Queensland Human Rights Act being operational for only just over 3 years, the QHRC has "observed a growing culture of human rights awareness in the government sector and wider community."

The Queensland Human Rights Act faced its first test months after coming into force, as the Queensland Government started to grapple with the impacts of COVID-19. According to the QHRC, during the global pandemic, the Queensland Human Rights Act provided:<sup>14</sup>

“a consistent, nuanced assessment of public health direction in an evolving environment against international human rights standard” and provided people complaining of human rights breaches with a process to have their concerns considered and, in some cases, resolved quickly. When the QHRC identified trends in complaints, these were relayed informally to the CHO and other key agencies.”<sup>15</sup>

Ultimately, in the context of the pandemic where human rights discourse was often misused by anti-lockdown protesters, the Queensland Human Rights Act provided a framework through which the Government could find the right balance between the competing rights of protecting life and preserving individual freedoms. For example, the QHRC was able to rely on the Queensland Human Rights Act and human rights jurisprudence to provide information to the public that a public health direction requiring people to wear a mask, was not in breach of human rights, but a proportionate response to protect people’s right to life and health.<sup>16</sup>

---

<sup>14</sup> Ibid.

<sup>15</sup> Queensland Human Rights Commission, *QHRC Submission to the PJCHR*, p. 5.

<sup>16</sup> Queensland Human Rights Commission, *Face masks and your rights*, 16 September 2021, accessed at <<https://www.qhrc.qld.gov.au/your-rights/covid-19-and-human-rights/face-masks-and-your-rights>>.

## 4. Reasons for a South Australian Human Rights Act

### 4.1 Giving effect to South Australian values

Human rights are the basic minimum standards of dignity, equality, and respect to which all people are fundamentally entitled. These are the same values that have underpinned South Australia's proud history of socially progressive reforms such as granting the right to vote, legalising trade unions, and decriminalising homosexuality. These reforms not only removed barriers that prevented people from fully participating in society, but also had the impact of communicating and upholding values important to South Australians.

Similarly, a South Australian Human Rights Act would protect and promote a culture of human rights based on respect, fairness, and dignity, and will ensure that people and communities can hold government to account.

### 4.2 A need for a comprehensive human rights framework in South Australia

Right now, in South Australia, human rights are only partially protected through a patchwork of laws. These disparate laws include the *Equal Opportunity Act 1984* (SA) which aims to protect people living in South Australia from discrimination on the basis of their sex, race, disability, age, sexual orientation, and other common grounds, and the *Racial Vilification Act 1996* (SA) which aims to prevent South Australians from racial vilification.

The fragmented nature of the limited existing human rights protections in South Australia does not reflect how people experience human rights breaches within the state, and it leaves many rights unprotected. 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.<sup>17</sup> Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation.

Further, it is important to treat human rights holistically because the enjoyment of many rights is contingent on, and contributes to, the enjoyment of other human rights.<sup>18</sup> 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;<sup>19</sup>
- meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education;

---

<sup>17</sup> 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).

<sup>18</sup> Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2006).

<sup>19</sup> See Keith Ewing, "Judicial Review, Socio-Economic Rights and the Human Rights Act" (January 2009) 7(1) *International Journal of Constitutional Law* 155.

- the right to privacy is 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.

#### 4.3 A clear framework for balancing competing rights

Certain human rights – such as the absolute prohibition on torture or slavery – should not be limited in any circumstances.<sup>20</sup> However, 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; or to safeguard public interests such as the health and safety of others.

A South Australian Human Rights Act would provide an appropriate framework for restrictions on rights (other than absolute rights) that are permissible under international law.<sup>21</sup> It would create a set of transparent rules to navigate our differences. The ACT Human Rights Act, Victorian Charter, and Queensland Human Rights Act all set out a framework for resolving competing rights. For example, under the Queensland Human Rights Act a family of a teenage boy detained in a youth detention centre and concerned about his access to family visits due to the state's COVID-19 quarantine measures aimed at protecting the health of others, use the early intervention and conciliation process under the Act enter into an agreement with the detention centre that allowed the boy to maintain family contact during the pandemic in accordance with protection of families and children under section 26 of the Act.<sup>22</sup>

#### 4.4 A South Australian Human Rights Act would improve law-making and government policy

A South Australian Human Rights Act would ingrain a human rights culture in all levels of government, including law-making, policy development and service delivery, while allowing for complex or unusual cases requiring careful interpretation of human rights principles to be determined by the courts.

The impact of a South Australian Human Rights Act in improving laws and government decision making at an early stage was evident in Victoria during the COVID-19 pandemic, when the Victorian Government introduced certain legislation into Parliament. If passed, the legislation would have allowed officers, authorised under public health legislation, to detain people based on the officer's belief about what the person might do. At the same time, the Victorian Government sought to expand the type of people who could be authorised as officers: under the proposal, a

---

<sup>20</sup> 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.

<sup>21</sup> See e.g. *Human Rights Act 2018* (Queensland) s 23.

<sup>22</sup> Queensland Human Rights Commission, *The First Annual Report on the Operation of Queensland's Human Rights Act*, 2019-20, p.134.

member of the public could have been appointed as an authorised officer and given the power to detain people. The Victorian Government specifically flagged the use of the controversial powers against people experiencing mental illness. The Human Rights Law Centre joined a range of bodies in raising human rights concerns with the legislation. In response to this, a Victorian Parliamentary committee, which reviews proposed legislation for compatibility with the Victorian Charter, also raised human rights questions about the proposal. The Government agreed to amend the legislation and did not proceed with the proposed detention powers.<sup>23</sup>

#### 4.5 A South Australian Human Rights Act would improve public service delivery and outcomes

A South Australian Human Rights Act will ensure people accessing essential public services will have their human rights considered and respected in crucial sectors such as health, education, aged care, and disability services. It would embed a culture within the public service that would aim to promote and protect human rights in South Australia. It would require government service delivery to prioritise the rights of the people being served, not just in the delivery of the service, but also formation and design. 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 South Australian Human Rights Act would have positive impacts on the work, language, and culture of public authorities.<sup>24</sup>

In Queensland, the Queensland Human Rights Act has been used not only assert the rights of individuals during COVID-19, but in doing so, improve access to health care:

