

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

1 July 2023

Centre for Law and Social Justice
School of Law and Justice, University of Newcastle
Level 5, 409 Hunter Street Newcastle, NSW 2300

Dear Committee Members and Secretariat staff,

Thank you for the opportunity to make a submission on Australia's current human rights framework. This submission is made on behalf of a research group focused on the human right to education.

Australia has a long history of championing human rights worldwide, and we pride ourselves on our national spirit of equality and a 'fair go'. Yet, Australia is an outlier as a liberal democracy without a national charter of human rights, either constitutionally or in legislation. Progress has been made at a sub-national level, with the ACT, Victoria and Queensland all enacting some form of human rights legislation to give effect to specified rights within their jurisdictions. However, Australians outside of these jurisdictions can only rely on a patchwork framework of common law and legislation to protect and ensure basic human rights.

It is no surprise that many important human rights, like the right to education, fall through the gaps. Australians greatly value education, but we often take for granted the pivotal impact that it has on our lives. Education is vital for the realisation of almost all other human rights and is the foremost means of eliminating poverty and empowering disadvantaged and marginalised peoples. Yet, there is no requirement for federal authorities to consider the right to education in decision making.

Australia's human rights framework needs to evolve to reflect our values as a nation, and to provide effective, comprehensive and robust protection for all human rights. To achieve this, we **recommend**:

1. That a federal Human Rights Act be enacted, adopting the dialogue model;
2. That the federal Human Rights Act should incorporate not only civil and political rights, but also economic, social and cultural rights. This should include the right to education generally, with express reference to be made to inclusive education and culturally appropriate education; and
3. That the federal Human Rights Act establish a mechanism for resolving human rights complaints, including access to courts and effective remedies where appropriate to achieve justice.

RECOMMENDATION 1: A federal Human Rights Act should be enacted, adopting the dialogue model.

Australia's current human rights framework is piecemeal and inconsistent. Although Australia is signatory to each of the major international human rights treaties,¹ our legal system does not automatically incorporate

¹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 23 March 1976) ('ICCPR'); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December

these treaties into domestic law.² In the absence of comprehensive federal legislation to give force to international law, basic human rights are recognised through a patchwork combination of the Constitution, common law, and legislation — none of which provide universal coverage or protection. In those limited areas where domestic law *does* incorporate human rights, it does so on an ad hoc basis without regard for applicable human rights norms; in some cases, it may even have the effect of diminishing human rights.³ A comprehensive federal Human Rights Act is needed to provide holistic recognition, protection and enforcement of human rights in Australia.

1.1 Australia's Limited Human Rights Framework

1.1.1 Recognition and Protection of Rights

The Constitution provides protection for a limited number of express and implied rights,⁴ reflecting key civil and political rights.⁵ However, the High Court is reluctant to recognise a broad spectrum of rights arising from the Constitution, and those rights which have been recognised are read narrowly.⁶ A number of other rights are recognised through the common law,⁷ which also provides protection to human rights indirectly through principles of statutory interpretation, including the principle of legality.⁸ However, the common law can be overturned by the passing of legislation, is slow to develop, and relies on impacted individuals bringing action in court.⁹

The majority of Australia's legislative framework for the protection of human rights operates through anti-discrimination legislation.¹⁰ Anti-discrimination law is a necessary element of human rights protection but is not sufficient to protect human rights on its own. It is limited in scope, in both the areas and the grounds on

1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD'); Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 1 March 1980, 1249 UNTS 14 (entered into force 3 September 1981) ('CEDAW'); 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) ('CAT'); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

² *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Kioa v West* (1985) 159 CLR 550 at 570; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

³ Catia Malaquias, 'Unrealised promises and hollow claims: Australia's failure to enact its international obligations under the CRPD for the education of students with disability' (2022) 66(3) *Australian Journal of Education* 235.

⁴ Including the right to vote (s 41) to trial by jury (s 80) to free exercise of religion (s 116) and to freedom of political communication (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106)).

⁵ See ICCPR articles 25, 14, 18 and 19 respectively.

⁶ Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, 198, 210.

⁷ Including 'the right to legal representation in serious criminal cases, the privilege against self-incrimination, a presumption of innocence in criminal rights, a presumption that the standard of proof in criminal cases is beyond reasonable doubt, freedom of movement... a presumption against retrospective laws, [and] the rules of procedural fairness': Australian Human Rights Commission (AHRC), *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) ('AHRC *Free and Equal*') 52.

⁸ *Momcilovic v The Queen* (2011) 245 CLR 1.

⁹ AHRC *Free and Equal* (n 7) 52.

¹⁰ At the federal level: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). In the states and territories: *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

which it applies,¹¹ and has been criticised for promoting formal, rather than substantive, equality.¹² Anti-discrimination law focuses on the negative duty to refrain from discrimination, rather than establishing a positive duty to promote equality.¹³ In this way, it only gives limited effect to Australia's international human rights obligations and there is a pressing need for comprehensive reform to strengthen human rights protections in Australia and ensure respect for international law.

1.1.2 Enforcement and Remedy

Outside of anti-discrimination law, individuals in Australia face significant challenges when seeking enforcement of their human rights. The only federal body able to hear complaints specifically relating to human rights is the Australian Human Rights Commission (AHRC). However, while the AHRC can investigate and conciliate complaints,¹⁴ its legal power is limited if conciliation is not successful. In such circumstances, the AHRC may make a report to the Attorney-General,¹⁵ but unlike in discrimination matters, there is no recourse for the affected parties to seek resolution or remedy through the courts.¹⁶ The AHRC, as it currently stands, has only limited effect in the protection and enforcement of human rights.

