



Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

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Dear Committee Members and Secretariat staff,

We thank the Parliamentary Joint Committee on Human Rights for inquiring into Australia's human rights framework and welcome the opportunity to make this submission. The Centre for Law and Social Justice was established in 2022 as a dynamic hub for social justice research, policy engagement and law reform. Based in the School of Law and Justice at the University of Newcastle, we draw on an extensive history of clinical legal education and community engagement with justice issues.

The Centre has and continues to undertake educational initiatives to promote human rights awareness in the community. For example, Director Amy Maguire has worked with 70 students in the course International Human Rights Law in Semester 1, 2023, to develop law reform submissions focused on contemporary Australian human rights issues, using the terms of reference of this inquiry as inspiration for students learning how to translate legal research into advocacy for law reform. Some of these submissions have been submitted to this inquiry by the student authors.

The Centre for Law and Social Justice is a member organisation of the Charter of Rights campaign coalition and endorses the recommendation and submission made by the coalition. The Centre is also engaged in collaborative research with the Australian Human Rights Commission and commends the recommendations contained in the Commission's 2022 position paper, 'A Human Rights Act for Australia'.

This submission addresses the following matters:

1. National human rights law reform, with focus on;
 - a. Australia's human rights framework, including the need for a national Human Rights Act; and
 - b. Business and human rights; and

2. Human rights for groups with particular vulnerabilities, namely;
 - a. First Nations peoples;

- b. Refugees and Asylum Seekers;
- c. LGBTQI+ people; and
- d. Persons with disability.

1. National Human Rights Law Reform

1a. Australia's human rights framework

Human rights in Australia are at a crossroads. Australia projects itself globally as a human rights leader with a strong history of commitment to the United Nations (UN) human rights agenda as expressed in treaties and institutions including the Human Rights Council.¹ Recent achievements include an anti-modern slavery reporting system² and an agenda for the global abolition of capital punishment.³ Australia is 'a vibrant multicultural democracy with a strong record of protecting civil and political rights.'⁴ Yet, with no charter of human rights, Australia is an outlier among liberal democracies,⁵ and it attracts persistent and well-founded critique for its human rights practice, particularly in relation to First Nations peoples and refugees.⁶ Ambivalent recent engagements with the international human rights system have raised concerns that Australia has regressed in human rights terms.⁷ In this context, it is timely for the Committee to consider comprehensive reform of Australia's human rights system. Polls have shown that an overwhelming majority of Australians support a Human Rights Act.⁸ The Government should therefore work to realise the wishes of the Australian population in this regard.

Human Rights in Australia – a 'patchwork quilt'

Australia may not have a human rights charter, but it is not devoid of legal protections. Instead, miscellaneous laws and principles in statute and common law offer piecemeal protection to some human rights interests.⁹ This 'patchwork quilt' of a human rights system includes a few constitutional rights (such as an implied, but limited, freedom of political communication), anti-discrimination laws, some scope for judicial interpretation aligned with Australia's international legal obligations,¹⁰ and

¹ Department of Foreign Affairs and Trade, *Foreign Policy White Paper* (2017).

² McGaughey, F, 'Behind the scenes: reporting under Australia's Modern Slavery Act' (2021) 27 *Australian Journal of Human Rights* 20.

³ Department of Foreign Affairs and Trade, *Australia's strategy for the abolition of the death penalty* (2018).

⁴ Human Rights Watch, *World Report* (2022).

⁵ Williams & Reynolds 2017

⁶ Williams, G & D Reynolds, *A Charter of Rights for Australia* (4th ed, UNSW Press, 2017).

⁷ Charlesworth, H, 'Australia in the UN Human Rights Council through the eyes of Andrew Byrnes and Andrea Durbach' (2021) 27(3) *Australian Journal of Human Rights* 575; de Kretser, H, 'Major UN Review of Australia's Human Rights Record' (2021) 95 *Australian Law Journal* 323.

⁸ Amnesty International, 'Report: Amnesty International Australia Human Rights Barometer 2022' (online, 5 September) <<https://www.amnesty.org.au/report-amnesty-international-australia-human-rights-barometer-2022>>

⁹ Bagaric, M, P Faris & T Alexander, *Australian Human Rights Law* (CCH, 2011).

¹⁰ McBeth, A, J Nolan & S Rice, *The International Law of Human Rights* (2nd ed, OUP, 2017).

parliamentary scrutiny processes for proposed legislation.¹¹ In its report to the UN Human Rights Council in advance of the Third Cycle of the Universal Periodic Review, Australia described its existing laws and institutions as effective in protecting human rights and supporting ‘robust public debate of human rights issues.’¹²

At the global level, Australia has engaged with the international legal framework since the UN Charter was adopted in 1945. Former Foreign Minister H.V. Evatt helped to draft the Charter and the Universal Declaration of Human Rights. Further, Australia held the first Presidency of the UN Security Council (UNSC) and has participated in 62 UN peacekeeping operations and is the UN’s 11th largest donor.¹³ Australia has served five terms on the UNSC and three terms on the UN’s Economic and Social Council. It has adopted the seven ‘core’ human rights treaties. In 2017, Australia published a Foreign Policy White Paper asserting that the international order relies on participation in international institutions.¹⁴ This position informed Australia’s campaign for a first-ever term on the Human Rights Council (HRC), which it served from 2018-2020.¹⁵