*“A hospital required patients to use face masks to prevent the spread of COVID-19, in accordance with official health directions at the time. A pregnant woman asked for an exemption for wearing a mask due to a trauma background, the experience of having her mouth covered caused claustrophobia and panic attacks. When the woman enquired with the hospital about an upcoming appointment, she was told she would not be allowed in without a mask. She was concerned about missing her in-person appointment, particularly because it was a high-risk pregnancy due to her having a number of medical conditions. The complaint was dealt with under the Human Rights Act. The conciliator from the Commission assisted a resolution with the hospital through early intervention. The conciliator checked with the woman whether the use of a PPE face screen might work as an alternative to the mask. The woman advised that this kind of face covering would not affect her mental health in the way a mask does. The hospital then followed up directly with the woman, advising her that her system would now include a note that she is exempt from wearing a mask and that they would provide her with a face shield instead. The woman expressed her gratitude for the matter being*

---

<sup>23</sup> Human Rights Law Centre 2021, *Parliament of Victoria Scrutiny of Acts and Regulations Committee Alert Digest* No.9 of 2020.

<sup>24</sup> Victorian Equal Opportunity and Human Rights Commission, 2014 *Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1.

*resolved swiftly and to her satisfaction and she was able to attend her medical appointment as planned.”<sup>25</sup>*

#### 4.6 A South Australian Human Rights Act would improve human rights knowledge base and culture in South Australia

A human rights culture is essential to creating a society grounded in fairness, dignity and respect. A human rights culture recognises our common humanity, and values substantive equality 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 to building free, just, and peaceful societies for everyone.<sup>26</sup>

During the COVID-19 pandemic we witnessed many public misconceptions about human rights, specifically what they are and how they may be limited in a proportional way. This left many in the public vulnerable to the influence of misguided beliefs. For instance, during the height of the pandemic, some 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 responses, and their ability to save lives. In addition to improving the knowledge base about human rights, state human rights acts can be used in moments like these to educate, clarify and counter harmful, misinformed public narratives.<sup>27</sup> In this instance, the Human Rights Law Centre was able to rely on the Victorian Charter to produce an explainer that outlined that the public health directions requiring us to wear a mask outside of our home was a small limit on our personal freedom for a very good reason – saving lives and protecting public health.<sup>28</sup>

---

<sup>25</sup> Queensland Human Rights Commission, *Queensland Human Rights Commission Annual Report 2020*, page 48.

<sup>26</sup> 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 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].

<sup>27</sup> 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>>.

<sup>28</sup> Ibid.

# 5. How would a South Australian Human Rights Act operate

## 5.1 What should a South Australian Human Rights Act cover

Ideally, a South Australian Human Rights Act should 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* (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*.<sup>29</sup>

As an initial step, the Human Rights Law Centre supports, the incorporation of all ICCPR and ICESCR rights as the primary focus of a South Australian Human Rights Act. In addition to this, given the urgency of the issues in this moment in South 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.

## 5.2 How should a South Australian Human Rights Act be interpreted

A South Australian Human Rights Act should include a provision requiring courts and tribunals to consider international law when interpreting it. This includes expressly mentioning 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 the state courts and help ensure South Australia keeps pace with advances in human rights.

State and territory human rights Acts currently in force all include a version of the following interpretive clauses:

*“All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.”*<sup>30</sup>

We recommend, as the Australian Human Rights Commission (AHRC) has done in its position paper for a federal human rights act,<sup>31</sup> that a South Australian Human Rights Act should include the following interpretive clause:<sup>32</sup>

---

<sup>29</sup> UNGA Res, UN Doc A/76/L.75 (26 July 2022).

<sup>30</sup> *Human Rights Act 2019 (Qld)*, s 48 (1).

<sup>31</sup> Australian Human Rights Commission, *Free and Equal Report*, p. 319, available at <<https://humanrights.gov.au/human-rights-act-for-australia>>.

<sup>32</sup> *Ibid.*

*“All primary and subordinate State legislation is to be interpreted, so far as is reasonably possible, in a manner 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.

Furthermore, to preserve parliamentary sovereignty and consistent with existing state and territory human rights Acts, where legislation or parts of legislation are found to be incompatible with human rights, they should not be invalidated. However, where statutory instruments and regulations are deemed incompatible with human rights, they may be struck down for going beyond what is required by the empowering act.

### 5.3 A South Australian Human Rights Act should include a parliamentary scrutiny process for proposed new laws for compliance with human rights

The current parliamentary scrutiny process in South Australia is very limited, and it does not include scrutiny of proposed new laws for compliance with human rights.

While a Human Rights Act would not prevent the South Australian parliament from passing laws that are inconsistent with human rights, it should require parliamentarians to be transparent and publicly accountable for when they do. As with existing state and territory human rights legislations, the South Australian Human Rights Act 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.

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.

Although the parliamentary scrutiny process is vital, this process alone has had limited success in preventing the passage of laws which undermine people’s human rights.<sup>33</sup> A South Australian Human Rights Act should provide a stronger foundation a parliamentary scrutiny process, as well as ensure that human rights are applied by courts, tribunals and public authorities.

### 5.4 A South Australian Human Rights Act should impose a positive duty on public authorities to consider human rights

One of the biggest impacts a South Australian Human Rights Act could have is to impose a positive duty on public authorities to consider human rights when making decisions, and to act compatibly with human rights. This duty would both reduce the likelihood of human rights being breached and give South Australians the ability to challenge decisions or seek other remedies when public authorities fail to adequately consider human rights or act consistently with them.

‘Public authority’ should be defined relatively broadly, to include:

---

<sup>33</sup> Adam Fletcher, *Human Rights Scrutiny in the Australian Parliament, RMIT University and the Human Rights Law Centre* (December 2022), 24.

- a government agency, department, office, court, tribunal, police force, commission, or statutory corporation) with powers or functions under South Australian law or of which is involved in the delivery of South Australian government programs or performing functions of a public nature; private entities when exercising functions of a public nature;
- individuals when exercising powers or functions under south Australian law, delivering South Australian government programs, or performing functions of a public nature; and
- South Australian Government Ministers.