1.1.3 Parliamentary Scrutiny

In response to the 2009 National Human Rights Consultation, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) was enacted, which established the Parliamentary Joint Committee on Human Rights (PJCHR) and related legislative scrutiny requirements. However, the effectiveness of these measures has been mixed. On the one hand, as part of the legislative process, the PJCHR examines Bills and legislative instruments for compatibility with human rights, and reports on this to both houses of Parliament.¹⁷ Initially, there were delays in the submission of these reports and this meant that many Bills were voted on before the PJCHR could provide their initial comments.¹⁸ However, since 2016, process improvements have been implemented such that the PJCHR has reported on the vast majority of Bills while still before Parliament.¹⁹ On the other hand, while all proposed Bills must include a statement of compatibility with human rights law,²⁰ failure to comply with this requirement does not invalidate Acts which are subsequently passed into law.²¹ As a result, these statements of compatibility are treated as a box-ticking exercise, and frequently lack comprehensive and detailed consideration of potential human rights impacts.²² This raises concern regarding the adequacy and effectiveness of this requirement, and suggests that human rights scrutiny mechanisms are having only

¹¹ Australian Human Rights Commission, 'Discussion paper: Priorities for federal discrimination law reform', *Free and Equal: An Australian Conversation on Human Rights* (October 2019); Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.

¹² Dominique Allen, 'Removing barriers to substantive equality: a case study of remedying disability discrimination complaints' (2011) 17(2) *Australian Journal of Human Rights* 159; Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *UNSW Law Journal* 188.

¹³ Excluding the recent *Gender Equality Act 2020* (Vic) which confers a positive duty to promote gender equality on public sector entities, Councils and universities. See Rosalind Croucher, 'Seeking Equal Dignity without Discrimination — the Australian Human Rights Commission and the Handling of Complaints' (2019) 93 *Australian Law Journal* 571, 581; Dominique Allen, 'Thou shalt not discriminate: moving from a negative prohibition to a positive obligation on business to tackle discrimination' (2020) 26(1) *Australian Journal of Human Rights* 110.

¹⁴ *Australian Human Rights Commission Act 1986* (Cth) s 11(f).

¹⁵ *Australian Human Rights Commission Act 1986* (Cth) s 20A.

¹⁶ *Australian Human Rights Commission Act 1986* (Cth) s 20; AHRC *Free and Equal* (n 7) 58.

¹⁷ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a).

¹⁸ See George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 501.

¹⁹ AHRC *Free and Equal* (n 7) 303-7, citing Charlotte Fletcher and Anita Coles, 'Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights (Senate Lecture Series, August 2022) 9.

²⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8.

²¹ *Ibid* s 8(5).

²² AHRC *Free and Equal* (n 7) 313-321, particularly 316. See also Williams and Reynolds (n 18); Tom Campbell and Stephen Morris, 'Human Rights for Democracies: A Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7, 18-19.

a limited impact on the creation of a human rights culture in federal Parliament. Further measures are necessary to foster a greater respect for human rights as well as to strengthen the protection of rights in the legislative process.

The scrutiny framework also only addresses one aspect of Australia's obligations regarding human rights. The *Human Rights (Parliamentary Scrutiny) Act* only applies to legislation; the vast majority of human rights impacts occur in the way that legislation is implemented and delivered by the executive government. For this reason, a federal Human Rights Act which covers the obligations of all three branches of government is necessary to ensure full respect for human rights in Australia's domestic law. In doing so, Australia can establish a robust legislative framework which outlines a comprehensive approach to the protection of human rights to ensure formal and substantive equality for its citizens.

1.2 A Federal Human Rights Act

A federal Human Rights Act adopting the dialogue model would strengthen the existing human rights framework and provide more consistent and meaningful protection of human rights for all Australians. The dialogue model proposes 'a formal 'dialogue' between the executive, legislature and judiciary, with each branch sharing responsibility for respecting and protecting human rights'.²³ As the AHRC note, one of the strengths of this approach is that it gives each of the branches of government a role that is appropriate for their separate functions: 'Parliament considers human rights when it makes laws, the executive when it applies laws and policies, and the judiciary when it interprets laws'.²⁴ Adopting a federal Human Rights Act following this model therefore has the potential to significantly expand the protection of human rights in Australia.

A federal Human Rights Act following the dialogue model would complement the existing requirements under the *Human Rights (Parliamentary Scrutiny) Act 2011* and could retain the role of the Parliamentary Joint Committee on Human Rights.²⁵ Importantly, this Act would not prevent Parliament from passing legislation that is inconsistent with human rights obligations.²⁶ For example, all state and territory human rights legislation contain a provision to override human rights if Parliament decides it is proper to do so.²⁷ This is important for two reasons: it recognises situations when derogation from rights is necessary due to competing interests, and it upholds the freedom of Parliament to determine the appropriate course of action.

Like other dialogue models, a federal Human Rights Act would also require courts to interpret legislation in a manner which is consistent with human rights, to the greatest extent possible, so long as such an interpretation is supported by the legislative text.²⁸ Where the federal Human Right Act may depart from other examples of the model is in circumstances where such an interpretation is not possible.²⁹ Other dialogue models provide some mechanism for the courts to make a formal declaration of inconsistency in these cases.³⁰ However, the High Court has indicated that such a declaration may be constitutionally invalid within the current federal context.³¹ Nevertheless, in cases where statutory interpretation issues arise and the courts find that it is not possible to interpret specific legislation in a manner consistent with human rights,

²³ AHRC *Free and Equal* (n 7) 101.

²⁴ *Ibid.*

²⁵ Catherine Branson, 'Human Rights Protections: Need We Be Afraid of the Unelected Judiciary' (2019) 40(1) *Adelaide Law Review* 233, 235.

²⁶ *Ibid.*

²⁷ See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31; *Human Rights Act 2019* (Qld) pt 3 div 2.

²⁸ Branson (n 25) 235.

²⁹ *Ibid.*

³⁰ See *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2019* (Qld) s 48(1).

³¹ *Momcilovic v The Queen* (2011) 245 CLR 1, 70, 241. See also Wendy Lacey, 'Beyond the legalese and rhetoric: improving human rights protection in Australia' (2010) 16(1) *Australian Journal of Human Rights* 1.

the reasons for that finding would be reported with the rest of the judgment. As it would with any other common law decision, Parliament would then be free to accept the decision reached by the court or make amendments to the legislation in response. In this way, even without the formal power to issue a declaration of inconsistency, courts would still be able to engage in human rights 'dialogue' with Parliament.