Australia’s bid for election to the HRC was, however, somewhat incongruous with other developments since the turn of the century. In 2000, the UN Committee on the Elimination of Racial Discrimination criticised Australia’s record on race relations. The Committee’s report was met with open hostility by the Government, with then Attorney-General Daryl Williams calling it ‘unacceptable’ and describing Australia as a ‘model member of the UN.’¹⁶ This combative attitude to international scrutiny has extended to critique of Australia’s practice in relation to asylum seekers. In 2015, when a UN Special Rapporteur found that Australia’s offshore detention policy for asylum seekers travelling by boat failed to protect people from torture, then Prime Minister Tony Abbott said, “Australians are sick of being lectured by the United Nations.”¹⁷ Despite Australia’s stronger recent record of international engagement on human rights, including through its membership of the HRC, global critique persists. In October 2022, the UN Subcommittee on Torture suspended its visit to Australia because it was prevented from visiting certain places of detention, exposing Australia’s failure to establish an effective National Preventive Mechanism under the Optional Protocol to the Convention Against Torture. Global critique of Australia reflects real and significant problems in its human rights record. For example, Australia has the highest Indigenous incarceration rate in the world by percentage of population, and, across almost all jurisdictions in Australia, it is legal for children as young as ten to be arrested and imprisoned.

¹¹ Debeljak, J & L Grenfell, Eds., *Law Making and Human Rights* (Thomson Reuters, 2020).

¹² Australian Government – Attorney-General’s Department, ‘National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21’ (2021).

¹³ Department of Foreign Affairs and Trade, ‘United Nations’ (2022).

¹⁴ Department of Foreign Affairs and Trade, *Foreign Policy White Paper* (2017).

¹⁵ Department of Foreign Affairs and Trade, ‘Australia on the Human Rights Council – Pillars and Priorities’ (2017); Maguire, A, F McGaughey & G Monaghan, ‘Performance or Performativity? Australia’s Membership of the United Nations Human Rights Council’ (2019) 25 *Australian Journal of Human Rights* 317.

¹⁶ Chiam, M, ‘International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia’ in M Groves, J Boughey & D Meagher (Eds.), *The Legal Protection of Rights in Australia* (Hart, 2019).

¹⁷ Maguire, A, ‘Why does international condemnation on human rights mean so little to Australia?’ in *The Conversation Yearbook: 50 standout articles from Australia’s top thinkers* (Melbourne University Press, 2016), 70.

Further concerns regarding Australia’s piecemeal human rights system relate to the status and operation of the national human rights institution, the Australian Human Rights Commission (AHRC). The AHRC is a statutory body with responsibility for responding to complaints, advising government on law reform, conducting education, research, and inquiries, advising courts, and monitoring Australia’s human rights practice.¹⁸ Given the lack of comprehensive human rights legislation in Australia, the AHRC plays an essential role in protecting human rights. Yet, in recent years, the AHRC and its past President, Professor Gillian Triggs, have been subjected to politicised attacks and government resistance to accountability measures that have weakened its ability to meet its mandate.¹⁹ Further, due to significant cuts over recent federal budgets, the AHRC is under-resourced and cannot meet all its statutory responsibilities. Its independence has been undermined by non-transparent appointments to Commissioner roles, which raised the risk that the AHRC could lose its A-status accreditation and associated standing in the global accrediting body.²⁰ This risk was addressed by the recent passage of the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022* to confirm the transparency of appointment processes into the future.

We note that the AHRC’s 2022 position paper ‘A Human Rights Act for Australia’ envisions an enlarged role for the AHRC in promoting and protecting human rights in the context of human rights law reform. This proposal amplifies the significance of recommendations to amend the *Australian Human Rights Commission Act 1986* to ensure full compliance with the Paris Principles. The Paris Principles require National Human Rights Institutions (NHRIs) to be ‘independent in law, membership, operations, policy, and control of resources’.²¹ They also require that NHRIs have ‘a broad mandate; pluralism in membership; broad functions; adequate powers; adequate resources; cooperative methods; and engage with international bodies’. We welcome the passage of the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022* as a crucial step in ensuring clear, transparent, merit-based appointments to the Commission. The proposed amendments set out in ‘A Human Rights Act for Australia’ would further safeguard the Commission’s full compliance with the Paris Principles. Such compliance is essential to its institutional independence, legitimacy, and international credibility.

Australia’s piecemeal human rights system sends mixed messages about its human rights commitment to both domestic and global constituencies. Yet, as this inquiry demonstrates, coming years hold substantial potential for reform. Comprehensive human rights reform could align Australia’s laws and policies with its international legal obligations,²² deliver real-world benefits to Australian people, particularly the most vulnerable,²³ enhance judicial capacity to promote human rights realisation through the common law,²⁴ strengthen law-making engagement with human rights across legislative

¹⁸ *Australian Human Rights Commission Act 1986* (Cth)

¹⁹ Maguire, A, ‘Why does international condemnation on human rights mean so little to Australia?’ in *The Conversation Yearbook: 50 standout articles from Australia’s top thinkers* (Melbourne University Press, 2016), 70.

²⁰ Maguire, A, ‘Budget cuts to the AHRC couldn’t have come at a worse time’, *The Conversation*, 30 March 2022.

²¹ Principles Relating to the Status of National Institutions (The Paris Principles), Adopted 20 December 1993 by General Assembly Resolution 48/134: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>

²² Australian Human Rights Commission, ‘A Human Rights Act for Australia’ (2022).

²³ Human Rights Law Centre, *Charters of Human Rights Make our Lives Better* (2022).