To preserve parliamentary sovereignty, the South Australian Parliament, except when acting in an administrative capacity, should be excluded from the definition.

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."<sup>34</sup>

When deciding whether other functions are of a "public nature," potential public authorities and courts should take account of several 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.

Some services are inarguably public in nature and should be explicitly listed as they are in the ACT Human Rights Act,<sup>35</sup> including aged-care services; places of detention and correctional centres; disability services; public housing services; public education; and emergency services.

The implications of this positive duty for public authorities are significant: they may be variously 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.<sup>36</sup> However, the impact of the positive duty on public authorities in developing and maintaining a human rights culture in South Australia will be invaluable.

## 5.5 The participation duty should be included in the South Australian Human Rights Act

The participation duty requires authorities to ensure that people who stand to be most impacted by decisions and laws are able to have a say in decision making through effective consultation and participation with decision-makers. In addition to the positive duty to consider and act in accordance with human rights, there should be an overarching participation duty included in a

---

<sup>34</sup> *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>35</sup> *Human Rights Act 2004* (ACT), s 40A(3).

<sup>36</sup> Australian Human Rights Paper, *AHRC Position Paper*, p 22.

South Australian Human Rights Act in recognition of historic inadequate engagement of governments with particular communities and people in Australia, including indigenous people, children and people with disability.

The inclusion of the participation duty in a South Australian Human Rights Act will send a clear message to public authorities that it is not acceptable for policies to be developed without the engagement of those directly affected.<sup>37</sup>

What qualifies as compliant, meaningful participation should be detailed in a South Australian Human Rights Act to give sufficient guidance to public authorities, including objective criteria regarding the timing and means of participation.<sup>38</sup>

The AHRC position paper on a federal Human Rights Act, recommended there be provisions in the federal Human Rights Act elaborating on how indigenous communities, children and people with disability can participate in decisions affecting them.<sup>39</sup> We support this position for a South Australian Human Right Act and recommend that the participation processes for decision impacting indigenous people and communities should be facilitated through the proposed South Australian Voice mechanism, in line with UNDRIP principles,<sup>40</sup> and include a standard of free, prior, and informed consent.<sup>41</sup> With respect to the duty owed to children, a South Australian Human Rights Act should be guided by the CRC and ensure that decision-makers listen to the child and give their views due weight in accordance with their age and maturity when assessing what is in a child's best interests.<sup>42</sup> Participation duty relating to people with disability should be informed by Convention on the Right of Persons with Disabilities (CRPD) and accordingly supported to make their own decisions in all aspects of their lives, no different to able-bodied people with capacity.

## 5.6 A South Australian Human Rights Act should include an equal access to justice duty

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.

---

<sup>37</sup> Free and Equal Report, p. 164.

<sup>38</sup> Ibid.

<sup>39</sup> AHRC Position Paper, p. 24.

<sup>40</sup> UNGA Res, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007) (UNDRIP), art 19; AHRC, Position Paper, Pg. 184

<sup>41</sup> UNGA Res, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007) (UNDRIP), art 19.

<sup>42</sup> *Convention on the Rights of the Child*, art 12(1).

## 5.7 A South Australian Human Rights Act should include a freestanding, direct cause of action

A South Australian Human Rights Act should enable a direct cause of action. This will provide a clear avenue through which people can take action and seek remedy if a public authority's decision infringes, or does not properly take account of, human rights.

The ACT Human Rights Act provides for an independent cause of action which enables people 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.<sup>43</sup>

The concern with including a direct cause of action in Victoria – that it would lead to a proliferation of litigation and burden the State Government with costly proceedings and remedies – has not borne out in the ACT.<sup>44</sup> In South Australia, as in the ACT, the Government can anticipate that the Human Rights Act will most often be treated as an additional basis for judicial review to those routinely used in administrative law.

International best practice from comparable jurisdictions confirm that remedies must be accessible, affordable, timely and effective.<sup>45</sup> By contrast, section 59 of the Queensland Human Rights Act and section 39 of the Victorian Charter requires individuals to establish an existing cause of action before being able to rely on the protected human rights in legal proceedings. The Victorian section is especially, and unnecessarily, complex.

The complexity of establishing a separate cause of action for a breach, particularly for people who may not be able to access legal advice or representation, acts as a barrier to seeking an effective remedy for a breach of their rights. The result is that for some people, access to appropriate remedies for infringements of their rights remains illusory.<sup>46</sup>

This requirement of the Victorian and Queensland human rights legislation also creates an impression that human rights will not be treated with the seriousness and importance that they deserve. This misperception limits the potential impact of the legislation because:

- (a) many people whose rights may have been infringed do not pursue a claim 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.

A direct cause of action would avoid such confusion and create a simpler way for aggrieved individuals to access remedies.

---

<sup>43</sup> Ibid.

<sup>44</sup> Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australian National University, 2, available at <<http://acthra.anu.edu.au/publications/index.html>>

<sup>45</sup> Scottish Human Rights Commission, *Adequate and Effective Remedies for Economic, Social and Cultural Rights* (December 2020).

<sup>46</sup> 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.

## 5.8 A South Australian Human Rights Act should include non-judicial and judicial remedies

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 a South Australian Human Rights Act.

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.

### 1. Non-judicial remedies

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 South Australian Human Rights Act on the judicial system.

### 2. Judicial remedies

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 effective remedy is an essential aspect of protecting and promoting human rights. The desire to avoid court proceedings also functions as an important incentive for public authorities to ensure that human rights breaches do not occur in the first place.

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.

## 5.9 A South Australia Human Right Act should include a broad and inclusive standing

A South Australian Human Rights Act should take a broad and inclusive approach to who can bring proceedings or rely on their rights under an Act, including:

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

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.

#### 5.10 A South Australian Human Rights Act should include an independent statutory human rights authority

An independent statutory human rights authority would be vital to the success of a South Australian Human Rights Act. For the Human Rights Act to achieve its purpose of entrenching, promoting, and protecting human rights in the State, we recommend that the South Australian independent human rights authority should have the following functions:

- Reporting on the operation of the Human Rights Act;
- Public education and community engagement;
- Education and training of public service and government agencies;
- Reviewing laws, regulations and policies for human rights compatibility;
- Independent and mandated audit of government agency practices, and policies for compatibility with human rights;
- Ability to intervene in legal proceedings;
- Complaints handling powers; and
- Pre-enactment scrutiny into the executive's role in developing of policy and the drafting of all legislation (as recommended by the ACT Human Rights Commission in their PJCHR submission).