As Catherine Branson notes, '[w]hile it is for the legislature to set human rights standards in legislation, and for the judiciary to interpret such legislation when it is in dispute, the delivery of human rights in practice is very much the responsibility of the executive'.³² The current human rights framework has been limited in this regard. A federal Human Rights Act should therefore also have the following features:

1. The Act should establish a duty on public authorities to act consistently with, and give proper consideration to, human rights.³³ This includes both human rights laws as set out in international treaties to which Australia is a signatory, as well as domestic human rights provisions.
2. The Act should include an independent cause of action where the above duty has been breached, to ensure adequate access to justice.³⁴

Perhaps the most significant deficiency in Australia's current human rights framework is the lack of a comprehensive and definitive statement of the human rights which apply within our borders. A federal Human Rights Act would rectify this by providing a clear statement of the human rights that are recognised throughout Australia.³⁵ This 'would give both the legislature and the executive... the explicit benefit of what has been described as 'a set of navigation lights' to ensure that they respect human rights'.³⁶ Providing greater clarity regarding the content of human rights would also benefit members of the judiciary; although human rights 'are immanent in the common law, their content is contestable and judges invoking them are presently at risk of being charged with judicial overreach'.³⁷ It is therefore important to consider which rights should be included in a federal Human Rights Act, and how those rights should be articulated and interpreted.

RECOMMENDATION 2: The federal Human Rights Act must incorporate not only civil and political rights, but also economic, social and cultural rights. This should include the right to education generally, with express reference to be made to inclusive education and culturally appropriate education.

2.1 Economic, Social and Cultural Rights

Human rights are universal, indivisible, interdependent, and interrelated.³⁸ Each right is vital to ensure the inherent dignity of all people. Yet, in previous consultations on human rights in Australia, arguments have been raised that a federal Human Rights Act should give priority to civil and political rights over economic, social and cultural rights.³⁹ As a result, economic, social and cultural rights were specifically excluded from key recommendations proposed in the final report of the National Human Rights Consultation.⁴⁰

³² Branson (n 25) 235

³³ See *Human Rights Act 2004* (ACT) pt 5A s 40B; *Charter of Rights and Responsibilities Act 2006* (Vic) pt 3 s 38; *Human Rights Act 2019* (Qld) s 58

³⁴ See *Human Rights Act 2004* (ACT) part 5A s 40C.

³⁵ See, for example, *Human Rights Act 2004* (ACT) parts 3, 3A, and s7; *Charter of Rights and Responsibilities Act 2006* (Vic) part 2; *Human Rights Act 2019* (Qld) part 2.

³⁶ Branson (n 25) 246.

³⁷ *Ibid.*

³⁸ *Vienna Declaration and Programme of Action*, GA Res 48/121, UN Doc A/CONF.157/23 (12 July 1993, adopted 20 December 1993) [5].

³⁹ See, for example, *National Human Rights Consultation Final Report* (Report, September 2009), 76 ('NHRC Report')

⁴⁰ *Ibid* xxix-xxxviii. See Recommendation 22, that economic, social and cultural rights not be justiciable (xxxv); Recommendation 28, that the requirement for legislation to be interpreted consistently with human rights not include economic, social and cultural rights (xxxvii); Recommendation 30, that the duty for public authorities to act compatibly with human rights not

However, ‘a human rights framework that consists only of civil and political rights... fails to recognise the integral connection between the economic and social position of human beings and their capacity to exercise [their] rights’.⁴¹ This connection has been recognised in more recent human rights treaties, which have adopted ‘hybrid’ rights provisions that comprise both civil and political right as well as economic, social and cultural rights, which are not intended to be disentangled and implemented in part.⁴² As the AHRC note, ‘many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights... a failure to include [these] rights in a Human Rights Act would represent a failure to uphold key values held by the Australian community’⁴³. It is therefore vital for economic, social and cultural rights to be given equal recognition and protection under Australian law in the form of a new federal Human Rights Act.

Furthermore, although Australia’s framework for the recognition and protection of human rights is limited, civil and political rights are far more likely to receive protection compared to economic, social and cultural rights by virtue of our legal and political system. As noted above, our Constitution and common law recognise a number of important rights — all of which can be categorised as civil and political rights.⁴⁴ On the other hand, economic, social and cultural rights receive only incidental protection and are currently excluded from the AHRC human rights complaints jurisdiction.⁴⁵ As such, while formal recognition of civil and political rights is important, the introduction of a federal Human Rights Act is far more likely to have a significant and meaningful impact for economic, social and cultural rights, which currently lack adequate means of protection.

Economic, social and cultural rights are no broader in scope than civil and political rights, nor do they impose greater obligations in terms of budget allocation or policymaking. Both sets of rights are equally important to ensure respect for dignity and equality of all persons, and there is no doubt that the realisation of civil and political rights is seriously undermined without the fulfillment of those other rights.

With the proper formulation, there is therefore no reason a federal Human Rights Act could not incorporate economic, social and cultural rights in a meaningful and effective way. This would ensure that the Act reflects the indivisibility, interdependence and interrelatedness of all human rights, and the value placed on these rights by the Australian community.

2.2 The Right to Education

Everyone has the right to education. This has been recognised in international human rights law for almost seventy-five years since the passage of the Universal Declaration of Human Rights in 1948.⁴⁶ In the intervening years, Australia has reaffirmed its commitment to the right to education through its ratification of the ICESCR, and numerous other human rights treaties which have re-emphasised the importance of education as a fundamental human rights.⁴⁷

Australians greatly value education, but we often take for granted the pivotal impact that it has on our lives.

extend to economic, social and cultural rights (xxxviii); and Recommendation 31, than an independent cause of action for breach of human rights not apply to a breach of economic, social and cultural rights (xxxviii).

⁴¹ Liz Curran, ‘Human Rights in Australia: Their relevance to the vulnerable and marginalised’ (2008) 33(2) *Alternative Law Journal* 70.