²⁴ Byrnes, A, H Charlesworth & G McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2007).

and executive arms of government,²⁵ and advance Australia's national interest and global standing.²⁶ This reform process should extend beyond the content of the law to include complementary measures, for example the establishment of a national human rights index that would facilitate measurement of human rights performance and goal-setting for the future.

The Centre for Law and Social Justice commends the Australian Human Rights Commission's efforts through the Free and Equal project, including the 2022 position paper 'A Human Rights Act for Australia'. We note the AHRC's recommendation that a national Human Rights Act only apply to federal laws and agencies. Although this is in part a matter of the federal Parliament's law-making powers under the Constitution, we submit that the Committee and Parliament should act to ensure that human rights protections provided through law reform must be equal across all Australian jurisdictions. There is a risk that protections could be different in those sub-national jurisdictions that have human rights legislation and those that do not.

1b. Business and human rights

In today's world, there is an inextricable connection between the pursuit of global commerce and the protection of human rights.²⁷ This is because the operation of large corporations and other businesses necessarily involves the participation of workers and communities in all corners of the world, especially in developing countries. In fact, more than two-thirds of all transnational trade is now conducted by multinational corporations, many of which are located in Australia. Even more importantly, the research, design, production, and retail of most products are now performed through coordinated chain components that now stretch systemically across complex networks of firms in many countries. This coordinated activity is typically driven by what is often called the 'lead firm' – again, there are many such lead firms in Australia. Because of the interwoven nature of human rights and global commerce, businesses are, in a range of regards, at risk of negatively impacting human rights but equally so are in a unique position to *protect* human rights.²⁸

On the one hand, it is rare for lead firms to be subject to liability for the actions of other firms in the chain, even when those firms cause human rights harms.²⁹ This is even though, as noted, it is typically the lead firm that is both responsible for the coordinated organisation of the chain and also is situated to reap the most profit from the chain's collective activity. This paradox of control-plus-profit but with only limited legal responsibility has prompted calls of unfairness by commentators, some of whom

²⁵ Debeljak, J & L Grenfell, Eds., *Law Making and Human Rights* (Thomson Reuters, 2020).

²⁶ de Kretser, H, 'Major UN Review of Australia's Human Rights Record' (2021) 95 *Australian Law Journal* 323.

²⁷ For a more detailed discussion of the historical development, see K. Sobel-Read, 'Global Value Chains: A Framework for Analysis.' (2014) 5 *Transnational Legal Theory* 364, 376.

²⁸ Kevin Sobel-Read, 'Reimagining the Unimaginable: Law and the Ongoing Transformation of Global Value Chains into Integrated Legal Entities' (2020) 16(1) *European Review of Contract Law* 160.

²⁹ L. Heasman, *The Corporate Responsibility to Protect Human Rights: The Evolution from Voluntarism to Mandatory Human Rights Due Diligence* (Academic Dissertation, Helsinki, 2018) 14. See also N. Bernaz, *Business and Human Rights (Human Rights and International Law)* (Routledge, 2016) 264, quoting the US Supreme Court: "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation ... is not liable for the acts of its subsidiaries." *US v. Bestfoods* (1998) 524 US 51, 61.

refer to this inequity as a ‘liability deficit’ or ‘accountability gap.’³⁰ At the same time, through their role in coordinating their supply chains across so many countries, corporations can bring benefit to developing countries including by means of investment, training and capacity-building.³¹

In the process, as noted, lead firms are positioned to – and have the power to – manage their chains in ways that protect human rights; but because human rights protections tend to cost money (such as in paying living wages and providing adequate safety equipment), the pressures of the competitive global market mean that some corporations will not enforce human rights across their chains unless incentivised and required to.³² In this regard, where a country enacts a strong human-rights-protection regime, this equalises the playing field among all the businesses in that jurisdiction and further facilitates active and successful engagement by the relevant businesses.³³ Therefore, in strengthening Australia’s commitment to human rights, as the present Parliamentary Inquiry seeks to do, we submit that it is essential not only to recognise the role of global commerce in affecting human rights, but also to take the next steps and structurally integrate – through both incentives and restrictions – Australia’s domestic and international corporations in the resulting human rights framework.

A comprehensive human rights framework will promote enforceable human rights to redress wrongs, but more importantly, it will improve laws and policies so that public decision-makers and office holders properly consider human rights at the outset.³⁴ These enforceable rights will provide protections for various groups with vulnerabilities, some of which are discussed below.

2. Human rights for groups with particular vulnerabilities

2a. First Nations’ rights

First Nations Peoples in Australia are significantly more at risk of human rights violations than people of other ethnicities in Australia.³⁵ The human rights of First Nations Peoples are contained enshrined in the seven core international human rights treaties that Australia has adopted³⁶ and expressed in context

³⁰ J Salminen and M Rajavuori, ‘Transnational sustainability laws and the regulation of global value chains: Comparison and a framework for analysis’ (2019) *Maastricht Journal of European and Comparative Law* (pre-publication online version), 9 at <https://doi.org/10.1177%2F1023263X19871025>.

³¹ O. Cattaneo, G. Gereffi, S. Miroudot & D. Taglioni, World Bank, *Joining, Upgrading and Being Competitive in Global Value Chains: A Strategic Framework 4* (2013), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2013/04/09/000158349_20130409182129/Rendered/PDF/wps6406.pdf.

³² L. Heasman, *The Corporate Responsibility to Protect Human Rights: The Evolution from Voluntarism to Mandatory Human Rights Due Diligence* (Academic Dissertation, Helsinki, 2018) 14.