All jurisdictions in Australia with existing human rights legislation have an independent statutory human rights authority often evolving from and expanding on their initial functions under existing legislation such as state and territory based anti-discrimination legislation. As an example, the Anti-Discrimination Commission Queensland became the Queensland Human Rights Commission with new responsibilities and functions under the Queensland Human Rights Act.<sup>47</sup>

---

<sup>47</sup> Queensland Human Rights Commission, *Queensland Human Rights Commission to the Parliamentary Joint Committee on Human Rights*, p. 3.

## 6. Substantive rights to be included

All of the existing state and territory human rights legislation protects the rights set out immediately below. These rights come primarily from the ICCPR, and to a more limited extent, are drawn from the *International Covenant on Economic, Social and Cultural Rights*.

- Right to equality before the law
- Right to life
- Right to protection from torture and cruel, inhuman, or degrading treatment or punishment
- Freedom from forced work
- Freedom of movement
- Right to privacy and protection of reputation
- Freedom of thought, conscience, religion, and belief
- Freedom of expression
- Right to peaceful assembly and freedom of association
- Right to protection of families and children
- Right to take part in public life
- Cultural rights including distinct Aboriginal and Torres Strait Islander cultural rights
- Right to liberty and security of person
- Right to humane treatment when deprived of liberty
- Right to a fair hearing
- Certain rights in criminal proceedings
- Right not to be punished more than once
- Protection from retrospective laws

In addition, the right to education is protected in the ACT Human Rights Act and Queensland Human Right Act.<sup>48</sup> The right to work and related workplace rights are protected in the ACT Human Right Act. The right to access health services is protected in the Queensland Human Rights Act.<sup>49</sup> As mentioned earlier in this submission, the ACT is in the process of including the right to a healthy environment to the ACT Human Rights Act.

The South Australian government has an opportunity to improve on the existing state and territory human legislations. The South Australian government should incorporate all ICCPR and ICESCR rights a South Australian Human Rights Act. In addition to this, given the urgency of the issues in this moment in South 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.

### 6.1 Civil and political rights

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.

---

<sup>48</sup> Human Rights Act 2019 (QLD), section 36; Human Rights Act 2004 (ACT), Section 27A.

<sup>49</sup> Human Rights Act 2019 (QLD), section 37.

The ICCPR includes:

- (a) the right to liberty and safety;<sup>50</sup>
- (b) the right to life;<sup>51</sup>
- (c) the right to vote;<sup>52</sup>
- (d) freedom of expression;<sup>53</sup>
- (e) right of peaceful assembly;<sup>54</sup>
- (f) the right to a fair trial;<sup>55</sup>
- (g) the right to be treated with humanity in detention;<sup>56</sup> and
- (h) the right to privacy.<sup>57</sup>

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 laws including by the Commonwealth Constitution. As result their protection has, generally, been subject to less controversy. Despite this, over the last decade people in Australia, including South Australia, have experienced a concerning incursion of anti-democratic laws which undermine people's civil and political rights.

By way of example only, this submission considers in further detail the right to equality before the law and non-discrimination, right to privacy, right to vote, and freedom of assembly and expression.

1. Equality before the law and non-discrimination

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.

Under article 2 of both ICCPR<sup>58</sup> and ICESCR,<sup>59</sup> discrimination of "any kind" is prohibited.<sup>60</sup> 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.

Compliance with right to quality and non-discrimination 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;

---

<sup>50</sup> *International Covenant on Civil and Political Rights (ICCPR)*, art 9.

<sup>51</sup> ICCPR, art 6.

<sup>52</sup> ICCPR, art 25.

<sup>53</sup> ICCPR, art 19.

<sup>54</sup> ICCPR, art 21.

<sup>55</sup> ICCPR, art 14.

<sup>56</sup> ICCPR, art 10.

<sup>57</sup> ICCPR, art 17.

<sup>58</sup> ICCPR, art 2.

<sup>59</sup> *International Covenant on Economic, Social and Cultural Rights, (ICESCR)*, art 2.

<sup>60</sup> *Ibid.*

- (c) the law should provide protection against discrimination; and
- (d) laws, policies and programs should promote equality.

The ACT Human Rights Act, Victorian Charter, and the Queensland Human Rights Act include the right to equality before the law, and non-discrimination and has the impact of coordinating the approach to discrimination across all government policy, legislation and service delivery. The inclusion of the right to equality before the law, and positive duty in a Human Rights Act will not only help establish a more coherent approach to rights protection in South Australia, will also ensure that public authorities do not enforce laws, policies and programs in a discriminatory or arbitrary manner.

## 2. Right to Privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence.<sup>61</sup> 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.”<sup>62</sup> Intrusions on privacy can also have a chilling effect on the exercise of other human rights, including freedom of expression and freedom of association.

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.

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

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.

The right to privacy is included in all three existing state and territory human rights legislation. The following is an example of how the right to privacy in the Victorian Charter has assisted individuals:

*“Mr Kaba, a black man, was a passenger in a vehicle that was subject to a random stop and search by the police. The police asked for Mr Kaba’s name and address multiple times. Mr Kaba refused to provide these details and protested about racist harassment. The matter went to the Supreme Court which found that the police acted incompatibly with Mr Kaba’s rights to privacy and freedom of movement by repeatedly demanding his name and address. The police questioning was found to be coercive, in that Mr Kaba was made*

---

<sup>61</sup> ICCPR, art 17.

<sup>62</sup> Ruth Gavison, 'Privacy and Limits of Law'(1980) 89 *Yale Law Journal* 455.

*to feel that he could not choose to leave or refuse to co-operate and was in breach of Mr Kaba's Charter rights and Victoria Police's obligation to act in a way that is proportionate and compatible with human rights.*"<sup>63</sup>

Everyone in South 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 State Government.

