



# THE RIGHT TO EDUCATION IN AUSTRALIA



**CENTRE FOR  
LAW AND  
SOCIAL JUSTICE**

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## 1. Introduction

Everyone has the right to education. The fundamental right to education was first recognised in Article 26 of the *Universal Declaration of Human Rights* in 1948,<sup>1</sup> and has been repeatedly reaffirmed in the 75 years since then.

Education is vital for eliminating poverty, ending exploitation, and empowering disadvantaged and marginalised people.<sup>2</sup> The knowledge and skills acquired through education make it possible for people to live independently and participate fully in their communities.<sup>3</sup> Education also impacts whether people can enjoy almost all of their other human rights.<sup>4</sup> Without an adequate education, it is difficult for people to meaningfully exercise their rights to life, health, work, an adequate standard of living, privacy, and non-discrimination, amongst many others.<sup>5</sup>

Perhaps most importantly, education is also a benefit in itself: ‘a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence’.<sup>6</sup>

Australians greatly value education, but we often take our access to education for granted. Almost everyone in our community receives at least a primary school education, and the majority also complete high school.<sup>7</sup> But our access to education is not limited to the school years. In the years before school, young children enjoy the benefits of early childhood education,<sup>8</sup> and many people will continue their education after school, at universities or in vocational education and training.<sup>9</sup>

However, despite a long history of commitment to both human rights and education, Australia does not recognise an enforceable right to education in federal law. Not only is this inconsistent with Australia’s obligations under international human rights law, but it also has real consequences for people whose right to education is infringed upon.



## 2. What is the right to education?

The right to education was first recognised in the Universal Declaration of Human Rights 75 years ago,<sup>10</sup> and was subsequently enshrined in the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), adopted in 1966.<sup>11</sup> Since then, the right to education has been reaffirmed in almost all international human rights treaties, which have further expanded upon the right as it applies to disadvantaged and marginalised groups in society.<sup>12</sup> The right to education recognises that education comes in many forms and at many levels. Realisation of the right requires education in all its forms and at all levels be available, accessible, acceptable and adaptable.<sup>13</sup> What this means has been elaborated by the United Nations Committee on Economic, Social and Cultural Rights:

Available – Schools must be available in sufficient quantity with the physical infrastructure required to be functional, such as school and library buildings, sanitation facilities, sufficient teachers and support staff, teaching materials, and computer and IT facilities where appropriate.<sup>14</sup>

Accessible – Schools must be accessible to everyone. Accessibility has three dimensions:

- Non-discrimination, meaning education must be accessible to all, especially the most marginalised or disadvantaged groups, without discrimination.
- Physical accessibility, meaning schools must be within safe physical reach, either geographically to allow in-person attendance or via modern technology to allow remote study.
- Economic accessibility, meaning education must be affordable to all.

Acceptable – Education, including curricula and teaching methods, must be acceptable to students and their parents. Education must be relevant, culturally appropriate, and of good quality.<sup>15</sup> Students must be able to pursue education with dignity and free from any form of violence including corporal punishment.<sup>16</sup>

Adaptable – Education must be flexible to adapt to the needs of changing societies and communities, and to respond to the needs of students.



In deciding how these essential features of education should apply, the best interests of the student will be the primary consideration.<sup>17</sup> Education should also address the aims set out in Article 13(1) of the ICESCR, which states that education:

... shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms... education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>18</sup>

The Convention on the Rights of the Child adds further goals of education, including 'development of the child's personality, talents and mental and physical abilities to their fullest potential', 'respect for... [the child's] own cultural identity, language and values', equality between the sexes, and 'respect for the natural environment'.<sup>19</sup> These aims are particularly important in assessing the acceptability of education.

For the right to education to be realised, specific commitments must be met for different levels of education. Article 13 of the ICESCR requires primary education be compulsory and free to all students.<sup>20</sup> This is the absolute minimum standard of education which it is expected that all countries will provide.<sup>21</sup> For countries like Australia, where greater resources are available, it is expected that governments will also provide fundamental, secondary (including technical and vocational) and higher education, with the goal that these should also be made free over time.

### What are Australia's obligations?

Australia is a party to seven of the nine the core international human rights treaties, as well as several other international agreements specifically focused on education.<sup>22</sup> These treaties require the Australian government to adopt 'appropriate legislative, administrative, budgetary, judicial, promotional and other measures' as necessary to meet its three levels of obligation: to respect, to protect, and to fulfil the right to education.<sup>23</sup>

The obligation to respect the right to education means the Australian government must not implement any law, policy or other measure that would limit or prevent the enjoyment of the right to education.<sup>24</sup> In a similar way, the obligation to protect requires the government to take steps to prevent any third parties from interfering with the enjoyment of the right to education.<sup>25</sup> Australia's obligations apply not only to the right to education as a whole, but also to each of the essential features of education noted above. For example, the government must respect the availability of education by not unnecessarily closing any school and protect the accessibility of education by ensuring that parents or employers do not prevent students from attending school.<sup>26</sup>

The obligation to fulfil requires the government to provide, facilitate and promote the right to education.<sup>27</sup> A core element of this obligation is the government's direct provision of education by establishing and funding schools.<sup>28</sup> However, as the right to education includes the right for individuals and groups to establish non-government schools,<sup>29</sup> the government must also facilitate the provision of education by non-government parties - for example, by creating the necessary minimum standards for private education providers and accrediting non-government providers. Likewise, parents have a right to choose non-government schools for their children,<sup>30</sup> and the government must facilitate that choice.



### Why do we need a Federal Charter?

Many of Australia's obligations under the right to education are addressed by the existing framework for public and private education. Importantly, however, in most states and territories, and at the federal level, education is not guaranteed as a right. This means that many people in Australia lack the capacity to assert their right to education in a legal context if the services they rely on for their education are withdrawn.

Realisation of the right to education cannot be left to state and territory governments alone. The federal government provides significant funding for education, contributing at least 20% of the total public funding for all public primary and secondary schools, and approximately 80% of the public funding for all non-public schools.<sup>31</sup> Decisions made regarding this funding should be informed by recognition of and respect for the right to education. Furthermore, some areas of federal responsibility are intrinsically linked to education, like the provision of subsidies for early childhood education or student welfare payments, and the decisions of the federal government in these matters can have major impacts on a person's ability to access and enjoy education.

A federal Charter of Human Rights including the right to education would:<sup>32</sup>

1. Provide a clear statement of all our rights and freedoms in one place, so that all Australians can know their rights and advocate for their realisation.
2. Ensure that human rights are given proper consideration by public officials in any actions or decisions made regarding law, policy and service provision.
3. Enable people to take action and seek justice if their human rights are violated.



### 3. What does the right to education mean for marginalised groups in Australia?

Although the right to education is held equally by all people, some groups face additional barriers that prevent their enjoyment of the right on an equal basis. Many of these groups have historically been denied access to education, which continues to be felt in their reduced participation rates and lower educational outcomes. International human rights law recognises these long-standing inequalities and elaborates on the necessary steps to make the right to education meaningful for these disadvantaged groups. There is also consideration that marginalisation can be compounded, for example for Aboriginal and Torres Strait Islander people who also live with disability.