³³ N. Bernaz, *Business and Human Rights (Human Rights and International Law)* (Routledge, 2016), 8.

³⁴ Daney Faddoul, Charter of Rights Campaign Coalition, ‘Charters of Human Rights Benefit Everyone’ (2023) *Submission to the Inquiry into Australia’s Human Rights Framework*.

³⁵ Thalia Kehoe Rowden, ‘Aboriginal People and Torres Strait Islanders Suffer Human Rights Violations in Australia’, *Human Rights Measurement Initiative* (Article, 19 July 2019) <<https://humanrightsmeasurement.org/aboriginal-people-and-torres-strait-islanders-suffer-human-rights-violations-in-australia/>>.

³⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of all Forms of Racial*

through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³⁷ also endorsed by Australia. The UNDRIP was adopted by the UN General Assembly in 2007 in acknowledgment that individualistic human rights protections as contained in the seven core treaties have failed to protect or promote the rights of Indigenous peoples and communities. The UNDRIP was compiled largely from already existing rights statements, however, it places emphasis on the barriers faced by Indigenous peoples in seeking the full realisation of those rights. The Chair of the UN Permanent Forum on Indigenous Issues welcomed the Declaration as the first UN resolution drafted by the rights-holders themselves.³⁸ With this knowledge, it is particularly important to ensure a national Human Rights Framework implemented in Australia is done so in collaboration with Aboriginal and Torres Strait Islander Peoples. The right to self-determination is at risk of being excluded within a national Human Rights Framework that is not co-designed with First Nations Peoples. This is supported by Australia's history of laws, policies and practices violating First Nations Peoples self-determination rights and lack of reform in this area. For instance, even with the introduction of the native title system, the Australian legal system tends to prioritise the maintenance of Crown sovereignty over land.³⁹ When looking at trends in law reform, across the extensive recommendations that came out of the Royal Commission into Aboriginal Deaths in Custody, the recommendations with the greatest remaining implementation gaps relate to the right to self-determination.⁴⁰

The Uluru Statement gifted in 2017 by First Nations Peoples in Australia, provided a statement inviting the government and nation to create a better future through constitutional reform.⁴¹ Ensuring the realisation of the three key principles of the Uluru Statement from the Heart – Voice, Treaty and Truth are at the core of a National Human Rights Framework is therefore crucial to protecting and promoting Aboriginal and Torres Strait Islander Peoples rights, particularly the right to self-determination, which

Discrimination, opened for signature on 21 December 1965, 2106 UNTS 1 (entered into force 4 January 1969); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature on 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

³⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007).

³⁸ Victoria Tauli-Corpuz, *Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61st session of the UN General Assembly.

³⁹ This is evidenced by the continual denying of First Nations sovereignty through common law and statute law. Mechanisms within legal institutions demonstrate the prioritisation of colonial land concepts over First Nations land rights. For instance, the native title system prioritises legislative rights when they compete with native title rights and interests: Native Title Act 1993 (Cth) sections 15, 22B, 23G, 227, 238.

⁴⁰ Deloitte Access Economic, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal deaths in Custody* (Independent Review, August 2018) xi.

⁴¹ *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

has been denied since British invasion.⁴² This implementation would facilitate the protection of rights as expressed in the UNDRIP, reducing the inequities currently faced by First Nations Peoples.

2b. Human rights for refugees and asylum seekers

Australia attracts consistent and justified international critique for adopting a securitised approach to aspects of migration policy, which has driven a framing of refugees and people seeking asylum – particularly those who seek to reach Australia by boat after fleeing their countries of origin – as posing threats to national security.⁴³ The UN Human Rights Committee has determined that the indefinite detention of asylum seekers constitutes a cruel and degrading practice in conflict with Australia’s human rights obligations,⁴⁴ including key anti-torture treaties and the UN Convention on the Rights of the Child.⁴⁵ Further, The Kaldor Centre for International Refugee Law argues that offshore processing does not ‘save lives,’ ‘stop the boats,’ or ‘break the business model of people smugglers.’⁴⁶ Australia’s practice in relation to refugees and asylum seekers raises multiple human rights issues, and this submission does not seek to deal with all of these. Rather, we present two case studies that indicate examples of how Australia could improve its human rights practice in relation to these vulnerable populations.

Case Study – Work Rights for Refugees

This case study deals with data gathered through qualitative empirical research, including with refugees from Bhutan.

Technically, the Bhutanese refugees are on a humanitarian visa that allows them to work. When speaking with them, they expressed their desire to be employed. Yet, they struggled to move into the workforce and attributed this difficulty to discrimination based on their status as refugees. One man noted, ‘people won’t recognise the skills that we are bringing, people just think refugees are poor people without any skills.’⁴⁷ Another expressed a similar concern that the refugee label minimised their employability, ‘the skills that we have will not be valued.’⁴⁸ Most participants imagined their children would shed the refugee status but expressed apprehension that refugee identity would follow their

⁴² Historically, Australia has taken the view that accepting First Nations Peoples’ self-determination would diminish the political integrity of the state: Rawiri Taonui, ‘The Rise of Indigenous Peoples: The United Nations Declaration on the Rights of Indigenous Peoples’ in Selwyn Katene and Rawiri Taonui (eds), *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (Massey University Press, 2018) 31.

⁴³ Ronald Blieker, David Campbell, Emma Hutchison & Xzarina Nicholson, ‘The Visual Dehumanisation of Refugees’ (2013) 10(10) *Australian Journal of Political Science* 413.