And yet right now, there are very limited legally enforceable prohibitions on unlawful or arbitrary interference with a person's privacy in South Australia. In the place of a law protecting South Australians' right to privacy, South Australia has a limited administrative instruction issued by the Cabinet which provides direction to State Government agencies in relation to the collection, storage, and use of personal information.<sup>64</sup> This Cabinet instruction is not legally enforceable and there are no pathways for people who have had their privacy breached, to pursue compensation or other legal remedies. This is an inadequate protection for the right to privacy, and as there is no right to privacy in common law and the *Privacy Act 1988* (Cth) only applies to federal government agencies, South Australians are largely unprotected.

### 3. Freedom of assembly and freedom of expression

The freedom to assemble and the freedom of expression allow people 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.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup>

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

---

<sup>63</sup> Human Rights Law Centre, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities*, pp. 71-72; *DPP v Kaba* [2014] VSC 52. See our case summary here < <https://www.hrlc.org.au/human-rights-case-summaries/random-stops-and-license-checks-by-police-lawful-coercive-questioning-not> >

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58.

<sup>67</sup> *Brown v Tasmania* [2017] HCA 43.

about the application of the implied freedom to non-statutory executive action.<sup>68</sup> 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.

On 18 May 2023, the South Australian Legislative Assembly introduced, and passed, the *Summary Offences (Obstruction of Public Places) Amendment* (the Bill) in response to protest activity in Adelaide which briefly closed traffic.<sup>69</sup> The Bill amended section 58 of the *Summary Offences Act 1953* (SA) (the Act) to, among other things, dramatically increase the maximum penalty for obstructing a public place.<sup>70</sup> The broad scope of the section and the threat of a \$50,000 fine breaches the right of citizens to peacefully protest and undermines South Australian democracy.<sup>71</sup> Although a South Australian Human Rights Act would not prevent a Bill from passing Parliament, it would have mandated the government to address the human rights implications of the Bill through a statement of compatibility and subjected it to human rights scrutiny by a parliamentary committee.

The inclusion of the right to freedom of expression in a South Australian Human Rights Act would also strengthen protection for press freedom, journalists and whistleblowers. 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.<sup>72</sup>

A South Australian Human Rights Act would serve to protect whistleblowers in their whistleblowing to the media, in situations where orthodox whistleblower protections might not apply.<sup>73</sup> 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 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.”<sup>74</sup> 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.<sup>75</sup> 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.”<sup>76</sup>

---

<sup>68</sup> *Cotterill v Romanes* [2023] VSCA 7 (8 February 2023).

<sup>69</sup> *Ibid.*

<sup>70</sup> Human Rights Law Centre, *South Australia Anti-Protest Laws* (Webpage, 23 February 2024)

<<https://www.hrlc.org.au/reports-news-commentary/sa-anti-protest-laws>>

<sup>71</sup> Amnesty, *Civil Society condemns South Australia’s Anti-Protest Bill*, (Webpage, 23 February 2024)

<<https://www.amnesty.org.au/civil-society-condemns-south-australias-anti-protest-bill/#:~:text=The%20Bill%20passed%20the%20lower,or%20jailed%20for%20three%20months.>>

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> 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.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

#### 4. Right to vote

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;<sup>77</sup> and the right to vote for all women in South Australia, won in 1894.

Although voting is currently compulsory in South Australia, young people, Aboriginal communities, people experiencing homelessness, culturally and linguistically diverse communities and people with disability still experience barriers to participating in elections.<sup>78</sup> The inclusion of the right to vote in the Human Rights Act would provide an avenue for redress for those facing unacceptable barriers to voting, such as language and accessibility barriers.

## 6.2 Economic, social, and cultural rights

#### 5. Approach to economic, social, and cultural rights in a South Australian Human Rights Act

Economic, social and cultural rights represent the minimum standards that need to be respected for people to live a dignified life. The South Australian Council of Social Services (SACOSS) has reported that 60,660 households in the State are living below the poverty line.<sup>79</sup> This represents 9% of all South Australian households, or 131,945 people, including 22,350 children.<sup>80</sup>

Introducing a Human Rights Act in South Australia is critical to ensuring people marginalised groups in our community who are most at risk of having their economic, social and cultural rights breached by public authorities are able to hold them to account. Enshrining these rights in a South Australian Human Rights Act will also lead to policy development and decision-making by the 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 the State.

Many economic, social, and cultural rights should be familiar to Australian law makers. Some socio-economic rights, like the right to work, join and form trade unions and feel safe at work were protected by statute long before civil and political rights were recognised.<sup>81</sup>

Others include the right to:

- (a) an adequate standard of living, including adequate housing;<sup>82</sup>

---

<sup>77</sup> Only in 1965 were Aboriginal and Torres Strait Islander people granted the right to vote in Queensland.

<sup>78</sup> Electoral Commission South Australia, *2022 State and by Election Reports* (Webpage, 23 February 2024) <<https://ecsa.sa.gov.au/html/publications/2022-State-and-by-Election-Reports/chapter-3.html>>

<sup>79</sup> Commissioner for Children and Young People, *Poverty Project* (Website, 23 February 2024) <<https://www.cyp.com.au/poverty-project/>>.

<sup>80</sup> Ibid.

<sup>81</sup> Rights and Resources South Australia, *Final Report* available at <[https://www.rightsnetworksa.com/files/ugd/8cf77c\\_96fe06184b184ffbc053d1d93524c06.pdf](https://www.rightsnetworksa.com/files/ugd/8cf77c_96fe06184b184ffbc053d1d93524c06.pdf)>

<sup>82</sup> ICESCR, art 11.

- (b) the enjoyment of the highest attainable standard of physical and mental health;<sup>83</sup>
- (c) take part in cultural life;<sup>84</sup>
- (d) just conditions of work and wages sufficient to support a minimum standard of living;<sup>85</sup>
- (e) equal remuneration for equal work and equal opportunity for promotion;<sup>86</sup> and,
- (f) free primary education for all and accessible education at all levels.<sup>87</sup>

By way of example only, this submission considers in further detail the rights to health, education, housing.