⁴² See for example Article 24 of the CRPD; Andrea Broderick and Shivaun Quinlivan, ‘The Right to Education: Article 24 of the CRPD’ in Charles O’Mahony and Gerard Quinn (eds), *Disability Law and Policy: An Analysis of the UN Convention* (Clarus Press, 2017).

⁴³ AHRC *Free and Equal* (n 7) 125.

⁴⁴ See 1.1.1 above

⁴⁵ AHRC *Free and Equal* (n 7) 278.

⁴⁶ *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, UN Doc A/810 (10 December 1948) art 26.

⁴⁷ Including: CRC (n 1); CRPD (n 1); CEDAW (n 1); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007) (‘UNDRIP’)

Education interacts with, and is vital for the realisation of, almost all other human rights.⁴⁸ It is the foremost means of eliminating poverty and empowering disadvantaged and marginalised peoples.⁴⁹ Education intersects with all aspects and stages of life, and transcends the boundaries of race, gender, age, class and religion. It creates vital opportunities for the acquisition of knowledge and skills which are needed for one to live independently and to participate within society. Perhaps most importantly, education is recognised as a reward in itself: ‘a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys... of human existence’.⁵⁰ In this way, education is a powerful tool to achieve fairness and inclusion within society whilst overcoming systemic disadvantages.

2.2.1 Content of the Right to Education

The right to education applies to all levels and forms of education, including primary and secondary education, technical and vocational education, higher education, early childhood education, fundamental education, and adult education and life-long learning.⁵¹ The Committee on Economic, Social and Cultural Rights have noted the following essential and interrelated features of the right:⁵²

- **Availability:** Schools must be available ‘in all locations and in sufficient quantity so as to ensure all levels of education are available’⁵³, and must also have functional physical infrastructure including ‘school and library buildings, sanitation systems... competitively salaried teachers, teaching materials, [and] computer and other IT facilities’.⁵⁴
- **Accessibility:** Schools and education programmes must be accessible to everyone. There are three overlapping aspects of accessibility:
 - Non-discrimination — education must be provided to all, especially the most vulnerable groups, without discrimination on any prohibited grounds.⁵⁵
 - Physical accessibility — education must be within safe physical reach, either by attendance at some reasonably convenient location or via modern technology.
 - Economic accessibility — education must be affordable to all.
- **Acceptability:** the form and substance of education, including curricula and teaching methods, must be acceptable to students and parents. Amongst other things, this means education must be relevant, culturally appropriate and of good quality.⁵⁶
- **Adaptability:** education must be flexible to adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. As noted by UNESCO, ‘It is not for children to do their best to cope with whatever education may be available... Rather, teachers and schools must adapt to children with diverse capabilities and support needs’.⁵⁷

The best interests of the student must be a primary consideration in the application of these features.

Any formulation of the right to education to be included in a federal Human Rights Act must recognise and incorporate these essential features. It should also provide the following guarantees:

- Compulsory and free primary education;⁵⁸

⁴⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 13 (1999): the Right to Education (Article 13 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 21st Sess, UN Doc E/C.12/1999/10 (8 December 1999) [1] (*‘CESCR General Comment 13’*).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ ICESCR (n 1) art 13; CRC (n 1) art 6, 18, 29; UNESCO handbook 103-110

⁵² CESCR General Comment 13 (n 48) [6].

⁵³ UNESCO, *Right to Education Handbook* (UNESCO, 2019) 77.

⁵⁴ *Ibid.*; CESCR General Comment 13 (n 48) [6].

⁵⁵ See also UNESCO (n 53) 77.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 78.

⁵⁸ ICESCR (n 1) art 13(2)(a).

- Secondary education that is available free to all;⁵⁹
- Vocational and technical education that is available and accessible to all;⁶⁰
- Higher education that is equally available to all, on the basis of capacity.⁶¹

These guarantees incorporate the minimum obligation permitted under article 13 ICESCR, as well as recognising the ‘impermissibility of any retrogressive measures taken in relation to the right to education’,⁶² by setting Australia’s progress beyond that minimum obligation towards full realisation of the right to education as the minimum standard required moving forward.⁶³

The right to education also recognises the freedom of parents and legal guardians to choose non-public schooling options which conform with their religious and moral convictions.⁶⁴ This freedom is limited only by the requirement that non-public schools must meet minimum educational standards set by the government.⁶⁵ This ensures that all children receive a quality education, and this requirement should be maintained in a federal Human Rights Act.

A formulation of the right to education which includes the above elements encapsulates the essential features and core obligations of the right. Alongside with the duty on public authorities to act consistently and give proper consideration to this right, and a cause of action for breach of the right, this would give effect to Australia’s obligation to respect, protect and fulfil the right to education.

2.2.2 Status of the Right in Australia

Despite its vital importance, the right to education is not universally protected in Australia. The right is expressly provided for in the human rights legislation of the ACT and Queensland,⁶⁶ and by incorporation of the ICESCR in Victoria.⁶⁷ The formulation of the right to education in the ACT and Queensland is limited in scope, but has had an impact on policy and decision-making nonetheless.⁶⁸ In the states and territories without human rights legislation, however, recognition of the right to education is limited, and generally not enforceable. For example, the *Education Act 1990* (NSW) states that it is based in part on the principle that every child has the right to receive an education.⁶⁹ Yet, this principle does not give rise to, and cannot be taken into account in, any civil cause of action.⁷⁰ Ultimately, therefore, whether an individual student’s right to education is recognised and enforceable will depend on the state in which they study. Australians deserve equal protection and promotion of their human rights, regardless of where they live; this would be achieved by recognition of the right to education in a federal Human Rights Act.

It is important to include the right to education in a federal Human Rights Act, even though state and territory governments bear considerable responsibility for education. The federal government provides significant funding for education. At present, the federal government contributes at least 20% of the total public funding of all public primary and secondary schools, and approximately 80% of the public funding for all non-public

⁵⁹ Ibid art 13(2)(a), (b).

⁶⁰ Ibid art 13(2)(b).

⁶¹ Ibid 13(2)(c).

⁶² CESCR General Comment 13 (n 48) [45].