⁴⁴ Amy Maguire, Laura Bereicua, Annabel Fleming & Olivia Freeman, ‘Australia, Asylum Seekers and Crime Against Humanity?’ (2015) 40(3) *Alternative Law Journal* 185.

⁴⁵ Jill Sheppard & Jana Von Stein, Does Australia’s harsh asylum seeker policy matter to the average Australian? It depends whether they have to get off the couch’ *The Conversation* (online, 20 July 2022) < <https://theconversation.com/does-australias-harsh-asylum-seeker-policy-matter-to-the-average-australian-it-depends-whether-they-have-to-get-off-the-couch-180779>>

⁴⁶ Madeline Gleeson & Natasha Yacoub, ‘Cruel, Costly and Ineffective: The Failure of Offshore Processing in Australia’ (2021), Policy Brief 11, 1.

⁴⁷ Chhetri Male, Age 20s, Interview Salisbury 2013.

⁴⁸ Brahmin Male, Age 40s, Interview Salisbury 2013.

children, ‘...I worry that our children, even if they have a high level of education, will not be able to get jobs.’⁴⁹ While the existing anti-discrimination frameworks at a state and federal level provide protections against racial discrimination, they do not protect against discrimination based on migration pathway or refugee status. Further, the importance of a Human Rights Act should not be measured against what protection are already provided in existing legislations. The decisive factor should be what *more* could be done to strengthen existing protections. A bare minimum protection of human rights through anti-discrimination laws is not an aspirational goal of significant value in the Australian nation. This is evidenced in its lack of protection for migration pathway and refugee status.

Refugees arriving on humanitarian visas do have a legal right to work, though exercising that right is complicated due to migration status-based discrimination. Asylum seekers, on the other hand, are typically placed on a Bridging Visa while waiting for their application of protection to be assessed. Depending on the specific visa conditions attached to a BVA, an asylum seeker *may* be granted work rights.⁵⁰ However, this right is not granted automatically, and the process can be administratively difficult.⁵¹ Those granted a BVE typically have no work rights. As of 31 March 2023, there were 37,820 people on a BE,⁵² but many of these visa holders have no working rights. Denying asylum seekers access to the labour market may force these individuals into poverty, which may lead to further breaches of their right to an adequate standard of living (Article 11)⁵³ and the right to physical and mental health (Article 12).⁵⁴

Even when working rights are attached to bridging visas, asylum seekers may also, like refugees arriving on humanitarian visas, face discrimination because of their migration status. Enforcing the right to work restores dignity and self-worth to refugee communities and can improve work and language skills, enhance capacity for economic independence and support participation in the community.⁵⁵ Adopting a Human Rights Framework will create a layer of protection against discrimination for groups and experiences (like discrimination due to migration status) that currently lack protections in Australia. A Federal Charter of Human Rights will strengthen Australia’s rights-based model and promote rights for all people in Australia.

Case Study on Freedom from Arbitrary Detention

This case study demonstrates that the current lack of comprehensive human rights protections allows for indefinite and/or arbitrary detention of people in various contexts (including asylum seekers). This case study argues that a national human rights protection will overcome the persistence of Al-Kateb

⁴⁹ Chhetri Male, Age 40s, Interview Adelaide 2012

⁵⁰ Kaldor Centre for International Refugee Law, ‘Bridging Visa Fact Sheet’ (2020).

⁵¹ Caroline Fleay, Anita Lumbus & Lisa Hartley, ‘People Seeking Asylum in Australia and their Access to Employment: Just What Do We Know’ (2016) *Cosmopolitan Civil Societies Journal* 8(2) 4969.

⁵² Department of Home Affairs, ‘Unauthorised Maritime Arrivals on Bridging E Visa’ (2023).

⁵³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁵⁴ *Ibid*

⁵⁵ Caroline Fleay, Anita Lumbus & Lisa Hartley, ‘People Seeking Asylum in Australia and their Access to Employment: Just What Do We Know’ (2016) *Cosmopolitan Civil Societies Journal* 8(2) 4969

precedent and current legislative arrangements that give wide powers to ministers and provide little or no merits or judicial review for detainees.

For decades Australia has maintained the draconian policy of imposing arbitrary and indefinite detention upon people who do not hold a valid visa to be in Australia. Unlawful non-citizens⁵⁶ are mandatorily detained by Australian immigration authorities in accordance with the Migration Act.⁵⁷ This hard-line policy applies to all persons seeking asylum, whether adults or children, and regardless of their health, disability, or other individual circumstances. For people arriving in Australia by boat without a valid visa, the detention system is even harsher including off-shore detention.⁵⁸ While it is acknowledged that a period of time is necessary for immigration authorities to conduct relevant security and other checks, persons seeking asylum who are detained under this system can be held for an indefinite period and sometimes for many years.⁵⁹ The Migration Act does not specify the length of the period of detention and there is very limited review of detention by the judicial system. Such 'Crimmigration' policies are an affront to human rights and Australia's role in being a signatory to the applicable United Nations Convention.⁶⁰

Together with the arbitrary nature of Australia's immigration detention policies, the wrongful detention case study of Cornelia Rau shone a spotlight into the opaque detention system operating in Australia. Ms Rau, an Australian permanent resident, was detained on the Australian mainland suspected of being an unlawful non-citizen. She was locked up in a Queensland gaol and at the Baxter Detention Centre in South Australia in 2004 and early 2005. There was no merits review of Ms Rau's executive detention during the period in which she was held. Judicial review was theoretically available, however access to the courts was impossible because Ms Rau could only give confusing accounts of her identity due to a serious psychiatric illness.⁶¹ Ms Rau's detention resulted in a severe deterioration in her mental health and her disappearance within the system caused untold distress for her family.⁶²

Together with the Rau case, multiple reviews, and reports, including immigration department and Commonwealth Ombudsman reports, indicate that there have been a series of detention cases where persons have been wrongfully detained in immigration detention in Australia.⁶³ The Commonwealth Ombudsman has reviewed wrongful detention cases from 2006 onwards.⁶⁴ With such serious and potentially harmful outcomes at stake, the immigration detention scheme ought to contain checks on executive power. The importance of a proper review of an individual's detention is crucial in circumstances where a person can be effectively detained for life as held by the High Court of Australia

⁵⁶ Migration Act (Cth) 1958 s14.

