

Submission to the Inquiry into

**Whether the Australian Parliament should enact a federal
Human Rights Act**

to the

Parliamentary Joint Committee on Human Rights

Prepared by

I INTRODUCTION

This submission aims to strengthen the Parliamentary Joint Committee on Human Rights' findings in relation to the need for a federal Human Rights Act. With a focus on First Nations people, particularly First Nations women and girls, a federal Human Rights Act would provide a vitally comprehensive instrument for recognition and enforcement of human rights in Australia.

The Australian Human Rights Commission's ('**AHRC**') Position Paper¹ emphasises the need to protect the rights of First Nations people within a federal Human Rights Act. The lack of legal human rights protection within the *Commonwealth of Australia Constitution Act 1977* (Cth) ('**the Constitution**') and absence of a federal Human Rights Act disproportionately impacts disadvantaged, marginalised and discriminated communities.² The vulnerabilities of First Nations people are consistently overlooked by the patchwork legal framework of human rights protection in this country,³ resulting in perpetuation of health, social and justice disparities.⁴ Whilst some Australian states have Human Rights Acts,⁵ the full coverage and equal application of a federal Act would ensure comprehensive protections of human rights without geographical limitations.⁶

This submission draws on the *Wiyi Yani U Thangani* project as a novel *blakprint* for systemic and structural reform in Australia for First Nations women and children.⁷ The project has highlighted that despite the decades of reform and commitments to human rights in Australia, the absence of an overarching strategy for effective and transparent monitoring has led to a system of 'dispersed accountability, unnecessary duplication and disconnected

¹ Australian Human Rights Commission (2022), 'Free & Equal – Position paper: A Human Rights Act for Australia', *Australian Human Rights Commission*.

² *Ibid* 48.

³ *Ibid* 11.

⁴ *Ibid* 48.

⁵ *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2019* (Qld).

⁶ *Ibid* 57.

⁷ June Oscar AO (2023), 'Wiyi Yani U Thangani National Summit Communiqué', *Australian Human Rights Commission*, 1.

outcomes.⁸ This submission ultimately recommends that this overarching strategy can be found in a federal Human Rights Act.

II HUMAN RIGHTS CONCERNS FOR FIRST NATIONS PEOPLE

The trauma and injustice of colonisation suffered by First Nations people have materialised in a number of ways. The juxtaposition between First Nations people and non-Indigenous people continue to manifest in stark differences in living standards, life expectancy, levels of education, health and employment.⁹ The detriment suffered by First Nations people is experienced differently on the basis of gender, as First Nations women and girls remain one of the most marginalised and politically disenfranchised groups in Australia.¹⁰ Being of heightened vulnerability, the status of First Nations women and girls requires specific attention and a human rights-based approach.¹¹

The *Wiyi Yani U Thangani* Report¹² thoroughly explored the rights of First Nations women and children as articulated in various international human rights instruments (highlighted in *Appendix A*).¹³ Among these, the right to self-determination¹⁴ is of particular relevance, as the voices of First Nations women are frequently conflated and lost among the needs and aspirations of First Nations men.¹⁵ There are proven far-reaching benefits for the health and wellbeing of First Nations people when their self-determination and control is increased, as demonstrated in states with treaties and stronger connection with their Indigenous peoples (such as Canada and New Zealand).¹⁶ Further, the added drivers of violence specific to First

⁸ Australian Human Rights Commission, 'Wiyi Yani U Thangani (Women's Voices) – First Nations Women's Safety Policy Forum Outcomes Report: November 2022', *Australian Human Rights Commission*, 16.

⁹ Commonwealth of Australia (2012), 'Australia's National Human Rights Action Plan 2012', *Australian Government*, 24.

¹⁰ June Oscar AO (2020), 'Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future Report', *Australian Human Rights Commission*, 116.

¹¹ *Ibid* 24.

¹² *Ibid*.

¹³ This table summarises the individual human rights explored in Oscar (n 9).

¹⁴ Article 1 of the *International Covenant on Civil and Political Rights* ('**ICCPR**'); Article 1 of the *International Covenant on Economic, Social and Cultural Rights* ('**ICESCR**'); and Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('**UNDRIP**').