⁶³ Progressive realisation of the right to education would require taking steps towards the introduction of free technical and vocational education, and free higher education. However, for reasons set out in AHRC *Free and Equal* (n 7) 127-8, a narrower scope which excludes progressive realisation is recommended to ensure constitutional compatibility.

⁶⁴ ICESCR (n 1) art 13(3). See *Human Rights Act 2004* (ACT) s 27A(3)(b); UNESCO handbook 77-8.

⁶⁵ ICESCR (n 1) art 13(3). UNESCO handbook p 77

⁶⁶ *Human Rights Act 2004* (ACT) s 27A; *Human Rights Act 2019* (Qld) s 36.

⁶⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.

⁶⁸ For example, in the ACT, policies which charged students on certain visa subclasses to attend ACT public schools, including refugee and asylum-seeking children, were redeveloped to be consistent with the right ‘to have access to free school education’: ACT Human Rights Commission, *Annual Report 2013-14* (Report, September 2014) 39.

⁶⁹ *Education Act 1990* (NSW) s4.

⁷⁰ Ibid s 127.

schools.⁷¹ The amount of funding contributed by state and territory governments is also based on agreement with the federal government.⁷² The federal government is also directly responsible for the funding of higher education. Recognition of and respect for the right to education is clearly highly relevant to decisions made in regard to these funding allocations.

Further, some areas of federal responsibility are intrinsically linked to education, to the extent that decisions of the federal government in these matters are likely to have significant ramifications for an individual's enjoyment of the right to education. Examples include subsidies for early childhood education, and student welfare payments such as youth allowance, Austudy and Abstudy. The federal government is also responsible for the NDIS, which provides supports that are vital to enable people with disabilities to have access to education services.

More broadly, a range of international treaties have provided the federal government with a constitutional basis to legislate in respect to education in specified contexts. A federal Human Rights Act enacted to give effect to human rights broadly, including the right to education, would fall under the foreign affairs power as it gives effect to Australia's obligations under the various human rights treaties to which it is signatory. The federal government would also have authority to pass legislation related to the education of students with disabilities, to give effect to its treaty obligations in that regard.⁷³

The importance of recognising the right to education is further demonstrated by the unprecedented disruption caused by the COVID-19 pandemic. Estimates at the onset of the pandemic predicted that as many as 46% of students would be 'vulnerable to adverse effects on their educational outcomes, nutrition, physical movement, social and emotional wellbeing by being physically disconnected from school'.⁷⁴ The sudden shift to remote learning also exposed the unequal resources available to families and schools within Australia's education system, with students in high socio-economic areas far more likely than their low socio-economic counterparts to have the parental support, technological and material resources, and internet access necessary to maintain their education during lockdowns.⁷⁵ The burdens of the pandemic were also not shared equally, with states and territories having different experiences of the length and severity of lockdowns and other measures.⁷⁶

The COVID-19 response highlights the limitations of a federal decision-making framework that fails to engage with fundamental human rights.⁷⁷ It required a difficult balancing act between competing interests, with the

⁷¹ 'How Schools are Funded' *Department of Education* (Web Page, 23 February 2023)
<<https://www.education.gov.au/schooling/how-schools-are-funded>>

⁷² *Ibid.*

⁷³ Under CRPD art 24. See Matthew Stubbs, Adam Webster and John Williams, *Persons with Disability and the Australian Constitution* (Research Report, October 2020).

⁷⁴ Natalie Brown, Ketty Te Riele, Becky Shelley and Jessica Woodroffe, *Learning at home during COVID-19: Effects on vulnerable young Australians* (Independent Rapid Response Report, April 2020) 8. See also Catherine Drane, Lynette Vernon and Sarah O'Shea, *The impact of 'learning at home' on the educational outcomes of vulnerable children in Australia during the COVID-19 pandemic* (Report, April 2020).

⁷⁵ Teresa Angelico, 'Educational Inequality and the Pandemic in Australia: Time to Shift the Educational Paradigm' (2020) 48(1) *International Studies in Educational Administration* 46, 48-50. See also Brown et al (n 74) 20-23; Drane et al (n 74); Clare Buckley Flack, Lyndon Walker, Amanda Bickerstaff, Hester Earle and Cara Margetts, *Educator perspectives on the impact of COVID-19 on teaching and learning in Australia and New Zealand* (Report, April 2020); Clare Buckley Flack, Lyndon Walker, Amanda Bickerstaff, and Cara Margetts, *Socioeconomic disparities in Australian schooling during the COVID-19 pandemic* (Report, July 2020).

⁷⁶ For example, Melbourne was in lockdown for a total of 246 days between March 2020 and October 2021: Calla Walquist, 'How Melbourne's 'short, sharp' Covid lockdowns became the longest in the world' *The Guardian* (online, 2 October 2021)
<<https://www.theguardian.com/australia-news/2021/oct/02/how-melbournes-short-sharp-covid-lockdowns-became-the-longest-in-the-world>>

⁷⁷ Amy Maguire and Donna McNamara, 'Human rights and the post-pandemic return to classroom education in Australia' (2020) 45(3) *Alternative Law Journal* 202.

overriding priority of preventing serious illness and death for as many people as possible. In such circumstances, it is imperative that our decision-making frameworks are designed to ensure human rights are protected to the greatest extent possible.⁷⁸

2.3 The Right to Education for Disadvantaged and Marginalised Communities

The current lack of formal recognition of the right to education disproportionately affects disadvantaged and marginalised peoples in Australia. This includes rural, regional and remote communities, culturally and linguistically diverse communities, people with disabilities, people in detention, people experiencing homelessness, asylum seekers and refugees, the LGBTQI+ community, and First Nations peoples. Each of these groups have diverse and unique needs that would benefit from the protection and promotion of the right to education.