⁵⁷ Migration Act (Cth) 1958 s189.

⁵⁸ Kaldor Centre for International Refugee Law, 'Offshore Processing: An Overview' (2021).

⁵⁹ Australian Human Rights Commission, 'Immigration Detention and Human Rights' (online 24 April 2023) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights>>

⁶⁰ United Nations Convention and Protocol Relating to the Status of Refugees, 1951.

⁶¹ Shaun McCarthy, Amy Maguire and Amy Elton, Executive Detention: Still no effective review for detainees, (2016) 41 *Alternative Law Journal*, 249.

⁶² Mick Palmer, Inquiry into the Circumstances of the Detention of Cornelia Rau, Final Report, July 2005.

⁶³ Vivienne Thom, Independent Review for the Department of Immigration and Border Protection into the Circumstances of the Detention of two Australian Citizens, Final Report, 9 June 2017.

⁶⁴ Commonwealth Ombudsman, Preventing the immigration detention of Australian citizens, Investigation into the Department of Home Affairs' Implementation of the Recommendations of the Thom Review, December 2018.

in *Al-Kateb*.⁶⁵ There remains no systematic judicial review process for a person detained where there is uncertainty about their citizenship or residency status or on humanitarian grounds.

The mandatory immigration detention system needs to be overhauled. The indefinite and arbitrary detention of persons, regardless of their individual circumstances, needs to be reviewed in light of the prevailing law as set out in *Al-Kateb* together with the lack of any appropriate, accessible, and systematic judicial review of detainees. A national human rights framework will overcome the persistence of *Al-Kateb* precedent and current legislative arrangements.

2c. Rights of LGBTQIA+ people

A national Human Rights Act and framework is necessary to ensure the human rights of vulnerable groups across the country are given consistent and adequate protection. Every human has the right to be respected and safe⁶⁶ however, in Australia, LGBTQIA+ people often have these rights violated through violence, harassment and discrimination.⁶⁷ Incorporating a focus on LGBTQIA+ people within a national human rights framework will help address social stigma that contributes to human rights breaches and eradicate legal discrimination.⁶⁸ National anti-discrimination laws do not currently afford protection to all LGBTQIA+ human rights. For instance, exemptions to anti-discrimination laws allows religious organisations to sack, expel, or deny service to LGBTQIA+ people. Simultaneously, each state and territory have different laws which either enhance or prevent LGBTQIA+ peoples' enjoyment of their human rights.⁶⁹ Thus, where you live within Australia determines how susceptible you are to human rights violations. Due to the inconsistencies between sub-national jurisdictions, and the absence of a national Human Rights Act, laws within Australia can infringe on human rights without recourse. This has led to LGBTQIA+ Australians seeking enforcement of their rights through international avenues, such as through the United Nations Human Rights Committee.⁷⁰ If Australia implements a domestic national framework that includes an avenue for redress when rights are violated, this will remove the need for the intervention of an international body, saving Australia the expenses associated with this and the reputational harm.

⁶⁵ *Al Kateb v Godwin* (2004) 219 CLR 562.

⁶⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art 5; *International Covenant on Economic Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 23 March 1976) Art 7; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁶⁷ Australian Human Rights Commission, 'Lesbian, Gay, Bisexual, Trans and Intersex Equality', *Our Work LGBTQIA+* (Web Page) <<https://humanrights.gov.au/our-work/lgbti/lesbian-gay-bisexual-trans-and-intersex-equality>>; Australian Human Rights Commission 2.

⁶⁸ Mark Dreyfus, Attorney-General, 'Australian Government Keynote Address' (Speech, Sydney World Pride Human Rights Conference, 1 March 2023).

⁶⁹ Equality Australia, *Act for Equality NSW* (Web Page) <<https://equalityaustralia.org.au/actforequalitynsw/>>.

⁷⁰ Australia has been party to four United Nations Treaty Committee Decisions involving LGBTQIA+ rights: *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994); *Young v Australia*, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003); *Campbell v Australia*, Communication No 2216/2012, UN Doc CCPR/C/119/D/2216/2012 (1 November 2017); *G v Australia*, Communication No 2172/2012, UN Doc CCPR/C/119/D/2172/2012 (17 March 2017); *Remedy Australia, Cases about LGBTQIA+ (4)*, (Web Page) <<https://remedy.org.au/cases/subject/27/>>; Paula Gerber, 'International Human Rights Law: Achieving Outcomes for our Communities' (Panel Discussion, Sydney World Pride Human Rights Conference, 3 March 2023).