#### **Women and girls:**

The Convention on the Elimination of Discrimination Against Women ('CEDAW') recognises that all human rights should be enjoyed on the basis of equality between genders and requires the elimination of discrimination against women in all areas of public life, including education.<sup>33</sup>

In Australia, significant gains have been made in gender equality in education at all levels. For example, 93% of Australian women aged 20-24 have completed qualifications equivalent to Year 12 or above.<sup>34</sup> Women currently make up approximately 55% of university graduates at the undergraduate level,<sup>35</sup> and the 2022 census recorded that 50% of women aged 25-44 have a tertiary qualification at the Bachelor-level or higher.<sup>36</sup> However, many women and girls still face barriers to equal enjoyment of the right to education. Contrary to the intention of CEDAW,<sup>37</sup> stereotypes regarding the roles of men and women persist in education, with statistics suggesting that women only account for between 20-35% of current students across science, technology, engineering and mathematics (STEM) fields,<sup>38</sup> compared to 70-75% across education, health and welfare, and society and culture.<sup>39</sup>

#### **Children:**

Although children are often the primary focus of education policy, the specific needs and vulnerabilities of children within the education system are not always considered, and children often have very little agency in the decisions made regarding their education. The Convention on the Rights of the Child ('CRC') recognises that children are rights-holders, and calls for the best interests of the child to be the primary consideration in decisions that impact the child and their enjoyment of their human rights.<sup>40</sup> Wherever possible, taking into account their age and relative maturity, children also have a right to have their views considered in matters relevant to their rights,<sup>41</sup> including in decisions made about their education such as which school they should attend. Children's views should also be taken into account in the education system more broadly, through 'participation of children in decision-making processes [such as] class councils, student councils and student representation on school boards and committees',<sup>42</sup> and through consultation with children 'on all aspects of education policy'.<sup>43</sup>

As well as reaffirming the right to education for all children, the CRC calls for education to be directed towards 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.<sup>44</sup> The Committee on the Rights of the Child notes that this means education must be 'child-centred, child-friendly and empowering'.<sup>45</sup> The Committee also note that: 'Children do not lose their human rights by virtue of passing through the school gates.'<sup>46</sup> Children must therefore be treated with dignity and respect in education settings.





### People with disability:

People with disability continue to be disadvantaged in education, due to continuing social stigmas around disability, as well as a lack of accessible and inclusive education. For example, physical accessibility barriers make it difficult for people who use wheelchairs or other mobility aids to attend school, and students who are deaf and/or blind may have only limited access to appropriate resources in braille or Auslan.

The Convention on the Rights of Persons with Disabilities recognises that in order for people with disability to enjoy education on an equal basis with others, education in all its forms and at all levels must be inclusive.<sup>47</sup> This requires that people with disability have access to mainstream education on an equal basis to others, with reasonable accommodations and support measures as appropriate to facilitate their educational needs.<sup>48</sup> Inclusive education also means that the whole education system must be accessible for people with disability- including 'information and communication, assistive systems, curriculum, education materials, teaching methods, assessment and language and support services'.<sup>49</sup>

### Aboriginal and Torres Strait Islander peoples:

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.<sup>50</sup>

The right to education should be enjoyed equally by all people, without discrimination on the basis of race or ethnicity.<sup>51</sup> However, while many gains have been made, a deeply entrenched disparity remains between the educational opportunities and outcomes of Aboriginal and Torres Strait Islander peoples and the non-Indigenous population. For example, according to the 2021 census, only around 37% of Aboriginal and Torres Strait Islander people had completed schooling to Year 12 (or equivalent), compared to 62% of non-Indigenous people.<sup>52</sup>

Recognition of the right to education for Aboriginal and Torres Strait Islander peoples also requires that education be culturally relevant and appropriate. Aboriginal and Torres Strait Islander peoples have a rich and valuable cultural heritage, but this has not been reflected or respected in the Australian curriculum, which is dominated by an urban, Western worldview.<sup>53</sup> As recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Aboriginal and Torres Strait Islander peoples have the right to 'the dignity and diversity of their cultures, traditions, histories and aspirations', and this should be appropriately reflected in education.<sup>54</sup> Education is also one of the key means by which Indigenous cultural heritage, language, identity, and customs can be protected and passed down from generation to generation.<sup>55</sup> UNDRIP therefore also recognises that Aboriginal and Torres Strait Islander peoples have the right to pass on their culture and languages, including by establishing schools in their own language.<sup>56</sup>

### People seeking asylum and refugees:

People seeking asylum and refugees may experience particular disadvantages in education. People seeking asylum detained in immigration detention facilities have only limited access to education, and many children miss out on vital early learning opportunities.<sup>57</sup> This is exacerbated by unsafe conditions in immigration detention facilities.<sup>58</sup> Challenges persist even once protection visas are granted, including impacts of trauma and poor mental health, financial constraints, language barriers, unfamiliarity with the Australian education system, and discrimination.<sup>59</sup>

The Convention relating to the Status of Refugees guarantees access to public education for refugees.<sup>60</sup> States are obliged to provide refugees with primary education on the same terms as it is provided to citizens and permanent residents.<sup>61</sup> Beyond primary education, refugees should be treated 'as favourably as possible', and at the very least, the same as international students 'generally in the same circumstances'.<sup>62</sup> The exception is in regards to education fees, where refugees are to benefit from the lowest fees charged at any public educational institution.



## Case Study: Inclusive education and access to remedies for students with disability

People with disability are among the most marginalised group of people in Australian society. The recent *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* brought to light the continuing disadvantage and discrimination faced by people with disability in all areas of life, including education.<sup>63</sup> These issues are deeply entrenched in Australia's education system, leading to significant inequality in educational outcomes for people with disability. This is evident in the fact that, amongst people with disability aged between 15 and 64, only 25% have completed school to Year 12 or equivalent, compared to 55% of people without disability in the same age range.<sup>64</sup>

*The Disability Discrimination Act 1992 (Cth)* makes it unlawful to discriminate against a person on the basis of their disability, including in the provision of education.<sup>65</sup> This is paired with the *Disability Standards for Education 2005 (Cth)*.<sup>66</sup> The *Disability Standards* require schools to make reasonable adjustments to facilitate students with disability to participate<sup>67</sup> This has significant implications for removing the barriers to education for people with disability; according to the Nationally Consistent Collection of Data on School Students with Disability, in 2017, 18.8% of students received an educational adjustment.