In recognition of the systemic disadvantages and barriers faced by certain groups in respect of access to education, a number of thematic human rights treaties have expanded on the right as it applies to certain groups.⁷⁹ These thematic treaties reflect developments in human rights law recognising that marginalised people have the right to enjoy their human rights on an equal basis with others in society,⁸⁰ and that to achieve this, certain special measures may be required.⁸¹

2.3.1 The Right to Inclusive Education

People with disabilities continue to face disadvantage in education. The Committee on the Rights of Persons with Disabilities note that for many, 'education is available only in settings where persons with disabilities are isolated from their peers and where the education they receive is of an inferior quality'.⁸² Education is 'the primary means by which persons with disabilities can lift themselves out of poverty, obtain the means to participate fully in their communities and be safeguarded from exploitation'.⁸³ Australia's laws and policies have fallen short in providing students with disabilities equal access and enjoyment of education. Therefore, is vital that a federal Human Rights Act recognise not only the right to education, but the embedded and concurrent right to inclusive education alongside it.

Inclusive education requires ensuring that people with disabilities have access to mainstream, non-segregated education on an equal basis with others,⁸⁴ alongside reasonable accommodations and support measures as appropriate to facilitate their learning needs.⁸⁵ An inclusive education system must be introduced across all levels of the education sector, including preschool, secondary and tertiary education, and should also extend to extracurricular and social activities associated with schools.⁸⁶ Inclusive education

⁷⁸ See Sandra Fredman, 'A human rights approach: The right to education in the time of COVID-19' (2021) 92 *Child Development* e900.

⁷⁹ See n 1.

⁸⁰ For example, CEDAW (n 1) art 2; see also Theresia Degener, 'Disability in a Human Rights Context' (2016) 5(3) *Laws* 1.

⁸¹ For example, CEDAW (n 1) art 3, 4.

⁸² Committee on the Rights of Persons with Disabilities, *General Comment No 4 (2016): the Right to Inclusive Education (Article 24 of the Convention of the Rights of Persons with Disabilities)*, UN Doc CPRD/C/GC/4 (25 November 2016) ('*CRPD General Comment 4*'). [3].

⁸³ *Ibid* [10].

⁸⁴ In regards to non-segregation, see CRPD General Comment 4 (n 82) [4], [11], [39]; Australian Human Rights Commission, *Submission to the United Nations Committee on the Rights of Persons with Disabilities* (Submission, 25 July 2019) 9[3]; K De Bruin., 'The Impact of Inclusive Education Reforms on Students With Disability: An International Comparison' (2019) 23(7-8) *International Journal of Inclusive Education* 811; United Nations High Commissioner on Human Rights, *Empowering Children with Disabilities for the Enjoyment of their Human Rights Including through Inclusive Education*, UN Doc A/HRC/40/27 (22 January 2019); Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, *Joint Statement: Rights of Children with Disabilities*, available at https://www.ohchr.org/sites/default/files/2022-03/CRC-CRPD-joint-statement_18March2022.docx.

⁸⁵ CRPD (n 1) art 24; CRPD General Comment 4 (n 82) [13].

⁸⁶ CRPD General Comment 4 (n 82) [8].

must also accommodate the differing and diverse needs of the individual student, and ‘focuses on the full and effective participation, accessibility, attendance and achievement of all students, especially those who, for different reasons, are excluded or at risk of being marginalised’.⁸⁷ This would include altering the physical environment of schools to remove barriers, as well as adapting pedagogies and learning materials where appropriate to ensure equal participation for all students.

Further measures may also be required to ensure access to education for women and girls with disabilities. The Committee on the Rights of Persons with Disabilities have previously recognised the specific barriers to inclusive education which are experienced by women and girls and have called for States to remove such barriers which include the risk of gender-based violence, a lack of value placed on their education, and higher instances of stigma and prejudice.⁸⁸

Importantly, the right to inclusive education suggests that governments should adopt ‘inclusive disaster risk reduction strategies for comprehensive school safety and security in emergencies that are sensitive to learners with disability’.⁸⁹ This is of particular relevance in the wake of the education disruptions caused by the COVID-19 pandemic, which disproportionately impacted on students with disabilities.⁹⁰

The right to inclusive education should be explicitly included as part of a federal Human Rights Act. Recognition of the right should not be limited to a note that ‘the right to education should be interpreted in light of Article 24 of the CRPD.’⁹¹ It is vital that public authorities are aware of the right to inclusive education, and factor this into the decisions they make regarding education policy. This may be overlooked or given less weight if the right is not set out independently. Students with disabilities should also be able to make a complaint specifically based on a failure to provide inclusive education, rather than on a breach of the right to education more generally, to enable the development of detailed jurisprudence in this area.

Inclusive education benefits all students, not only students with disabilities. It provides the foundation for an inclusive society and is also a countermeasure to address the impact of centuries of severe and systemic exclusion through institutionalisation and other forms of segregation. Inclusive education is necessary to respect the ‘inherent dignity and autonomy’ of all students and recognise ‘their ability to effectively be included in and contribute to society’.⁹² It is therefore crucial that the right to inclusive education be given recognition in a federal Human Rights Act.

2.3.2 The Right to Culturally Appropriate Education

Aboriginal and Torres Strait Islander peoples face many barriers to full enjoyment of the right to education. Continued marginalisation, separation and disconnection from their culture, community and country, intergenerational trauma, systemic discrimination, and poverty all contribute to the inequality experienced by Aboriginal and Torres Strait Islander peoples.⁹³ Recognition of the right to culturally appropriate education through a federal Human Rights Act could contribute significantly towards reducing these barriers to equality in education.

Culturally appropriate education has multiple facets. On the one hand, Aboriginal and Torres Strait Islander peoples have the right to ‘establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and

⁸⁷ Ibid [9].

⁸⁸ Ibid [44].

⁸⁹ CRPD General Comment 4 (n 82) [14].

⁹⁰ See n 74, n 75.

⁹¹ As proposed by the AHRC: see AHRC *Free and Equal* (n 7) 129.

⁹² CRPD General Comment 4 (n 82) [10].

⁹³ For example, see Jan Gray and Quentin Beresford, A ‘Formidable Challenge’: Australia’s Quest for Equity in Indigenous Education (2008) 52(2) *Australian Journal of Education* 197.

learning’, as well as the right ‘to have access, when possible, to an education in their own culture and provided in their own language’.⁹⁴ This should be expressly recognised under a federal Human Rights Act.