¹⁵ Oscar (n 10) 116.

¹⁶ Scott Winch (2022), 'Submission 81: The Application of the UNDRIP in Australia', *World Vision*, 1.

Nations families¹⁷ requires a dedicated approach.¹⁸ Colonisation and racism in the forms of land dispossession, separation of families and communities and the forcible removal of children are historic traumas that are deeply linked with the experience of family violence.¹⁹

Representation plays a significant role in the state of human rights in Australia. Since parliamentarians concentrate on the issues applicable to the majority population of the voting public, minorities (particularly First Nations women and children) are often overlooked in the law-making process.²⁰ Further, First Nations women and children have increased interactions with public services and institutions, and as a consequence, there is a higher possibility of administrative decisions that adversely affect their rights.²¹ The potential of a constitutional Voice to Parliament will enable First Nations voices to be heard by the key political institution in the country,²² which would assist in the creation of a federal Human Rights Act that adequately addresses the above issues for First Nations women and children.

III OBLIGATIONS AND STRATEGIES

Australia is a party to seven of the major international human rights treaties.²³ *Appendix A* highlights the articles and their respective treaties of most importance to First Nations women and children.

A *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')

Of heightened significance is the ground-breaking UNDRIP. Australia became a party to the UNDRIP two years after its adoption by the United Nations in 2007,²⁴ despite having the

¹⁷ Australian Human Rights Commission (n 8) 15.

¹⁸ Ibid.

¹⁹ Australian Human Rights Commission (n 8) 26.

²⁰ Australian Human Rights Commission (n 1) 86.

²¹ Ibid 87.

²² Elisa Arcioni (2021), 'The Voice of Parliament proposal and 'the people' of the Constitution', *Alternative Law Journal*, 46(3) 225.

²³ Australian Human Rights Commission (n 1) 105.

²⁴ Ibid.

oldest continuing living culture in the world,²⁵ and is yet to create a National Plan for its implementation.²⁶ The UNDRIP elaborates on existing human rights as they apply to First Nations people²⁷ and places an obligation on States to guarantee the right to collective participation.²⁸

The AHRC has recommended that a federal Human Rights Act implements the UNDRIP through creation of a participation duty to compliment the Voice to Parliament and have this reflected in parliamentary scrutiny processes.²⁹ In addition, AHRC recommends the inclusion of cultural, non-discrimination and other rights within *International Covenant on Economic, Social and Cultural Rights* (as well as standalone cause of actions and representative standing), a clause enabling interpretation of rights in light of the UNDRIP and feature the collective right to self-determination³⁰ within the preamble.³¹ UNDRIP's adoption would particularly benefit First Nations children in 'improving their education outcomes, protections in the criminal justice systems and protecting [their] kinships and culture.'³²

B *Wiyi Yani U Thangani* project

The *Wiyi Yani U Thangani* project highlights the need for government recognition and investment in First Nations women and girls by including their voices in policy development to drive systemic change and break cycles of disadvantage.³³ The recommendations of the project have formed through the *Wiyi Yani U Thangani* Report, Implementation Framework

²⁵ Australian Human Rights Commission, 'Aboriginal and Torres Strait Islanders: Australia's First Peoples' (Online web page, no date) <<https://humanrights.gov.au/our-work/education/aboriginal-and-torres-strait-islanders-australias-first-peoples>>.

²⁶ Australian Human Rights Commission (n 1) 130.

²⁷ Australian Human Rights Commission (n 1) 105.

²⁸ Ibid 188.

²⁹ Australian Human Rights Commission (n 1) 19.

³⁰ Article 1 of the ICCPR; Article 1 of the ICESCR; and Article 3 of the UNDRIP.

³¹ Australian Human Rights Commission (n 1) 19.

³² Winch (n 16) 3.