However, this legislative framework has been subject to considerable critique from legal and human rights scholars and the Royal Commission noted that students with disability continue to face discrimination, including gatekeeping practices which deny their access to education, inappropriate use of exclusionary discipline practices, and failures to provide the adjustment and supports they need to participate equally in the school environment.<sup>68</sup> There is no 'independent compliance framework' to enforce the *Disability Standards* and ensure that students with disability are not subject to discriminatory practices in schools.<sup>69</sup> Advocacy alone is not enough to ensure that policies regarding inclusive education and reasonable accommodations are accepted and implemented in practice.<sup>70</sup> Research indicates that teachers' attitudes towards inclusive education are based largely on practical issues of implementation, rather than understanding and commitment to the underlying values and principles of inclusion.<sup>71</sup> This is likely exacerbated by the fact that, according to the 2015 review, the *Disability Standards* fail to 'articulate broader aspirations of social inclusion, achievement of individual potential or inclusive education'.<sup>72</sup> Instead, the *Disability Standards* provide a minimum expectation and leave a broad scope of discretion to individual schools, without defining 'a shared vision and policy of inclusive education'.<sup>73</sup>

While various state and territory education laws and guidelines outline the support services available to students to meet the national *Disability Standards*, this falls short of guaranteeing these supports as a right.<sup>74</sup> As a result, the only avenue of redress for students whose needs have not been met is to take action under anti-discrimination legislation.<sup>75</sup> This is a challenging course of action for students with disability, as courts have been reluctant to make findings of disability discrimination against schools, especially in cases where a student's disability results in what the school considers to be challenging or disruptive behaviour.<sup>76</sup> Schools may also argue that requested adjustments are not reasonable; the *Disability Standards* do not require adjustments to be made that would 'compromise academic integrity' and courts have confirmed the 'unreasonableness' of proposed adjustments which they considered would do so.<sup>77</sup> Even where an adjustment is considered to be reasonable, education providers can avoid liability for discrimination by establishing that providing the accommodation would cause 'unjustifiable hardship', such as where the cost would be unaffordable or require unreasonable reallocation of resources.<sup>78</sup> In this way, discrimination claims based on failure to comply with the *Disability Standards* are weighted in favour of schools and education authorities, rather than students with disability seeking to assert their equal right to education.



The right to education guarantees inclusive education for people with disability,<sup>79</sup> which requires moving away over time from a dual-tracked system of mainstream and segregated education towards a single, universally accessible inclusive education system where people with disability learn together with other students.<sup>80</sup> In Australia, however, evidence suggests that segregated schooling of people with disability is increasing.<sup>81</sup> Segregation operates across a spectrum, and includes entirely separate 'special' schools as well as specialised classes or support units located within mainstream schools but separate from mainstream classes.<sup>82</sup> Enrolment data from the Australian Bureau of Statistics indicates that enrolment numbers at 'special' schools increased by 115.9% in the decade after the *Disability Discrimination Act 1992* (Cth) was enacted, and a further 84% after the introduction of the *Disability Standards for Education 2005* (Cth).<sup>83</sup>

Despite the clear position against segregation on the basis of disability taken by the Committee on the Rights of Persons with Disabilities which has characterised it as a form of disability discrimination,<sup>84</sup> the abolition of segregated education for people with disability remains contested in Australia, and the members of the recent Royal Commission were divided on the issue. Three of the Commissioners, two of whom were the only Commissioners with disability and the third of whom was the parent of a person with disability, saw segregated education as 'a significant human rights issue linked with violence against, and the abuse, neglect and exploitation of, people with disability', and called for all special or segregated education settings to be phased out in favour of fully inclusive education.<sup>85</sup> The remaining three Commissioners, on the other hand, supported maintaining separate facilities to provide for students with complex support needs outside of mainstream education settings. They note that 'there is always likely to be a relatively small group of children and young people with disability who prefer non-mainstream schools or whose parents or carers believe their complex support and educational needs are best met in a learning environment other than a mainstream school'.<sup>86</sup> However, there was limited exploration by those Commissioners of the notion of 'choice' within the dynamics of a dual-tracked system and widespread discriminatory gatekeeping<sup>87</sup> or the tension between parental beliefs and preferences and children's human rights<sup>88</sup>. Further, these Commissioners appeared to seek to redefine the notion of 'segregation', which has been well understood and at the centre of the disability human rights agenda for many decades<sup>89</sup>, relying on a limited concept of 'regular interchanges'<sup>90</sup> between students in mainstream settings and students in segregated settings that falls significantly short of equality and non-discrimination norms under international human rights law.<sup>91</sup>

It is clear that Australia's current framework for human rights falls short of fully realising the right to education for people with disability. Better recognition and stronger protection of the right to inclusive education is vitally needed. A federal human rights charter that both incorporates the rights of people with disability and provides accessible and effective avenues for remedy would be a significant step towards achieving justice and equality for this group. It could provide a blueprint for an transforming the education system over time into a system that ensures inclusive education.

## 4. How is the right to education protected in other countries?

Australia is one of only a handful of countries to not have a charter of human rights in some form. In countries where human rights are recognised in a charter, people have much greater power to ensure their rights are upheld and to hold governments accountable for failures to meet human rights obligations.

Many countries include their charter of rights as part of their Constitution. For example, the Constitution of India guarantees certain fundamental rights, including the right to education. There is an obligation on the Indian government to respect and protect these rights,<sup>92</sup> and they are enforceable against the government in court. A landmark case for the right to education in India is *Mohini Jain v State of Karnataka*,<sup>93</sup> which recognised the right to education as a necessary condition for the fulfilment of the right to life under the Indian Constitution. Mohini Jain brought a case before the Supreme Court after she was denied admission to a private medical university in Karnataka on the basis that she could not afford the fees.<sup>94</sup> At the time, the Karnataka government allowed private universities within the state to charge high tuition fees to students who were admitted into non-government seats, and even higher fees to students from outside of the state.<sup>95</sup> Mohini Jain argued that this policy violated the right to education, by making education inaccessible to certain students. The government of Karnataka argued that realisation of the right to education was subject to the availability of resources, and, as the schools could not meet their operation costs if they charged all students equally, charging some students higher fees was justified.<sup>96</sup> The Supreme Court disagreed, finding that the right to education requires equal access to education, and that charging certain students higher fees unjustly interfered with that right.<sup>97</sup> Subsequently, an amendment was passed in 2002 to expressly recognise education as an independent right in the Indian Constitution.<sup>98</sup>

Similarly, the South African Constitution expressly recognises the right to education.<sup>99</sup> The government's obligation to fulfil the right to education was at the heart of *Minister of Basic Education v Basic Education for All*.<sup>100</sup> The case was brought on behalf of students from schools in the Limpopo province, after a new curriculum had been introduced which required new textbooks to be distributed to all schools. After two years, many schools in the Limpopo province still had not received all required textbooks,<sup>101</sup> which significantly impacted the education of students in the province, the majority of whom were from poor, rural communities.<sup>102</sup> This was despite court orders made against the Minister of Basic Education that directed them to provide the necessary textbooks on an urgent basis.<sup>103</sup> The Department of Basic Education was taken back to court, and appealed, arguing that the standard of conduct required to satisfy the government's obligations under the constitutional right to education should take into account extenuating circumstances which impacted on the delivery of the textbooks.<sup>104</sup> The Supreme Court rejected this argument, and determined that the Department of Basic Education had a duty to follow up on its commitment to provide the required textbooks.<sup>105</sup> It was noted that the constitutional guarantee of the right had 'no internal limitation requiring the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'.<sup>106</sup> The court also held that failing to deliver textbooks to some schools, while providing them to others, amounted to discriminatory treatment.<sup>107</sup>

Constitutional recognition of human rights is not the only means by which the right to education has been protected in other countries. Many other countries have passed legislation that incorporates international human rights law into their domestic legal systems.<sup>108</sup> Some of these countries have common law systems that operate in a comparable way to the Australian legal system. This means the human rights statutes enacted by these countries provide useful exemplars for human rights legislation in Australia.