At the same time, Aboriginal and Torres Strait Islander peoples ‘have the right to all levels and forms of education of the State without discrimination’.⁹⁵ Culturally appropriate education in this context applies to the content of education, and what students are taught. In this sense, the Australian public education system should respect and incorporate Aboriginal and Torres Strait Islander culture on an equal basis as part of the curriculum. Aboriginal and Torres Strait Islander peoples have the right to ‘the dignity and diversity of their cultures, traditions, histories and aspirations, which shall be appropriately reflected in education’.⁹⁶ This has not always been recognised in Australia’s education system.⁹⁷ Culturally appropriate education therefore requires a curriculum which incorporates culture, history and tradition without othering or problematising Aboriginal and Torres Strait Islander peoples.⁹⁸ Recognising a right to culturally appropriate education in a federal Human Rights Act would require federal decisions relating to the national curriculum to be made with these considerations in mind.

Culturally appropriate education also relates to the nature of learning and teaching, and how students are taught. Research has indicated that the Western understanding of education which informs the curriculum – ‘definitions of success, what constitutes ‘learning’, what counts as knowledge and how it is taught’ – differs from the understanding of Aboriginal and Torres Strait Islander peoples.⁹⁹ Culturally appropriate education therefore requires consideration of how Aboriginal and Torres Strait Islander students are taught, and engagement with alternative pedagogies informed by cultural practices.

RECOMMENDATION 3: The federal Human Rights Act should establish a mechanism for resolving human rights complaints, including access to courts and effective remedies where appropriate to achieve justice.

As noted above, the current human rights framework in Australia provides very little means for individuals to seek redress when their human rights are violated. Article 2(3) of the ICCPR obliges the Australian government to provide accessible and effective remedy for violations of human rights; it is therefore important for a federal Human Rights Act to provide a more robust complaints process that gives access to meaningful remedies where human rights have been infringed upon.

3.1 Complaints Mechanism

We endorse the AHRC recommendation that a federal Human Rights Act complaint system should mirror the existing unlawful discrimination jurisdiction, by expanding the Commission’s current human rights jurisdiction.¹⁰⁰ Under this approach, complainants would first lodge a complaint with the AHRC for conciliation (or other appropriate alternative dispute resolution); if conciliation fails, or is inappropriate, the

⁹⁴ UNDRIP (n 47) art 14(1), (3). See also Michelle Bishop, ‘A rationale for the urgency of Indigenous education sovereignty: Enough’s enough’ (2021) 48(3) *The Australian Educational Researcher* 419.

⁹⁵ Ibid art 14(2)

⁹⁶ UNDRIP (n 47) art 15.

⁹⁷ See, for example, Kevin Lowe and Tyson Yunkaporta, ‘The inclusion of Aboriginal and Torres Strait Islander content in the Australian National Curriculum: A cultural, cognitive and socio-political evaluation’ (2008) 33(1) *Curriculum Perspectives* 1; Jacinta Maxwell, Kevin Lowe and Peta Salter, ‘The re-creation and resolution of the ‘problem’ of Indigenous education in the Aboriginal and Torres Strait Islander cross-curriculum priority’ (2018) 45 *the Australian Educational Researcher* 161.

⁹⁸ See Maxwell et al (n 97); Sara Weuffen and Kym Willis, ‘The Fallacy of Cultural Inclusion in Mainstream Education Discourses’ in Sara Weuffen, Jenene Burke, Margaret Plunkett, Anitra Goriss-Hunter, Susan Emmett (eds), *Inclusion, Equity, Diversity, and Social Justice in Education: A Critical Exploration of the Sustainable Development Goals* (Springer Singapore, 2023) 91.

⁹⁹ N Harrison, C Tennant, G Vass, J Guenther, K Lowe and N Moodie, ‘Curriculum and learning in Aboriginal and Torres Strait Islander education: A systematic review’ (2019) 46 *The Australian Educational Researcher* 233.

¹⁰⁰ See AHRC *Free and Equal* (n 7) Chapter 11.

complainant could then apply to the court for adjudication.¹⁰¹ As the AHRC note, the discrimination complaints process has ‘well-understood legal architecture’, and ‘a consistently high satisfaction rate’.¹⁰² Modifying the human rights jurisdiction to operate in the same manner would take advantage of the familiarity of this existing process, as well as the extensive expertise of the AHRC in human rights matters.

It is vital that complainants have recourse to the courts if alternative dispute resolution methods fail or are inappropriate. This is one of the major failings in Australia’s current human rights complaints system — while discrimination matters can be escalated to courts if conciliation fails, human rights complaints raised on other grounds cannot.¹⁰³ There are multiple reasons why complainants should have access to courts. Firstly, there are circumstances where conciliation and mediation have little prospect of success.¹⁰⁴ In such cases, effective and equitable remedy is unlikely to be available without access to litigation. Secondly, there are matters which are of such importance that they should be heard judicially in the first instance - either due to public importance,¹⁰⁵ or due to ‘an imminent risk of irreparable harm to a person’.¹⁰⁶ The AHRC recommend introducing an additional ground for termination of human rights complaints to apply in the latter circumstances, which would allow the complaint to be immediately escalated to the court.¹⁰⁷

The main justification given for not allowing access to courts in human rights complaints is that doing so would ‘open the floodgates’ for litigation, and lead to an unreasonable and unmanageable number of cases being brought. However, this risk would be mitigated by the requirement for complaints to be made to the AHRC in the first instance – in the majority of cases, litigation would be available only after alternative dispute resolution attempts within the Commission have failed.¹⁰⁸ Concerns regarding ‘floodgates’ are also not supported by evidence from other Australian jurisdictions. For example, in 2009, a direct cause of action which could be initiated in the ACT Supreme Court was introduced to the *Human Rights Act 2004* (ACT). While there was an initial increase in the number of cases involving human rights in that year, this has now returned to pre-2009 levels.¹⁰⁹ There is therefore no reason to believe that there would be a floodgate of litigation under a federal Human Rights Act, given the complaints process proposed by the AHRC.