³³ Australian Human Rights Commission (n 8) 17.

and National Framework for Action (through a National First Nations women and girls Summit)³⁴ and address:

- (1) *Leadership and decision-making for self-determination*;³⁵
- (2) *Language, land, water and cultural rights*;³⁶
- (3) *Societal healing and intergenerational wellbeing*;³⁷ and
- (4) *Economic justice and empowerment*.³⁸

A major part of the project focuses on ending violence.³⁹ As a result, the *Wiyi Yani U Thangani* First Nations Women's Safety Policy Forum occurred in 2022 to consider how to address the root causes and drivers of violence, as the government prepares to deliver on its commitment to develop a standalone *National Plan to End Violence against First Nations Women and Children*. The Forum aimed to re-set the relationship with government to place First Nations women in centrality, and consequently shape the policies and systems that impact their lives.⁴⁰

The final stage of the project began just last month with the *Wiyi Yani U Thangani* National Summit, where over 800 First Nations women from across Australia attended and issued a Summit Communiqué⁴¹ and Youth Statement⁴² outlining the delegates' perspectives, calls to action and recommendations for governments to enhance First Nations gender justice and equity.⁴³

³⁴ Australian Human Rights Commission, 'Wiyi Yani U Thangani (Women's Voices) Implementation Framework (2022)', *Aboriginal and Torres Strait Islander Social Justice*, (Online news post, 15th February 2022) <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/wiyi-yani-u-thangani-5>>.

³⁵ June Oscar AO (2021), 'Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future – Implementation Framework', *Australian Human Rights Commission*, 30.

³⁶ *Ibid* 43.

³⁷ Oscar (n 35) 66.

³⁸ *Ibid* 90.

³⁹ Australian Human Rights Commission (n 8) 17.

⁴⁰ *Ibid* 8.

⁴¹ Oscar (n 7).

⁴² June Oscar AO (2023), 'Wiyi Yani U Thangani Youth Statement', *Australian Human Rights Commission*.

⁴³ Australian Human Rights Commission, 'Aboriginal and Torres Strait Islander women to 'design' their future with new national approach to First Nations gender justice', *Aboriginal and Torres Strait Islander Social Justice*, (Online media release, 11th May 2023) <<https://humanrights.gov.au/about/news/media-releases/aboriginal-and-torres-strait-islander-women-design-their-future-new>>.

IV THE IMPACT OF A FEDERAL HUMAN RIGHTS ACT

The current legislative protections of human rights in Australia are not enough. The Constitution offers express protection for only a few scattered human rights.⁴⁴ First Nations people, who have only been recognised by this document since 1967,⁴⁵ face additional barriers in ensuring its protection through the races power,⁴⁶ which has enabled the creation of laws which disadvantage First Nations people.⁴⁷ By introducing a federal Human Rights Act which implements the recommendations of the *Wiyi Yani U Thangani* project, the interaction between public authorities and First Nations women and children would significantly improve. This reform would ensure that the interactions of First Nations people with the legal system always operates fairly and inclusively.⁴⁸

The major value provided by a Federal Human Rights Act is the ability to have robust checks on executive power.⁴⁹ First Nations people have suffered at the hands of all branches of government throughout the history of colonial Australia, so accountability is paramount for public trust. The Act should provide opportunities for individuals, advocates and representative bodies to raise complaints about human rights to the Commission and the judiciary.⁵⁰ By imposing a duty on public authorities to adhere to human rights and establishing a review mechanism for individuals affected by arbitrary decisions that violate human rights, accountability is enhanced.⁵¹ As a result, there is predicted strengthening of 'administrative flexibility, deeper decision-making processes, and outcomes for vulnerable people'⁵² including First Nations women and children. By binding all arms of government to this framework, human rights will no longer be siloed to particular groups of the population.⁵³

⁴⁴ George Williams (2019), 'Australia's Constitutional Design and the Protection of Human Rights', *The Legal Protection of Rights in Australia*, 19.

⁴⁵ Ibid.

⁴⁶ Section 51(xxvi) of the Australian Constitution.

⁴⁷ Williams (n 44) 19. This was demonstrated through *Katrinyeri v Commonwealth* (1998) 195 CLR 337 and the override of the *Racial Discrimination Act 1975* (Cth) with the *Northern Territory Emergency Response Act 2007* (Cth).

⁴⁸ Oscar (n 35) 88-89.

⁴⁹ Australian Human Rights Commission (n 1) 75.

⁵⁰ Oscar (n 35) 89.

⁵¹ Ibid 75.

⁵² Ibid 88-89.

⁵³ Ibid 82.