For example, in the United Kingdom, the right to education is safeguarded by the *Human Rights Act 1998 (UK)*. The impact of this legislation is illustrated in *R (E) v Islington London Borough Council ('E's Case')*.<sup>109</sup> The case involved a young girl, E, who, along with her mother and two younger siblings, had moved into Council-provided accommodation in the London Borough of Islington, due to domestic violence at their previous place of residence.<sup>110</sup> Despite being notified that E was in need of priority placement at a local school, by the time Islington Council organised a place for her, E had been out of school for nearly three months.<sup>111</sup> Less than two months later, the Council relocated E's family to temporary accommodation in another Borough.<sup>112</sup> E was unable to remain at her Islington school, but no arrangements had been made for the new Borough Council to take over responsibility for her schooling.<sup>113</sup> As a result, E went a further two months without access to education before a new place was found.<sup>114</sup> Less than six months later, the family were moved back to Islington, where the Council again failed to make appropriate arrangements for E to attend school.<sup>115</sup> It took yet another two months for E to be able to return to school.<sup>116</sup> In total, E had been unable to access education for nearly seven months, all in the space of a year. The court found that the failure to provide E with access to schooling for half of the school year was effectively a denial of the essence of her right to education.<sup>117</sup> E's Case demonstrates the importance of legislative recognition of the right to education for students who face administrative and bureaucratic barriers that impede their access to education. Without the protection of the *Human Rights Act 1998 (UK)*, E would have had no means to seek redress for the denial of her right to education.



## 5. The right to education in Australia

Under the ICESCR, governments have an obligation 'to use all the means at [their] disposal to give effect to the rights recognised in the Covenant'.<sup>118</sup> While this does not necessarily require 'comprehensive incorporation' or 'any specific type of status in national law',<sup>119</sup> the rights set out in the ICESCR must still be appropriately recognised under domestic law to ensure that they can be enforced and that 'appropriate means of redress or remedies' are 'available to any aggrieved individual or group'.<sup>120</sup> Despite being a signatory to the ICESCR and other international human rights agreements, the Australian government has not passed laws to give full effect to the human rights enshrined in these treaties. Some rights are protected under the common law and the Constitution, but the High Court is hesitant to interpret the Constitution as providing a broad spectrum of human rights, and those rights which are recognised tend to be narrowly defined.<sup>121</sup> There are also only limited avenues for people to take action if their human rights are violated. The main body responsible for human rights protection at the federal level is the Australian Human Rights Commission (AHRC). However, the AHRC complaints process is limited by law to investigation and conciliation,<sup>122</sup> and there is no option for parties to escalate their complaints to the courts if conciliation is not successful, unless the matter involves discriminatory treatment.<sup>123</sup> This means that human rights, including the right to education, are largely unenforceable in Australia.

Efforts have been made to improve the integration of human rights into Australian law by requiring statements of compatibility with human rights to be provided for any new legislation proposed in the federal Parliament.<sup>124</sup> The Parliamentary Joint Committee on Human Rights has also been established, and has the power to examine existing and proposed laws and policies for compatibility with human rights, and to inquire and report on matters relating to human rights.<sup>125</sup> However, legislation is not invalidated for non-compliance with human rights obligations, and incompatibility with human rights does not prevent a law from being enacted.<sup>126</sup> Despite the extensive scrutiny work undertaken by the Parliamentary Joint Committee on human rights,<sup>127</sup> human rights do not feature sufficiently in law- or policy-making or the administrative action of government departments. This lack of engagement with human rights is evident, for example, in the fact that no federal education legislation makes reference to students' right to education.<sup>128</sup>

Parliamentary scrutiny mechanisms, while important, do little to ensure that human rights are given due consideration in day-to-day decisions made by public authorities. The case studies below demonstrate the limitations of decision-making that fails to engage with human rights, in the context of the COVID-19 pandemic and recent legislative changes to higher education funding, both of which have had serious implications for the right to education in Australia.

## Australia's anti-discrimination laws

One important human right that has been integrated into Australian law is the right to non-discrimination. Article 2(2) of the ICESCR requires that all rights are 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>129</sup> The Australian government, and all state and territories, have enacted anti-discrimination laws with the aim of preventing discriminatory treatment and ensuring equal opportunities for marginalised groups in Australia.<sup>130</sup>

Anti-discrimination laws apply to education. For example, it is unlawful to discriminate on the basis of a protected attribute by:

- Refusing a student's application for admission,
- Imposing terms or conditions on a student's admission,
- Denying or limiting a student's access to any benefit the school provides,
- Expelling a student; or
- Subjecting a student to any other disadvantage.<sup>131</sup>

In this way, anti-discrimination laws can play an important role in providing remedies when a person's enjoyment of the right to education has been impacted. However, anti-discrimination laws are limited in scope, and many areas of potential discrimination are not adequately protected.<sup>132</sup> These laws also mainly operate reactively, responding after discrimination has occurred, rather than proactively preventing discriminatory treatment from occurring.<sup>133</sup> The reactive approach also means that the burden is placed on victims of discrimination to take action, and prove that the discrimination occurred.<sup>134</sup> This can be difficult due to the complexity of the legal rules and tests that apply.

There are also exceptions under anti-discrimination law which allow conduct that would otherwise be considered discriminatory.<sup>135</sup> For example, in a number of states, religious schools are permitted to take student's religious beliefs or convictions into account in deciding whether or not to grant admission.<sup>136</sup> In NSW and WA, the exception is not limited to consideration of a student's religious beliefs, allowing schools to discriminate on a range of other protected grounds.<sup>137</sup> A broad exception also exists at the federal level under the *Sex Discrimination Act 1984 (Cth)*, which permits religious schools to discriminate on the grounds of sexual orientation, gender identity, marital or relationship status, or pregnancy, where the discrimination is 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.<sup>138</sup> Submissions to a recent Australian Law Reform Commission inquiry gave examples of how this exception has allowed religious schools to discriminate against LGBTQIA+ students and staff.<sup>139</sup>

While it is legitimate for religious schools to have autonomy connected to their right to manifest religious belief in community with others, questions are raised as to whether some exceptions are too broad, given the impacts on students' rights to equality and non-discrimination, and their right to education.<sup>140</sup> Human rights law makes it clear that while there are circumstances in which human rights may conflict and compete with each other, any limitations or restrictions on such rights must be necessary and proportionate.<sup>141</sup>