Further, while jurisdictions that are advancing protections for LGBTQIA+ peoples might influence national legislation and policies to ensure the same rights are afforded across the country, aspects of these advances highlight other aspects of legislation that require harmonisation. For instance, NSW introduced in 2018 a new offence of publicly threatening or inciting violence⁷¹ which expanded protections to include sexual orientation, gender identity and intersex status. Yet, the NSW Anti-discrimination Act is still yet to be updated to reflect broader terminology than homosexuality, and 93z has not included 'sex characteristics' which is the language preferred by intersex advocates.⁷² Victorian legislation that would expand legitimate protected groups against vilification based on areas such as sex, gender identity, sexual orientation, disability and HIV/AIDS status has been endorsed by the Victorian government, but will only be implemented within the next 18 months.⁷³ As articulated by Son Vivienne and Jeremy Wiggins, "Anti-vilification laws are one way to protect humanity against violence, hate and bigoted ideologies that hurt all people, but especially those at the intersections of stigmatised gender, sexuality, race, ethnicity, faith, class and disability."⁷⁴

Another area where sub-national jurisdictions are advancing the protection of LGBTQIA+ human rights is health. The Commonwealth could replicate the commitments made by the ACT government to protecting the rights of intersex people in medical settings, which would extend the protection of this right to all intersex people in Australia, not just those residing in the ACT.⁷⁵ The federal government made several commitments to LGBTQIA+ equality throughout Sydney World Pride, earlier this year.⁷⁶ These commitments included national and international strategies and plans for improving the protection of LGBTQIA+ people in Australia and beyond, specifically within the Asia Pacific. For instance, announcements were made about Australia's first long-term strategy and dedicated funding to help LGBTQIA+ people in Asia Pacific; and Australia's 10-year national action plan for LGBTQIA+ health and wellbeing, and \$26 million for health research.⁷⁷ A national human rights framework/act could be leveraged to support these commitments through affording better protection over the human rights of LGBTQIA+ people domestically.⁷⁸ This would positively contribute to Australia's ambitions of being a

⁷¹ Crimes Act (NSW) 1900 s93z.

⁷² Alastair Lawrie, 'NSW Reforms Vilification Offences', *Public Interest Advocacy Centre* (Online, 22 June 2018) <<https://piac.asn.au/2018/06/22/nsw-reforms-vilification-offences/>>.

⁷³ Liam Elphick, 'Victoria Could Protect LGBTQI People from Hate. Why Won't the Government Act Now?', *The Age* (Online, 9 May 2023) <<https://www.theage.com.au/national/victoria/victoria-could-protect-drag-queens-from-nazi-hate-why-won-t-the-government-act-now-20230507-p5d6dn.html>>.

⁷⁴ Son Vivienne and Jeremy Wiggins, CEOs of Transgender Victoria and Transcend in response to the transphobic displays and hate speech that occurred outside of the Victorian Parliament House: Equality Australia, 'Trans, LGBTQIA+, Multicultural, Faith and Women's Organisations Condemn Victorian Protests' (Media Release, 19 March 2023) <<https://equalityaustralia.org.au/trans-lgbtqi-multicultural-faith-and-womens-organisations-condemn-victorian-protests/>>.

⁷⁵ The Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2023 passed in June this year.; Equality Australia, 'Sydney WorldPride Human Rights Conference' (Web Page) <<https://equalityaustralia.org.au/swp-human-rights-conference/>>.

⁷⁶ Ibid

⁷⁷ Equality Australia (n 69).

⁷⁸ As identified by the Australian Human Rights Commission, A national human rights act could promote the equal application of all laws to people in the LGBTQIA+ community; require the consideration of LGBTQIA+ rights when creating new legislation and policies; ensure government service providers respect the rights of LGBTQIA+ people through their operations and offer remedies when LGBTQIA+ people have their rights violated, such as through discrimination on the basis of their sexuality: Australian Human Rights Commission (n 67).

leader in relation to protecting LGBTQIA+ peoples' human rights, particularly in the Global South.

2d. Persons with Disabilities

Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) in 2008 and its Optional Protocol soon after. While accepting to be bound by the Convention, Australia's dualist legal system, however, meant that these international obligations are not automatically incorporated into domestic law. In 2019, the UN Committee on the Rights of Persons with Disabilities' (CtteeRPD) Concluding Observation on Australia expressed that there is insufficient harmonization between the domestic legislation, namely the Disability Discrimination Act 1992 (Cth) ('DDA'), and Australia's CRPD commitments. The DDA is a legislation that is premised on the medical model of disability,⁷⁹ and only addresses narrow aspects of disability rights (such as that relating to equality in education, work and employment, access to premises, provision of goods, facilities, and services, and the administration of laws and programs by the government).⁸⁰ The CtteeRPD remarked that 'there is no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination, especially at the Commonwealth level, that Aboriginal and Torres Strait Islander persons with disabilities are particularly disadvantaged and are often not consulted on matters that affect them, and that the complaints mechanisms under existing law, especially the Disability Discrimination Act 1992, are inaccessible to persons with disabilities.'⁸¹

The limited provision of the DDA, especially in stark contrast to the CRPD obligations requiring the State to eliminate barriers hindering equality (attitudinal, physical, structural, and digital)⁸² and to raise public

⁷⁹ In line with the medical model, the definition of disability in the DDA is equated with impairment. Section 4 of the DDA provides as follow:

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
and includes a disability that:
 - (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future (including because of a genetic predisposition to that disability); or
 - (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

⁸⁰ See section 3 of the DDA.