## 6. Obligation under ICESCR

In order for the South Australian government to properly protect and fulfill economic, social and cultural rights contained in ICESCR, it must:<sup>88</sup>

- (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.<sup>89</sup>

ICESCR also guarantees non-discrimination in the exercise of each of the economic, social and cultural rights.<sup>90</sup>

There are 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."<sup>91</sup> 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.<sup>92</sup> By law, Australia must take steps to realise these minimum core obligations immediately.
- (b) Progressive realisation: at international law, this requires governments to take appropriate steps to fully realise ICESCR rights and make continual progress with respect to these

---

<sup>83</sup> ICESCR, art 12.

<sup>84</sup> ICESCR, art 15.

<sup>85</sup> ICESCR, art 7.

<sup>86</sup> ICESCR, art 7(a)(i) & (c).

<sup>87</sup> ICESCR, art 13.

<sup>88</sup> 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].

<sup>89</sup> 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].

<sup>90</sup> CESCR Committee, *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (July 2009) [7].

<sup>91</sup> 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].

<sup>92</sup> 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>>.

rights over time.<sup>93</sup> Any steps that deliberately diminish ICESCR rights would be considered contrary to the principle of progressive realisation and would need to be appropriately justified.

- (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.

## 7. Economic, social and cultural rights are justiciable

A key barrier to the recognition of ICESCR rights in Australia has been concern with framing the rights in a way that ensures they are justiciable. Arguments against ICESCR rights were primarily preoccupied with concerns that judicial review of progressive realisation obligations would – impermissibly – require courts to determine matters that relate to the appropriate allocation of resources.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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 human rights legislation;
- 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.<sup>97</sup>

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.”<sup>98</sup>

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

---

<sup>93</sup> ICESCR, art 2.1.

<sup>94</sup> 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].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*, p. 15-16 [33].

<sup>98</sup> *Ibid.*, p. 9 [20].

economic, social and cultural rights are immediately applicable and capable of judicial application. Successful adjudication of these rights has taken place now for decades, debunking the assertion that ICESCR rights cannot be legitimately justiciable.<sup>99</sup> Courts have a role to play in actively monitoring and assessing whether states are fulfilling their obligations to protect and promote ICESCR rights.

The AHRC in its Position Paper on a Human Rights Act have also provided that progressive realisation principles are not inherently non-justiciable.<sup>100</sup>

A 2010 review of the ACT Human Rights Act 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.<sup>101</sup> 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.<sup>102</sup> The ACT Human Rights Act was amended in 2012 to include the right to education,<sup>103</sup> and in 2020 to include the right to work.<sup>104</sup>

In accordance with the recommendations of the 2010 report, the ACT Human Rights Act distinguishes between immediate and progressive obligations. The ACT Human Rights Act requires the ACT 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.<sup>105</sup> However, the ACT Government is not obliged to take steps to progressively realise the right to education in full.

The rights to education and healthcare were included in the Queensland Human Rights Act when the bill first passed in 2019,<sup>106</sup> again giving the rights a narrow expression.

## 8. Right to healthcare

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

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:

---

<sup>99</sup> 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).

<sup>100</sup> Australian Human Rights Commission, *A Human Rights Act for Australia* (Position Paper, December 2022), 128.

<sup>101</sup> 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].

<sup>102</sup> *Ibid* 121 [9.12].

<sup>103</sup> *Human Rights Amendment Act 2012* (ACT).

<sup>104</sup> *Human Rights (Workers Rights) Amendment Bill 2019* (ACT).

<sup>105</sup> *Human Rights Act 2004* (ACT), s 27A(3).

<sup>106</sup> Queensland Human Rights Commission, *Right to Education, Fact Sheet (July 2019)*, (Website, 23 February 2024) <[https://www.qhrc.Queensland.gov.au/\\_data/assets/pdf\\_file/0006/19905/QHRC\\_factsheet\\_HRA\\_s36.pdf](https://www.qhrc.Queensland.gov.au/_data/assets/pdf_file/0006/19905/QHRC_factsheet_HRA_s36.pdf)>

- (a) is not constrained to the right to access health care;<sup>107</sup>
- (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;<sup>108</sup> and
- (c) in all its forms and levels contains the interrelated and essential elements of availability, accessibility, acceptability, and of good quality.<sup>109</sup>

Core obligations under ICESCR<sup>110</sup> 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.<sup>111</sup> It also includes the right to control one's health and body, including sexual and reproductive freedom.<sup>112</sup>

Neither the ACT Human Rights Act nor the Victorian Charter include the right to health. The Queensland Human Rights Act 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.<sup>113</sup> Despite this narrow expression of the right to health, the Queensland Human Rights Act has been effective. As an example, a human rights complaint by a man about the impact of his detention in hotel quarantine on his mental health, resulted in Queensland Health arranging for mental health services to be available to him via telehealth.<sup>114</sup>

## 9. Right to an adequate living standard

Article 11 of the ICESCR provides that every person has the right to adequate living standards, including food, water, clothing and housing. 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.<sup>115</sup>

The elements of the right to adequate housing in international law is detailed in the CESCR's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions. The general comments clarify that the right does not mean that people can assert a right to housing on demand, but, rather "covers measures that are needed to prevent homelessness,

---

<sup>107</sup> 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.

<sup>108</sup> Ibid, art 7.

<sup>109</sup> Ibid.

<sup>110</sup> 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<sup>157</sup> and article 16 of the African Charter on Human and Peoples' Rights.

<sup>111</sup> OHCHR, *The Right to Health (Fact Sheet no 31, June 2008)*, (Website, 23 February 2024) <<https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf>>.

<sup>112</sup> 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].

<sup>113</sup> Section 37 does not appear to have been the subject of meaningful judicial consideration.

<sup>114</sup> Queensland, Human Rights Commission, *The First Annual Report on the Operation of Queensland's Human Rights Act 2019-20*, p. 110.

<sup>115</sup> Australian Human Rights Commission, *AHRC Position Paper*, p. 371.

prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalised groups, ensure security of tenure to all, and guarantee that everyone’s housing is adequate.”<sup>116</sup>

The right to adequate standard of living is important for everyone but has particular importance for women and children fleeing family violence, Aboriginal and Torres Strait Islander people, people with disability and people seeking asylum due to existing inequalities experienced by these groups.