## Case study: COVID-19 and the move to remote learning

The unprecedented disruption caused by the COVID-19 pandemic demonstrates the need for recognition of the right to education in Australia. Australia's pandemic response 'heavily relied on school closures and 'remote learning' in an effort to drive transmission to zero... regardless of local transmission rates'.<sup>142</sup> Over the course of 2020 and 2021, schools in all states and territories made the urgent switch to remote learning to combat the spread of the coronavirus. While it was necessary for governments at all levels to take action to minimise harm and loss of life, the response to COVID-19 highlights the limitations of a federal decision-making framework that fails to engage with human rights.<sup>143</sup>

Estimates at the onset of the pandemic predicted that as many as 46% of Australian students would be 'vulnerable to adverse effects on their educational outcomes, nutrition, physical movement, social and emotional wellbeing by being physically disconnected from school'.<sup>144</sup> Many students found that remote learning was not an adequate substitute for classrooms, noting fewer learning opportunities, reduced class options, delays in completion times, and lack of access to necessary resources.<sup>145</sup> Classroom learning is also difficult to replicate in a home setting, particularly for earlier grades where learning is largely play and inquiry based.<sup>146</sup> Parents and teachers alike reported concerns with the quality of education and student engagement provided via remote learning.<sup>147</sup> Teachers at schools in low socio-economic areas were particularly concerned that remote learning would compound existing inequalities and produce learning gaps that would be difficult to remedy.<sup>148</sup>

The move to remote learning also exposed deeply entrenched inequalities in Australia's educational system.<sup>149</sup> Students in high socio-economic areas were more likely than their low socio-economic peers to have the parental support, technological and material resources, and internet access necessary to maintain their access to education during lockdowns.<sup>150</sup> Evidence suggests that already disadvantaged students were likely to be further disadvantaged as a result of COVID-19 remote learning measures.<sup>151</sup> For example, the move to remote learning relied heavily on technology to deliver course materials, but access to the necessary technology varied significantly between students depending on socio-economic background,<sup>152</sup> family structure,<sup>153</sup> and location.<sup>154</sup> Many students indicated they did not have appropriate workspaces or resources to learn from home,<sup>155</sup> and in many families, technology had to be shared between multiple children in different grades.<sup>156</sup> While some schools opted for hard-copy resource packs to address this inequality, without the use of technology, educators were unable to maintain regular contact with many of their students.<sup>157</sup> The use of technology also raised concerns regarding students' safety and privacy, particularly in the use of surveillance software to monitor students during classes.<sup>158</sup>

The transition to remote learning was also more impactful on students who could not rely on their parents or guardians to assist with their learning. This was particularly the case for primary school students, who lacked the skills and experience required to navigate the required technology and complete activities independently<sup>159</sup> and for many students with disabilities,<sup>160</sup> particularly those who did not have access to accessible technologies. Many parents expressed difficulty with supporting remote learning due to a lack of professional training in education.<sup>161</sup> This was exacerbated for students from low socio-economic backgrounds whose parents were more likely to be unavailable due to work commitments.<sup>162</sup>

The response to the COVID-19 pandemic required a difficult balancing act between competing rights, with the overriding priority of preventing serious illness and death for as many people as possible. However, the decisions made throughout the pandemic gave little consideration to potential impacts on vital social, cultural and economic rights.<sup>163</sup> As Askola points out, 'repeated school closures are a particularly striking example of children being treated as 'vectors of transmission' with little overt consideration of their rights'.<sup>164</sup> Analysis of the pandemic's impact on education continues to largely focus on learning loss, potential future loss to the economy from lower education outcomes, the cost of remedial measures, and the investments needed to make remote learning feasible for disadvantaged students in future.<sup>165</sup> This makes the need for a federal human rights charter even more apparent, to ensure the right to education is given due consideration in these conversations and the eventual policy outcomes.

### Case study: Job-Ready Graduates policy reform and access to higher education

The lack of recognition of the right to education has consequences for all levels and forms of education, including higher education. Under article 13 of ICESCR, higher education should be 'equally accessible to all, on the basis of capacity'.<sup>166</sup> Access to higher education is becoming increasingly important, as a greater number of occupations require a minimum of Bachelor-level qualifications and more students pursue higher education qualifications.<sup>167</sup> However, rather than making higher education more accessible to future students, recent higher education policies in Australia may have the opposite effect, and further entrench existing inequalities.

The Job-Ready Graduates' policy package for higher education was introduced in 2020 in recognition of the increasing number of university places needed to accommodate growing student numbers. Its central feature is a change to the funding structure for higher education, in order to fund 39,000 additional student places. This major change has resulted in dramatic increases in student fees in certain fields of education. The portion of tuition fees which students are responsible for paying now ranges from around \$3,950 per year of study (with Commonwealth support of \$27,000) up to as much as \$14,500 (with Commonwealth support of only \$1,100 ).<sup>168</sup> In other words, students are responsible for somewhere between 12.7% and 92.9% of the costs of tuition, depending on their field of study.

One justification for the new funding model was to incentivise prospective students to study priority areas experiencing high employment demand, as fee rates are lower in these priority areas.<sup>169</sup> However, this approach relies on the government's ability to 'pick winners' by predicting specific degrees or disciplines that will be in demand at the time students graduate, usually three to four years into the future.<sup>170</sup> There is also a risk that the funding model could artificially inflate demand and create an influx of graduates from degrees chosen due to tuition costs, rather than interest or skill, undermining any promises of high employability in these disciplines.<sup>171</sup>

Education costs are just one of the factors which influence students' decisions regarding the disciplines they study. These decisions are also guided by students' preference, educational background, socio-economic background, career guidance and school experience, occupational expectations, psychological attributes and their university entrance marks.<sup>172</sup> Whether the Job-Ready Graduate fee model will lead to the intended increase in students in 'priority' areas will therefore remain to be seen. Nevertheless, the policy's intention must be balanced against the fact that the fee model may deter prospective students from disadvantaged and low socio-economic backgrounds from pursuing higher education altogether.<sup>173</sup> As Kotzmann notes, 'ultimately, all higher education fees act as a form of disincentive to the enjoyment of the right to higher education for those who lack the means or have a lower capacity to pay fees'.<sup>174</sup> Students from disadvantaged backgrounds tend to be more debt averse, and are also likely to be the most affected by the impacts of overall funding reductions.<sup>175</sup> For example, increased class sizes and reduced support services are likely to have a greater impact on students who have fewer resources and networks available outside of their higher education institution.<sup>176</sup> Rather than increasing employability, therefore, the Job-Ready Graduates package may have the long-term effect of locking disadvantaged people out of higher education and therefore out of higher paying occupations.<sup>177</sup>