The AHRC's Position Paper identified the need for protection of cultural rights,⁵⁴ particularly in relation to First Nations people, by the federal Human Rights Act. The AHRC proposed adoption of the *Human Rights Act 2019* (Qld)'s wording and separation of general cultural rights from First Nations' distinct cultural rights.⁵⁵ As a result, First Nations peoples, including women and children, will have protection of their 'right to enjoy, maintain, control, protect and develop their identity and cultural heritage [...], language and kinship ties,'⁵⁶ as well as rights to relationships with 'the land, territories, waters and seas with which they have a connection and to conserve and protect the environment and the productive capacity of these resources.'⁵⁷ Further, forced assimilation and destruction of culture will be prohibited.⁵⁸

Following its implementation, it is hoped a transformative cultural shift will occur within government as rights protection would become a core part of operations.⁵⁹ Further, government will be required to imagine a future beyond Western-centric frameworks, where First Nations women and children can rebuild structures to reflect who they are and weave them through the 'fabric of a reconciled nation.'⁶⁰

V RECOMMENDATIONS

- 1) To enact a federal Human Rights Act in Australia which protects general and cultural rights for First Nations people, in line with the AHRC's Position Paper.
- 2) To draw on the *Wiyi Yani U Thangani* project to adequately protect the rights of First Nations women and children in the federal Human Rights Act.
- 3) To ensure the federal Human Rights Act provides abilities for individuals, advocates and representative bodies to raise complaints about human rights, which can be heard by the AHRC and courts.

⁵⁴ Article 27 of the ICESCR and the UNDRIP.

⁵⁵ Australian Human Rights Commission (n 1) 130.

⁵⁶ Australian Human Rights Commission (n 1) 130

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Oscar (n 35) 82-83.

⁶⁰ Oscar (n 10) 123.

VI APPENDIX

A Human Rights for First Nations women and children

PRIORITY	HUMAN RIGHTS AREA	INSTRUMENT	ARTICLE	
Supporting strong families and communities	Right to freedom of violence [61]	<i>Committee on the Elimination of Discrimination against Women</i>	2	
			3	
			5	
			11	
			12	
	Rights of children [62]	<i>Convention on the Rights of the Child</i>	16	
			3	
			9	
			18	
			27	
	Rights of Indigenous Peoples [63]	<i>Universal Declaration on the Rights of Indigenous Peoples</i>	30	
			34	
			5	
			11	
			13	
Living and belonging	Right to an adequate standard of living including housing [64]	<i>International Covenant on Economic, Social and Cultural Rights</i>	11	
	Rights of people with disability [65]	<i>Convention on the Rights of Persons with Disabilities</i>		
	Right to country, culture and knowledge [66]	<i>International Covenant on Civil and Political Rights</i>	27	
		<i>Convention on the Rights of the Child</i>	30	
	Rights of Indigenous Peoples [67]	<i>Universal Declaration on the Rights of Indigenous Peoples</i>	10	
			12(1)	
			25	
			26	
			27	
			29	
	31			
	Healthy and engaged lives	Right to the highest attainable standard of health [68]	<i>International Covenant on Economic, Social and Cultural Rights</i>	12
		Right to education [69]	<i>International Covenant on Economic, Social and Cultural Rights</i>	13
			<i>Convention on the Rights of the Child</i>	28
				29
Rights of Indigenous Peoples [70]		<i>Universal Declaration on the Rights of Indigenous Peoples</i>	14(1)	
			14(2)	
			15(2)	
Thriving communities and sustainable economies	Economic, social and cultural rights [71]	<i>International Covenant on Economic, Social and Cultural Rights</i>	1	
			6	
			7	
	Rights of Indigenous Peoples [72]	<i>Universal Declaration on the Rights of Indigenous Peoples</i>	3	
			8	
			20(2)	
			21(1)	
			21(2)	
			23	
			26	
			32	

[61] Oscar (n 35) 178.

[62] Ibid 179.

[63] Ibid 180.

[64] Ibid 399.

[65] Ibid.

[66] Ibid 400.

[67] Ibid 401.

[68] Ibid 592.

[69] Ibid 594.

[70] Ibid 596.

[71] Ibid 788.

[72] Ibid 789.