It should be noted that the ACT Legislative Assembly Committee have recommended that the complaints mechanism under the *Human Rights Act 2004* (ACT) be amended to allow the ACT Human Rights Commission to conciliate human rights complaints, consistent with the AHRC’s proposal.¹¹⁰ This is also the current approach taken in Queensland under the *Human Rights Act 2019* (Qld). The ACT proposal is not based on too many cases reaching the courts;¹¹¹ rather, the ACT Committee found that the current system was not sufficient to protect the rights of individuals who are unable to access the Supreme Court.¹¹²

A human rights complaints system mirroring the unlawful discrimination jurisdiction, as proposed by the

¹⁰¹ Ibid 29.

¹⁰² AHRC *Free and Equal* (n 7) 281.

¹⁰³ *Human Rights Commission Act 1986* (Cth) s 20.

¹⁰⁴ In the discrimination context, complaints can be terminated due to no reasonable prospect of conciliation per *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(b).

¹⁰⁵ In the discrimination context, see *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(h).

¹⁰⁶ AHRC *Free and Equal* (n 7) 281.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 270.

¹⁰⁹ Ibid, citing Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 127.

¹¹⁰ AHRC *Free and Equal* (n 7) 279, citing Legislative Assembly for the Australian Capital Territory, Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (June 2022) 11.

¹¹¹ From 2004-2014, the *Human Rights Act 2004* (ACT) was only mentioned in 6.6% of published decisions of ACT tribunals, 9.2% of published decisions of the ACT Supreme Court, and 7.6% of published decisions of the ACT Court of Appeal: AHRC *Free and Equal* (n 7) 270, citing ACT Human Rights Commission, *Look who’s talking: A snapshot of ten years of dialogue under the HRA 2004* (Report, 2014).

¹¹² AHRC *Free and Equal* (n 7) 279-80.

AHRC, takes advantage of existing, familiar mechanisms, and strikes an appropriate balance between the accessibility of alternative dispute resolution and the authority of court proceedings. A federal Human Rights Act adopting this approach would provide significantly greater protection for human rights than is available under the existing framework.

3.2 Access to Remedy

We further endorse the AHRC recommendation that a federal Human Rights Act ‘grant courts a broad discretion over remedies’,¹¹³ replicating the range of remedies currently available under federal anti-discrimination law.¹¹⁴ This would include injunctions, orders requiring action, declaratory relief,¹¹⁵ monetary damages and administrative law remedies.¹¹⁶

There are good reasons to make monetary damages available for breach of human rights. Although monetary damages have been explicitly excluded under state and territory human rights legislation,¹¹⁷ these jurisdictions are outliers when other national jurisdictions are considered. Damages are available where appropriate in the UK, New Zealand and Canada.¹¹⁸ As the AHRC note, ‘procedural remedies will not always be effective in remedying every kind of breach... When it is not appropriate to have a decision remade, but a person has suffered loss or damages, courts should be able to provide a remedy — otherwise that individual will be denied justice’.¹¹⁹ Furthermore, it has been suggested that not making monetary compensation available as a remedy ‘may deter genuine litigants... and removes an incentive for private law firms to take on human rights cases... on a pro bono or ‘no win, no fee’ basis’.¹²⁰ While it may not be appropriate to award damages in every case, the federal Human Rights Act should ensure that monetary compensation can be awarded in circumstances where doing so is necessary to grant justice.

CONCLUSION

Although progress has been made in areas such as parliamentary scrutiny, Australia’s federal human rights framework is inadequate to protect and promote the full range of human rights as expressed in international law. A federal Human Rights Act adopting the dialogue model would supplement existing mechanisms and provide more effective, comprehensive, and robust protection for all human rights.

It is vital that a federal Human Rights Act include not only civil and political rights, but also economic, social and cultural rights, acknowledging that all human rights are interrelated and indivisible. Comprehensive protection would include specific protection for the right to education. We submit that adequate protection of the right to education, including specific protection for the embedded rights of inclusive education and culturally appropriate education, is crucial to achieving equity for marginalised and disadvantaged people in Australia and building a substantively equal society.

¹¹³ AHRC *Free and Equal* (n 7) 275.

¹¹⁴ See *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4) for a non-exhaustive list of remedies, including injunctions and monetary damages.

¹¹⁵ See, for example, declaratory relief in the discrimination context: *Commonwealth v Evans* (2001) 105 FCR 437 [8].

¹¹⁶ See *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 15, 15A, 16; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 104, 114 (Sweeney J), 126 (Morling J), 134 (Foster J).

¹¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) 39(3); *Human Rights Act 2004* (ACT) 40C(4); *Human Rights Act 2019* (Qld) 59(3).

¹¹⁸ *Human Rights Act 1998* (UK) s 8(3); *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667; *Canadian Charter of Rights and Freedoms* s 24(1).

¹¹⁹ AHRC *Free and Equal* (n 7) 272. See also Ciara Murphy, ‘Damages in the Australian human rights context’ (2021) 27(2) *Australian Journal of Human Rights* 311. The UK courts have also acknowledged the importance of providing remedy for wrongs through monetary damages when other remedy is not available or appropriate: see *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, 1057.

¹²⁰ Helen Watchers and Gabrielle McKinnon, ‘Five Years’ Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia’ (2010) 33(1) *UNSW Law Journal* 136, 158-9.

LEAD AUTHOR

Claire Dudgeon

RESEARCH TEAM

Dr Pok Yin Stephenson Chow, Senior Lecturer, University of Newcastle School of Law and Justice

Claire Dudgeon, Research Assistant, University of Newcastle School of Law and Justice

Saskia Jones, Project Officer, University of Newcastle School of Law and Justice

Associate Professor Amy Maguire, Director – Centre for Law and Social Justice, University of Newcastle

Cátia Malaquias, Lawyer and Inclusion and Human Rights Advocate

Associate Professor Fiona McGaughey, University of Western Australia Law School

Dr Donna McNamara, Senior Lecturer, University of Newcastle School of Law and Justice

Dr Caitlin Mollica, Lecturer, University of Newcastle Business School