The Job-Ready Graduates package also sees students lose their Commonwealth Supported Place (CSP) if they do not maintain a successful completion rate of at least 50% after their first eight courses.<sup>178</sup> The intention is to ensure 'that students are not burdened with a debt for studies from which they have derived little or no benefit' and 'that students are enrolling in appropriate courses for their aptitude and interests'.<sup>179</sup> As a result of this policy, students who do not meet the successful completion requirement will no longer be eligible to have the government pay a portion of their tuition fees, and will have to pay their tuition fees upfront, or withdraw from study.<sup>180</sup> This is a particular concern for students from low socio-economic backgrounds, students with disability, students from a non-English speaking background, and students from rural and remote areas,<sup>181</sup> who are more likely to struggle to meet the successful completion requirement. The Job-Ready Graduates package may therefore result in disadvantaged students withdrawing from higher education in greater numbers, due to the financial barriers imposed under the policy. Students from more privileged socio-economic backgrounds are also less likely to be negatively impacted by the completion requirements, as they may have greater capacity to afford the upfront tuition costs without relying on commonwealth support. The policy therefore not only impacts upon students' right to education, but also raises issues of equity and non-discrimination.<sup>182</sup>

The Job-ready Graduates fee increases disproportionately impact women. The disciplines most impacted by fee increases tend to have a higher percentage of women enrolling.<sup>183</sup> For example, women make up approximately two-thirds of enrolments in society and culture courses, for which student fee contributions have increased by \$7,969 annually – the highest across all disciplines, leading to students paying 93% of their course costs, up from 45%.<sup>184</sup> Women also account for 60% of domestic university enrolments, and overall women will be paying an additional \$498 million compared to an additional \$339 million for men, if current education patterns remain the same. Importantly, despite their higher enrolment rates, women already receive lower returns overall from university-level education,<sup>185</sup> and increased tuition costs in areas with high enrolment of women is likely to exacerbate these inequalities.

The Parliamentary Joint Committee on Human Rights noted in their scrutiny of the Job-ready Graduates package that ‘where these measures will lead to a decrease in the cost of undertaking studies, these measures will promote the right to education. [However]... where these measures would cause some studies to become more expensive, they engage and may constitute a retrogressive measure in relation to the right to education.’<sup>186</sup> The Committee particularly noted the lack of evidence provided to indicate ‘that the proposed increases in student contributions for certain courses would not have the effect of deterring future students from undertaking those studies, including students from lower socio-economic backgrounds or students from regional and remote areas’.<sup>187</sup> Furthermore, it was noted 98% of commonwealth-supported students will meet the successful completion requirements necessary to maintain their Commonwealth-Supported Place.<sup>188</sup> As such ‘it is not clear that there is a pressing and substantial concern which warrants the introduction of the minimum unit completion rate with respect to all Commonwealth Supported students’, and the subsequent limitation of the right to education.<sup>189</sup>

According to UNICEF, Australia currently ranks in the bottom third of OECD countries in providing equitable access to quality education.<sup>190</sup> This is not helped by government policies like the Job-Ready Graduates scheme, which risk significantly limiting access to higher education for students from disadvantaged backgrounds. While the recently elected Labor government has repealed some of the most adverse aspects of the Job-Ready Graduates framework,<sup>191</sup> a federal human rights charter remains vital to ensure that policy makers engage with education as a human right and commit fully to their obligations to ensure equitable access to higher education.



## 6. How are States and Territories protecting the right to education?

Victoria, Queensland and the ACT have each passed legislation to recognise, protect and promote human rights at the state/territory level.<sup>192</sup> Although there are some differences between these jurisdictions in their approach to human rights protection, they share the following common features:

1. Proposed laws must include a statement demonstrating how they are, or are not, compatible with human rights.<sup>193</sup> However, a lack of compatibility will not render a proposed law invalid, and in Victoria and Queensland, a declaration may be made to give effect to laws which are inconsistent with human rights.<sup>194</sup>
2. All public authorities - including government Ministers and their departments, public employees, local councils, police, and other public agencies – must give proper consideration to human rights when making decisions, developing laws or policies, or delivering services, and must act compatibly with human rights when carrying out their duties.<sup>195</sup> In the ACT, a person can bring a case to the ACT Supreme Court if they are impacted by a public authority not complying with this obligation.<sup>196</sup> However, in Queensland and Victoria, this can only be raised as part of a case brought on other grounds; no independent cause of action is created under the human rights statutes in those jurisdictions.<sup>197</sup>
3. Courts and tribunals must interpret all laws consistently with human rights, to the extent possible while remaining consistent with the law's purpose.<sup>198</sup> If a law is not consistent with human rights, it is not made invalid, but a declaration of incompatibility may be issued.<sup>199</sup> A response to this declaration must be tabled in parliament,<sup>200</sup> and it is then up to parliament to decide whether or not to amend the law to address the incompatibility.



## The right to education in the ACT and Queensland

The ACT and Queensland both explicitly include the right to education in their respective human rights legislation. *The Human Rights Act 2019 (Qld)* focuses on access to education, stating that ‘every child has the right to have access to primary and secondary education appropriate to the child’s needs’, and ‘every person has the right to have access, based on the person’s abilities, to further vocational education and training that is equally accessible to all’.<sup>201</sup> Similarly, the *Human Rights Act 2004 (ACT)* sets out that ‘every child has the right to have access to free school education appropriate to his or her needs’, and that ‘everyone has the right to have access to further education and vocational and continuing training’.<sup>202</sup> However, the ACT legislation specifically limits this to two ‘immediately realisable aspects’: that everyone is entitled to enjoy these rights without discrimination, and that parents or guardians may choose non-government schooling for their child.<sup>203</sup>

While the Queensland and ACT statutes focus on access to education, the ACT Human Rights Commission has noted that the four features of education are ‘interrelated and essential’, and therefore the elements of availability, acceptability and adaptability are still relevant.<sup>204</sup> However, few cases involving the right to education have been brought before the courts in either Queensland or the ACT, and there has been little judicial consideration given to the specific content of the right.

Outside of the judicial system, the ACT *Human Rights Act* has enabled the ACT Human Rights Commission to raise concerns regarding education policies and practices which have impacted the right to education for certain students in the Territory. For example, a 2011 report into the youth justice system noted concerns about the education of young people in Bimberi Youth Justice Centre which, at the time, was not consistent with human rights standards.<sup>205</sup> For instance, young people in segregation in Bimberi were provided written work to complete on their own, without access to a teacher.<sup>206</sup> The ACT Human Rights Commission made a number of recommendations to better ensure the right to education of young people in detention in Bimberi. However, the lack of adequate education for young people during periods of segregation was noted to have continued, according to a 2019 report by the ACT Disability and Community Services Commissioner and the ACT Human Rights Commissioner.<sup>207</sup>

In other cases, the ACT *Human Rights Act* has prompted improvements to policies that conflicted with the right to education. In 2013, concerns were brought to the ACT Education and Training Directorate regarding policies which charged fees to international students on a number of visa subclasses.<sup>208</sup> The students impacted by these policies included students granted refugee status, and students seeking asylum. The Human Rights and Discrimination Commissioner worked with the Directorate over two years to develop new policies that better reflected human rights obligations under the *Human Rights Act* and the Convention on the Status of Refugees.<sup>209</sup> This included policies which confirmed that public education in the ACT is free for people seeking asylum.