⁸¹ UN CtteeRPD, 'Concluding Observations on the Combined Second and Third Periodic Reports of Australia' UN Doc CRPD/C/AUS/CoO/2-3 (15 October 2019) para 9. ('CRPD Concluding Observations 2019')

⁸² CRPD Concluding Observations 2019 para 17.

awareness towards disability and discrimination,⁸³ seriously restrict the attainment of transformative changes in the public sector and in the society in general. For instance, preventable tragedies (and gross human rights abuse) continue to occur at the level of law enforcement towards persons with disabilities, including a 95 year-old woman with dementia being tasered by a police officer at her care home in Cooma, resulting in her death in May 2023.⁸⁴ In 2022, an Aboriginal girl with cerebral palsy and intellectual disability was tasered until she lost consciousness in Queensland.⁸⁵ In April 2021, a 45 year-old indigenous man with an intellectual disability was shot dead by the police in western Sydney.⁸⁶ These incidents seem to reveal, to say the least, a serious lack of understanding towards persons with disabilities despite repeated calls from disability groups and advocates to provide better training for first-responders.⁸⁷

In fact, the DDA only states in its objects to eliminate discrimination against persons on grounds of disabilities ‘as far as possible’ and to ensure persons with disabilities have the same rights ‘as far as practicable’,⁸⁸ which is not only confusing from a legal standpoint (as it puts into question, the extent to which DDA provisions are enforceable and justiciable) but deeply troubling (as it qualifies the equal rights of persons with disabilities to the extent ‘as far as possible/practicable’).⁸⁹ In different contexts, persons with disabilities continue to face systemic discrimination, e.g. in education, in employment, and across service sectors.⁹⁰ Women with disabilities face forced sterilisations, abortions, and contraception as a result of pressures from families and discrimination of healthcare workers (depriving their right of consent to medical treatment),⁹¹ as well as the lack of access to information as to their reproductive

⁸³ Article 8, UNCRPD.

⁸⁴ The Guardian, ‘Clare Nowland: 95-year-old Australian Woman Dies After Being Tasered by Police’, available at <https://www.theguardian.com/australia-news/2023/may/24/nsw-police-officer-charged-over-alleged-tasered-of-95-year-old-woman-in-aged-care-home> (24 May 2023); BBC, ‘95-year-old Woman Tasered by Police in Australia Dies’ available at <https://www.bbc.com/news/world-australia-65696475> (24 May 2023).

⁸⁵ ABC News, ‘Teenage Girl with Cerebral Palsy Tasered by Police at Townsville School’ available at <https://www.abc.net.au/news/2020-02-28/teenage-girl-with-cerebral-palsy-tasered-by-police-in-townsville/12008684> (28 February 2020)

⁸⁶ The Guardian, ‘Indigenous Man Shot Dead by Police at Home in Sydney’s West’ available at <https://www.theguardian.com/australia-news/2021/nov/09/man-shot-dead-by-police-at-home-in-sydneys-west> (9 November 2021)

⁸⁷ ABC News, ‘Tourette Syndrome Association of Australia Calls for Better Understanding from First Responders’ available at <https://www.abc.net.au/news/2023-05-04/first-responders-misjudging-tourette-syndrome-for-drug-taking/102297818> (4 May 2023); See s15(2) CRPD.

⁸⁸ See s3 DDA; See commentary ABC News, ‘I dug Deep into the Big Issues for People with Disability in Australia Today. This is What I Learned’ available at <https://www.abc.net.au/news/2022-12-02/disability-australia-discrimination-act/101685598> (2 December 2022).

⁸⁹ Cf. Article 4 of the CRPD, provides that ‘States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.’

⁹⁰ See ABC News (n 88).

⁹¹ See e.g., s 16(2) CRPD.

rights.⁹² The Former Disability Discrimination Commissioner Graeme Innes once called the DDA ‘unfit for purpose’.⁹³

The narrow provisions of the DDA (again, in stark contrast to the CRPD) also led aggrieved persons who have exhausted local remedies to file individual communications with the UN CtteeRPD. As of 2022, Australia appeared in 14 (out of 67 total) individual communications before the CtteeRPD and was found to have violated the convention in nine of these communications.⁹⁴ The CRPD provisions that Australia was found to have violated were wide-ranging. They include articles 2 (failure to provide reasonable accommodations), 3 and 4 (general principles and obligations), 5 (equality and non-discrimination), 9 (accessibility), 12 (equal recognition before the law), 13 (access to justice), 14 (liberty and security of the person), 15 (freedom from torture or cruel, inhuman or degrading treatment or punishment), 21 (freedom of expression and opinion and access to information), 29 (participation in political and public life) and 30 (participation in cultural life, recreation, leisure and sport). This suggests that Australia has failed tremendously when it comes to the protection and promotion of disability rights.

Conclusion

This submission has demonstrated a clear need for a comprehensive human rights framework, including a national Human Rights Act, to guide decision making, prevent breaches of human rights, and give people power to take action when their rights have been breached.

Recommendation:

That the federal Parliament pass a Human Rights Act for Australia that reflects the full range of Australia’s international legal obligations, and that human rights law reform attend particularly to the rights of the most vulnerable people and communities in Australian society.

Contributors

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⁹² The Guardian, ‘Disabled Australian Women Face Forced Sterilisation, Abortion and Contraception, Health Groups Say’ available <https://www.theguardian.com/australia-news/2023/apr/26/disabled-australian-women-face-forced-sterilisation-abortion-and-contraception-health-groups-say> (22 April 2023)

⁹³ See ABC News (n 88).

⁹⁴ Within these 14 communications, 3 were inadmissible and 2 were discontinued.