The right to adequate standards of living is not protected in any of the existing state and territory human rights legislation. The Human Rights Law Centre recommends that the right to housing should be protected in a South Australian Human Rights Act as 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.

## 10. Right to education

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”.<sup>117</sup> 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.

The full realisation of the right to education under the ICESCR includes:<sup>118</sup>

- primary education is to be compulsory and free to all;<sup>119</sup>
- 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;<sup>120</sup>
- 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

---

<sup>116</sup> Ibid.

<sup>117</sup> 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.

<sup>118</sup> ICESCR, art 13.2.

<sup>119</sup> 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.”

<sup>120</sup> 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.

- development of a system 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.

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.<sup>121</sup>

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.<sup>122</sup>

The Committee has remarked that the right to education should exhibit the following “interrelated and essential features”:<sup>123</sup>

- availability – functioning education institutions and programs should be available in sufficient quantity;
- accessibility – educational institutions and programs should be physically and economically accessible to all, and without discrimination;
- acceptability – the form and substance of education should be acceptable (i.e., relevant, culturally appropriate and of good quality); and
- adaptability – education should be flexible so it can adapt to changing societies and communities.

The right to education is not protected by the Victorian Charter, but some aspects of the right to education are expressly recognised in both the Queensland and ACT Human Rights Acts.<sup>124</sup> The ACT Human Rights Act also includes the “right to have access to further education and vocational and continuing training.”<sup>125</sup> The right to education in the ACT Human Rights Act is limited to two ‘immediately realisable aspects’:

- everyone is entitled to enjoy these rights without discrimination, and
- parents or guardians may choose non-government schooling for their child.

According to a recently published report by Newcastle University on the right to education, the inclusion of the right to education in the ACT Human Rights Act has resulted in improvement to accessing this right for people residing in the ACT including for refugees.<sup>126</sup> The report states that:

*“In 2013, concerns were brought to the ACT Education and Training Directorate regarding policies which charged fees to international students on a number of visa subclasses. The students impacted by these policies included students granted refugee status, and students seeking asylum. The Human Rights and Discrimination*

---

<sup>121</sup> ICESCR, art 13(3).

<sup>122</sup> ICESCR, art 13.4.

<sup>123</sup> 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.

<sup>124</sup> See Queensland Human Rights Act, s 36; *Human Rights Act 2004* (ACT), s 27A.

<sup>125</sup> *Human Rights Act 2004* (ACT), s 27A(1)-(2).

<sup>126</sup> Newcastle University, *Right to Education Report*, p. 22.

*Commissioner worked with the Directorate over two years to develop new policies that better reflected human rights obligations under the Human Rights Act and the Convention on the Status of Refugees.”<sup>127</sup>*

Given the importance of education in allowing people to participate in society, in eliminating poverty, ending exploitation, and empowering marginalised groups, it is important that the right to education is included in a South Australian Human Rights Act. f

#### 11. Right to enjoy and benefit from culture

Article 15 of ICESCR recognises the right of everyone to take part in cultural life. This right is also reflected in 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<sup>128</sup> and is related to other civil and political rights, including for example, freedom of religion.<sup>129</sup>

The CESCR 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.<sup>130</sup>

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.

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.”<sup>131</sup>

Special attention has been given to the cultural rights of indigenous people internationally through UNDRIP.<sup>132</sup> This is in recognition that indigenous people's “cultural rights manifest in specific 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.”<sup>133</sup>

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

---

<sup>127</sup> Ibid.

<sup>128</sup> ICESCR, art 1.

<sup>129</sup> ICCPR, art 18.

<sup>130</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21, E/C.12/GC/21*, 43rd session (21 December 2009) 4.

<sup>131</sup> Ibid.

<sup>132</sup> See, e.g., UNDRIP, arts 5, 8, 25, 29 and 31.

<sup>133</sup> Indigenous Law and Justice Hub, “*Inquiry into Australia's Human Rights Framework*”, 1 July 2023, 14.

and cultural life of the state<sup>134</sup> or right not to be subjected to forced assimilation or destruction of culture.<sup>135</sup>

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.<sup>136</sup>

The Victorian Charter,<sup>137</sup> Queensland Human Rights Act<sup>138</sup> and ACT Human Rights Act<sup>139</sup> all include the cultural rights of Aboriginal and Torres Strait Islander people, making explicit reference to the importance of kinship ties, traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.<sup>140</sup> Crucially, Aboriginal and Torres Strait Islander people's connection to Country – both land and waters – is explicitly recognised.

Additionally, Victorian Charter,<sup>141</sup> Queensland Human Rights Act<sup>142</sup> and ACT Human Rights Act<sup>143</sup> 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.

A South Australian Human Rights Act should give effect to international law relating to cultural rights, to protect and promote the cultural rights of South Australia's increasingly diverse population, and to recognise and proactively promote and protect the distinct cultural rights of aboriginal people in South Australia.

## 12. Right to self-determination

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.<sup>144</sup>

The right to self-determination “is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.”<sup>145</sup> The right to free, prior

---

<sup>134</sup> *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, art 5.

<sup>135</sup> UNDRIP, art 8.

<sup>136</sup> United Nations, Department of Economic and Social Affairs, *Historical Overview* (Website, 23 February 2024) <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>>.

<sup>137</sup> Victorian Charter, subs 19(2).

<sup>138</sup> Queensland Human Rights Act, s 28.

<sup>139</sup> *Human Rights Act 2004* (ACT), s 27.

<sup>140</sup> *Human Rights Act 2004* (ACT), s 27; Victorian Charter, subs 19(2); Queensland Human Rights Act, s 28.

<sup>141</sup> Victorian Charter, s 19.

<sup>142</sup> Queensland Human Rights Act, s 27.

<sup>143</sup> *Human Rights Act 2004* (ACT) s 27.

<sup>144</sup> Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009), p. 719.

<sup>145</sup> James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: The Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15 (4 March 2010) 41.

and informed consent in UNDRIP, included in articles 19 and 32, is inextricably linked to the right to self-determination.<sup>146</sup>

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.”<sup>147</sup> Article 4 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.