## The right to education in Victoria

The right to education is not explicitly included in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, the Charter's requirement that public authorities act compatibly with and give proper consideration to human rights is not limited to only those human rights explicitly listed; other rights and freedoms recognised in law, including in international law, must not be limited only because they are not included in the Charter.<sup>210</sup> This means that the Charter can be referred to in support of student's right to education, even though that right is not explicitly included in the text.

The right to education is also protected under the Charter where it intersects with other protected rights. For example, in their submission to the 2011 review of the Charter, the Youth Affairs Council of Victoria described a situation where a child with a learning disability was facing expulsion from his school due to behavioural issues.<sup>211</sup> His advocate raised his rights to education, equality, and freedom from discrimination in interactions with both the school and the Department of Education. The student was subsequently provided with additional supports which reduced his behavioural issues and allowed him to remain at the school.<sup>212</sup>

## The right to education in other Australian jurisdictions

Outside of Victoria, Queensland and the ACT, reference to the right to education may be found as part of broader, education-related legislation, but this is not enforceable. For example, section 4 of the *Education Act 1990* (NSW) recognises that 'every child has the right to receive an education', but this does not give rise to, and cannot be taken into account in, any cause of civil action.<sup>213</sup> A similar rule applies in the Northern Territory.<sup>214</sup> In the remaining states, the right to education is noted as an underlying principle which must be considered in the operation of education legislation,<sup>215</sup> but there is no specific means by which this can be enforced.



## Case study: The limited realisation of the right to education in remote areas

According to the 2022 Census, approximately 27.3% of primary and secondary students live in regional, remote, or very remote areas.<sup>216</sup> Once inner regional areas are excluded, this proportion drops to 9.5%. Students living in remote and very remote communities account for 1.1% and 0.7% of primary and secondary school students respectively.<sup>217</sup> Ensuring equitable access to education for these students has been a persistent challenge. In 2000, an inquiry undertaken by the Human Rights and Equal Opportunities Commission reported ‘significant barriers to the availability, accessibility and quality of education for rural and remote students’, suggesting there has been only limited realisation of their right to education.<sup>218</sup> In the two decades since, educational inequity between rural, regional and remote students and their metropolitan peers has remained an intractable problem.

The vast distances and low population density makes providing widely available education in remote areas a difficult task. The small size of the most remote communities makes the per capita cost of education much higher than in urban areas, making adequate resourcing of schools costly.<sup>219</sup> As a result, remote communities with fewer than 1000 residents are unlikely to have enough students to be provided with their own secondary schools.<sup>220</sup> Some communities rely on combined primary and secondary schools, often with multi-grade classrooms which require teachers to cater for the needs of students across a wide age range. For almost 1 in 5 students in very remote locations, the highest level of education available in their community is below the senior secondary (Year 11/12) level.<sup>221</sup> The availability of education is further limited by what has been described as the ‘perennial failure’ of staffing remote schools.<sup>222</sup> Despite the incentives offered by education authorities, remote schools struggle to attract and retain skilled teachers, with some schools having a turnover rate of 30-50% as experienced staff relocate to metropolitan areas to progress their careers.<sup>223</sup> Research also suggests that regional and remote schools are more likely to be staffed by newer, younger graduates, who are often more transient than staff in metropolitan schools.<sup>224</sup>

The limited availability of education in remote communities exacerbates issues of physical and economic inaccessibility. Many students in remote and very remote areas must relocate to larger communities or enrol in boarding schools in order to complete their secondary education, often at great financial and emotional expense.<sup>225</sup> This is also common for students who live with their families on outback sheep and cattle stations, who typically rely on distance education programs like School of the Air for their primary education.<sup>226</sup> In the Northern Territory, where just under 40% of all students are from remote or very remote communities, the options available for remote students to progress past Year 8 are weighted three to one towards relocating rather than remaining in their communities.<sup>227</sup> As Guenther and Osborne note: ‘Sending children to boarding schools does not overcome the fundamental access issues that limit equitable education opportunities that exist in rural and remote communities’.<sup>228</sup> The 2018 Independent Review into Regional, Remote and Rural Education recommended investment in digital technologies and infrastructure to improve access to education.<sup>229</sup> However, the experiences of distance education during the COVID-19 pandemic have raised concerns regarding the quality of online education, and the appropriateness of relying on digital and technological solutions to address educational inequality.<sup>230</sup>



The quality of education in remote communities is also often not equivalent to the education available at metropolitan schools. For example, remote students in the Northern Territory who choose not to relocate post-Year 8 are provided an alternative to mainstream secondary schooling that instead ‘focus[es] on post-primary literacy and numeracy and an employment pathways program... [providing] skills to gain employment’.<sup>231</sup> Where the mainstream curriculum is taught, teachers are frequently required to teach outside their subject expertise, due to the small size of schools and limited number of teachers available.<sup>232</sup> Classes are also often comprised of multiple grades, making it difficult to tailor lessons to students’ various learning needs.

Many students in remote communities also experience multiple forms of disadvantage.<sup>233</sup> In particular, the educational challenges associated with schooling in remote and very remote areas disproportionately impact upon Aboriginal and Torres Strait Islander students. Approximately 6-7% of all school students in Australia are Aboriginal or Torres Strait Islander; however, this rises to close to 25% in remote areas, and as high as 60% in very remote areas.<sup>234</sup> In this context, the education provided to students in remote schools is also lacking in cultural relevance. All schools are expected to teach the Australian Curriculum.<sup>235</sup> However, this curriculum has been frequently criticised for being dominated by Western and metropolitan-centric values and ideas.<sup>236</sup> The curriculum provides some flexibility for teachers to interpret and align content with place-based approaches to learning that incorporate and reflect local geographies and knowledges. Evidence also indicates a dramatic increase in attendance and learning outcomes when teachers learn and apply culturally appropriate practices.<sup>237</sup> However, these approaches are only effective if teachers have sufficient resources, skill and experience to implement them.<sup>238</sup>

These curriculum difficulties are exacerbated by standardised testing that ignores the different contexts in which students are learning.<sup>239</sup> Teachers in remote schools often report that the National Assessment Program- Literacy and Numeracy (NAPLAN) tests ‘presume experience and knowledge to be common across childhoods’, requiring students to respond to questions and texts that are “totally alien” to the life experiences of children in remote communities’.<sup>240</sup> Topics like ‘recycling, “hosing things into gutters”, tenpin bowling and going to the cinema’ are ‘concepts which may be familiar to children in urban areas, but are relatively foreign in a remote community’.<sup>241</sup> When coupled with the fact that education and standardised testing are provided only in Standard Australian English, which for many students in remote areas is a second or third language only used in school,<sup>242</sup> this ‘foreignness’ further compounds the inappropriateness of the curriculum for remote students’ educational context.

It is clear that the right to education is not fully realised for students in rural and remote areas. Education is neither widely available nor easily accessible, and schools are often unable to provide an acceptable education that is of high quality and culturally appropriate. Recognition of the right to education in Australia is vital to empower regional and remote communities to advocate for better education services, and to hold education authorities accountable for their failure to provide an adequate and equitable education system for the benefit of all students, not only those living in urban and metropolitan areas.



## 7. What difference would a federal charter of human rights make?

A federal charter of human rights would strengthen the existing human rights framework in Australia and provide more consistent and meaningful protection of the right to education for all Australians.

Currently, Australia's recognition and protection of human rights is limited, and is inconsistent between the few states with human rights legislation and those without. For most people in Australia, human rights cannot be claimed, asserted or enforced outside the limited scope of the Australian Human Rights Commission and anti-discrimination law. Human rights are not given sufficient consideration by policymakers or administrators at the national level, which leads to unnecessary and disproportionate restrictions and limitations on key rights and freedoms. Furthermore, many marginalised groups – including people with disability, Aboriginal and Torres Strait Islander peoples, and refugees and people seeking asylum – do not enjoy their human rights on an equal basis with the rest of Australia. More needs to be done to fulfil our obligations to equality and justice for these groups.

A federal charter of rights would make a real difference for human rights in Australia:

1. It would provide a clear statement of all our rights and freedoms in one place, so that all Australians can know and advocate for their rights.
2. It would ensure that human rights are given proper consideration by public officials in any actions or decisions made regarding law, policy and service provision.
3. It would enable people to take action and seek justice if their human rights are infringed upon.<sup>243</sup>

Federal recognition of the right to education would also embed the '4A' principles of availability, accessibility, acceptability and adaptability into Australia's education system at all levels. This would be a significant step towards ensuring that all Australian students are able to equally enjoy and benefit from education, regardless of their background.

Momentum for human rights reform continues to grow. In March 2023, the Australian Human Rights Commission released a position paper titled '*A Human Rights Act for Australia*',<sup>244</sup> one of three major papers marking the culmination of the four-year long inquiry, '*Free and Equal: An Australian Conversation on Human Rights*'.<sup>245</sup> In March 2023, at the instigation of the federal Attorney-General, the Parliamentary Joint Committee on Human Rights began an inquiry into Australia's human rights framework, which received over 300 submissions from individual members of the public, academics, lawyers, public interest groups and human rights organisations.<sup>246</sup>

The public imperative to act on Australia's human rights obligations has never been more pressing; the time for a federal charter is now.

## Endnotes

- 1 Universal Declaration of Human Rights, GA Res 217A (III) UN GAOR, UN Doc A/810 (10 December 1948) art 26 ('UDHR').
- 2 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 Soc E/C.12/1999/10 (8 December 1999) [1] ('CESCR General Comment 13').
- 3 Ibid.
- 4 Ibid. See also: UNESCO and Right to Education Initiation, Right to Education Handbook (UNESCO, 2019) 33 ('Right to Education Handbook').
- 5 See: Right to Education Handbook (n 4) 33-34.
- 6 CESCR General Comment 13 (n 1).
- 7 According to 2022 census data, of people aged 20-24 years, 90% had attained a qualification at Year 12 level (or Cert III for vocational students) or above: 'Education and Work', Australian Bureau of Statistics, (Web Page, May 2023) <<https://www.abs.gov.au/statistics/people/education/education-and-work-australia/latest-release>>.
- 8 According to OECD statistics on education, in 2020, 81.6% of children aged three to five were enrolled in early childhood education: 'Country Profile – Australia', GPS Education (Web Database, 2023) <<https://gpseducation.oecd.org/CountryProfile?primaryCountry=AUS&treshold=10&topic=EO>>.
- 9 According to OECD statistics, in 2021, 49.8% of Australians aged 25-64 attained a tertiary qualification: 'Country Profile – Australia', GPS Education (Web Database, 2023) <<https://gpseducation.oecd.org/CountryProfile?primaryCountry=AUS&treshold=10&topic=EO>>.
- 10 UDHR (n 1) art 26.
- 11 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13 ('ICESCR').
- 12 See, for example: 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) art 5(e)(v) ('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) arts 5(b), 10, 16(e) ('CEDAW'); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 6 ('CRC'); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990 (entered into force 1 July 2003) art 30 ('ICRMW'); Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 24 ('CRPD'); 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) arts 14, 15 ('UNDRIP').
- 13 See: CESCR General Comment 13 (n 2) [6].
- 14 Ibid [6]; Right to Education Handbook (n 4) 77.
- 15 CESCR General Comment 13 (n 2) [6].
- 16 Ibid [41]; Right to Education Handbook (n 4) 77.
- 17 CESCR General Comment 13 (n 2) [7].
- 18 ICESCR (n 11) art 13(1).
- 19 Ibid art 29(1).
- 20 Ibid art 13(2)(a).
- 21 Ibid art 14, which requires states that do not already provide free and compulsory primary education to adopt a plan of action to do so within a reasonable number of years.
- 22 For example, the UNESCO Convention Against Discrimination in Education, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) ('CADE').
- 23 CESCR General Comment 13 (n 2) [46]. See also: Dianne Otto and David Wiseman, 'In search of 'effective remedies': applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7(1) Australian Journal of Human Rights 5, 12-13, 14-16.
- 24 CESCR General Comment 13 (n 2) [47]; Otto and Wiseman (n 23) 15.

- 25** Ibid.
- 26** CESCR General Comment 13 (n 2) [50].
- 27** Ibid [46]. See also: Otto and Wiseman (n 23) 16.
- 28** CESCR General Comment 13 (n 2) [48].
- 29** ICESCR (n 11) art 13(4).
- 30** Ibid art 13(3).
- 31** 'How Schools are Funded', Department of Education (Web Page, 23 February 2023) <<https://www.education.gov.au/schooling/how-schools-are-funded>>
- 32** Human Rights Law Centre, 'Frequently Asked Questions', Charter of Rights (Web Page, 2022) <<https://charterofrights.org.au/resources/2020/2/7/faqs>>.
- 33** CEDAW (n 12) art 2.
- 34** Compared with 88% of men: 'Education and Work', Australian Bureau of Statistics (Web Page, May 2023) <<https://www.abs.gov.au/statistics/people/education/education-and-work-australia/latest-release>>.
- 35** 'Country Profile – Australia', GPS Education (Web Database, 2023) <<https://gpseducation.oecd.org/CountryProfile?primaryCountry=AUS&treshold=10&topic=EO>>.
- 36** Compared with 39% of men: 'Education and Work', Australian Bureau of Statistics (Web Page, May 2023) <<https://www.abs.gov.au/statistics/people/education/education-and-work-australia/latest-release>>.
- 37** See: CEDAW (n 12) art 10(c).
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- 128** See, for example: *Australian Education Act 2013* (Cth); *Education Services for Overseas Students Act 2000* (Cth); *Schools Assistance Act 2008* (Cth); *Higher Education Funding Act 1988* (Cth); *Higher Education Support Act 2003* (Cth).
- 129** ICESCR (n 11) art 2(2).
- 130** 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).
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- 136** *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1991* (Qld) s 41; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 2010* (Vic) s 39, 83. Note that a similar provision was recently removed in the Northern Territory under the *Anti-Discrimination Amendment Act 2022* (NT).
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