Aboriginal communities in South Australia continue to experience the negative consequences of colonisation on their culture, language and continue to experience socioeconomic disadvantage and poor outcomes in areas such as health and education.

The Human Rights Law Centre welcomes the Government of South Australia’s commitment to a state-based implementation of the Uluru Statement from the Heart including Voice, Treaty and Truth,<sup>148</sup> and the steps taken to establishing a South Australian Voice with election elections to form the Voice being held on 16 March 2024.

In addition to the full implantation of Uluru Statement from the Heart in South Australia, the Human Rights Law Centre recommends that the South Australian government fully implement UNDRIP right to self-determination. This implementation should be informed by consultation with aboriginal communities.

### 6.3 Right to a healthy environment

Human rights cannot be realised without a healthy environment. 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.

Australia is on an unsustainable environmental trajectory.<sup>149</sup> Climate change, pollution and biodiversity loss are well-recognised as being urgent and compounding threats to human wellbeing and human rights. Climate change predictions for South Australia indicate that there will be more very hot days, heat waves will be longer, and there will be more droughts and more dangerous fire weather. The health impacts from these events are particularly acute for already marginalised communities, particularly Aboriginal communities in the northernmost part of the State.<sup>150</sup>

---

<sup>146</sup> 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.

<sup>147</sup> UNDRIP, preamble.

<sup>148</sup> Attorney General’s Department, *First Nations’ Voice* (Website, 23 February 2024) <<https://www.agd.sa.gov.au/first-nations-voice>>

<sup>149</sup> Professor Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, October 2020), viii.

<sup>150</sup> Environment Protection Authority, *The South Australian State of the Environment Summary Report* (Report, December 2023) 12.

At the international level, this interdependence was recognised over 50 years ago in the Stockholm Declaration, where it was declared that the environment was essential to “well-being and to the enjoyment of basic human rights”, and that humanity has a “fundamental right to...an environment of a quality that permits a life of dignity and well-being”, which must be safeguarded for present and future generations.<sup>151</sup>

Currently, over 80 percent of UN member states (156 of 193) legally recognise the right to a clean, healthy, and sustainable environment (right to a healthy environment) in national constitutions, national legislation and/or regional treaties.<sup>152</sup> This right has also been recognised both by the UN Human rights Council in 2021,<sup>153</sup> and the General Assembly in 2022.<sup>154</sup> Australia was one of 161 countries that voted in favour of recognising this right in the General Assembly, however it remains one of a handful of nations in the world without explicit legal protection for the right to a healthy environment.<sup>155</sup>

Federal laws do not recognise the right to a healthy environment. The Human Rights (Healthy Environment) Amendment Bill 2023 was introduced to the ACT Legislative Assembly on 26 October 2023, which provides for express statutory protection for the right to a healthy environment in the ACT’s human rights framework. No other state or territory in Australia recognises this right.

Everyone in the South Australian community will benefit from the right to a healthy environment because all people rely on it for the necessities of life and enjoyment of their rights.

### 13. Prioritising First Nations people’s expertise

Aboriginal and Torres Strait Islander people around Australia have for so long fought for Australian Governments to recognise and respect their care of the land, waters, and ecosystems of Australia.<sup>156</sup> The failure of governments to recognise and respect Aboriginal and Torres Strait Islander peoples’ rights, knowledge and practices is a key cause of the climate and environmental challenges that we face today and will continue to limit our ability to combat these challenges if it doesn’t change.<sup>157</sup>

In this context, we urge the South Australian government to ensure that it develops a definition of the right to a healthy environment in collaboration with Aboriginal and Torres Strait Islander people in a way that ensures respect for their rights to land, water, culture, and self-determination.

---

<sup>151</sup> United Nations, *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14 (16 June 1972) 3.

<sup>152</sup> United Nations Office of the High Commissioner, A/77/284: *The human right to a clean, healthy and sustainable environment: a catalyst for accelerated action to achieve the Sustainable Development Goals* (Thematic Report, 10 August 2022), [25].

<sup>153</sup> Ibid.

<sup>154</sup> 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).

<sup>155</sup> Ibid.

<sup>156</sup> Dr Terri Janke et al, *State of the Environment Report* (19 July 2022) 10 (‘State of the Environment Report’).

<sup>157</sup> The Lowitja Institute, Submission to the ACT Justice and Community Safety Directorate (September 2022).

#### 14. International guidance

The UN Special Rapporteur on Human Rights and the Environment (**Special Rapporteur**) has indicated six substantive elements of the right to a healthy environment. These are: clean air, a safe climate, access to safe drinking water and sanitation, healthy biodiversity and ecosystems, toxic free environments in which to live, work and play, and healthy and sustainably produced food.<sup>158</sup>

The Special Rapporteur has also identified procedural elements of the right, which relate to accessing information, participation in decision-making and access to justice. Additionally, the Special Rapporteur has noted that the obligations of non-discrimination and equality apply to the equal enjoyment of human rights.<sup>159</sup>

#### 15. The right to healthy environment should be broadly defined

The Human Rights Law Centre recommends that the right be framed at a broad principled level, consistent with the UN General Assembly's recognition of the right as being to a "clean, healthy and sustainable environment".<sup>160</sup> Ultimately, detailing specific aspects of the right to a healthy environment is likely to limit the application of this right in the future, in ways that may be detrimental to human rights and the environment

#### 16. The right to healthy environment should be enforceable

A South Australian Human Rights Act should provide for access to justice, an essential procedural element of the right to a healthy environment. This is critical to embedding the right into communities in a substantive way and to increasing awareness of human rights and responsibilities across the community.

## 7. Conclusion

The Human Rights Law Centre welcomes this inquiry into whether South Australia should join the ACT, Victoria, and Queensland in enacting a Human Rights Act. This inquiry presents a once in a decade opportunity to recommend the introduction of Human Rights Act for South Australia.

The Human Rights Act would benefit everyone in South Australia and would result in better government decisions, better consultation, better education and better access to justice across sectors. The Human Rights Act will also build on the state's proud history of progressive reforms. The Human Rights Law Centre stands ready to provide oral submissions should it be useful to the Committee.

---

<sup>158</sup> 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), 10.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.