

Submission

Inquiry into Australia's
Human Rights Framework
2023

ANTAR



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Submission: Inquiry into Australia's Human Rights Framework (2023)

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With thanks:

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**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**

About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Nations Peoples. We do this primarily through campaigns, advocacy, and lobbying.

ANTAR is working to mobilise Australians to vote YES at the referendum for a First Nations Voice to Parliament enshrined in the Constitution, and for this to be complemented with a Makarrata Commission to drive agreement making and truth-telling processes across Australia.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including cultural heritage protection; justice reinvestment, over-incarceration and raising the age of criminal responsibility; anti-racism campaigns, native title and land rights, and closing the life equality gap.

ANTAR is a foundational member of both the Close the Gap Campaign and Change the Record Campaign Steering Committee, and an organisational and executive committee member of Just Reinvest NSW. ANTAR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, independently funded and community-based organisation.

Introduction

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights' *Inquiry into Australia's Human Rights Framework*.

ANTAR commends the Parliamentary Joint Committee on Human Rights for looking into this important area. As noted on the Inquiry page on the Australian Parliament House website, consideration of Australia's Human Rights Framework is not new and, although focus has drifted over the last decade, it is timely that renewed attention be given to the questions of how Australia implements and upholds its human rights commitments.

ANTAR is a founding member of the Close the Gap and Change the Record campaigns (we also auspice the CTR campaign). We are also organisational members of Just Reinvest NSW and work closely with First Nations communities to achieve some fundamental reforms as they impact Aboriginal and Torres Strait Islander peoples. ANTAR is also one of the four convening organisations that are leading the Allies for Uluru coalition of civil society organisations that support the proposed reforms of the Uluru Statement from the Heart.

It should be noted that the Close the Gap Campaign and the Change the Record Campaign are Aboriginal and Torres Strait Islander-led coalitions that are formed and operate on a human-rights based approach. The articulation of human-rights and their application - and international rights specific to Indigenous peoples such as those contained in declarations like the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) - have been critical to the advocacy for better outcomes for Aboriginal and Torres Strait Islander peoples.

Australia has a long history of supporting the development of international conventions that articulate and promote human rights, particularly since the end of World War 2 in the 1940s.

However, we do not have an adequate domestic regime that ensures human rights are honoured and protected within Australia. As Dr Ed Wensing has noted:

“Australia has signed a number of United Nations conventions, covenants and declarations that commit us to protecting and promoting all human rights, but the majority of our international commitments have not been translated into our own national laws. While Australia does have a suite of equal opportunity and anti-discrimination laws in place at both Commonwealth and State/Territory levels, many Australians will be surprised to discover that there are very few laws protecting our human rights in Australia.”¹

The Australian Constitution is also lacking many human rights protections with only ‘a small number of discrete human rights protections’ included in Australia’s foundational document.² For Aboriginal and Torres Strait Islander peoples, as highly vulnerable communities that have a very fractured relationship with the colonising Commonwealth of Australia and its State and Territory governments, the Constitution has explicitly worked against their rights. Where there are human rights protections they are offered in a patchwork and inconsistent manner - as outlined by the Australian Human Rights Commission.

It is our assessment that the 2010 Human Rights Framework and subsequent National Human Rights Action Plan have not delivered the elevation of human rights that is needed in Australia. The absence of a Federal Human Rights Act has contributed to this situation.

There has also been a gap between the lapsing of that Framework (not supported by the Coalition governments between 2013-22) and this consideration, which reflects poorly on our collective commitment to upholding human rights in our laws, policies and practices.

¹ Dr Ed Wensing (2023) Why Australia Needs a Human Rights Act - <https://antar.org.au/blog/why-australia-needs-a-human-rights-act/>

² Ibid

As a national advocacy organisation, solely focused on justice, rights and respect of First Nations Peoples in Australia, our consideration of the Inquiry's questions of focus is through the lens of Aboriginal and Torres Strait Islander rights and priorities as articulated by their leaders, peaks, campaigns and communities.

ANTAR, as outlined in this submission, strongly recommends that the Australian Human Rights Framework would be empowered by a First Nations Voice to Parliament and would complement a Human Rights Act that seeks to protect and promote the rights of First Nations peoples. As Dr Hannah McGlade has said:

"As envisaged by the delegates at the Regional Dialogues, the National Voice should have a role in speaking to State Parliaments and can have a particularly important role in informing governments across Australia about the internationally agreed rights of Indigenous peoples"³

A robust national Human Rights Framework can elevate and complement the agency of First Nations peoples across Australia.

Should the Australian Parliament enact a federal Human Rights Act, and if so, what elements should it include?

ANTAR supports and endorses the proposal to create and enact a federal Human Rights Act and we support the proposed model outlined by the Australian Human Rights Commission in its 2022 *Free & Equal Position Paper: A Human Rights Act for Australia*.⁴

ANTAR strongly supports a Human Rights Act including significant protections for the rights of Aboriginal and Torres Strait Islander peoples - with clear links to the articles of the United Nations *Declaration on the Rights of Indigenous*

³ National Indigenous Times (7 Dec 2022) -

<https://nit.com.au/07-12-2022/4460/many-views-on-what-the-voice-to-parliament-could-and-should-be>

⁴ Australian Human Rights Commission (2022) Free & Equal: Position paper: A Human Rights Act for Australia -

https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_summary_report_rqb_0.pdf

Peoples.⁵ As articulated in the *Free & Equal Report* (2022), a Human Rights Act should include:

- A ‘participation duty’ on government(s) to ‘reflect principles of self-determination through practical measures’;
- The inclusion of cultural rights (with positive implications for cultural heritage protection across all Australian jurisdictions); and
- A more fundamental response to the right to self-determination beyond a ‘participation duty’, consistent with and complementary to a First Nations Voice to Parliament.

The Canadian Government introduced the *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021. This Act ‘provides a roadmap for the Government of Canada and First Nations, Inuit and Métis peoples to work together to implement the UN Declaration based on lasting reconciliation, healing, and cooperative relations.’⁶

The province of British Columbia in Canada has also enacted legislation to implement the United Nations *Declaration on the Rights of Indigenous Peoples* (UN Declaration). The purposes of that Act are to affirm the application of the UN Declaration to the laws of British Columbia, to contribute to the implementation of the Declaration, and to support the affirmation of, and develop relationships with, Indigenous governing bodies in British Columbia.

The Act requires the government of British Columbia to prepare and implement in consultation and cooperation with First Nations peoples an action plan to achieve the objectives of the UN Declaration. An annual report must also be provided to the Legislative Assembly on progress with implementing the plan and achieving its goals.

⁵ United Nations Declaration on the Rights of Indigenous Peoples (2007) - <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>

⁶ Implementing the United Nations *Declaration on the Rights of Indigenous Peoples Act* (2021) (Canada) - <https://www.justice.gc.ca/eng/declaration/index.html>

This should be the aim of an Australian Human Rights Act, to provide a bridge to a cooperative approach between the state and Aboriginal and Torres Strait Islander peoples.

Are existing mechanisms to protect human rights in the federal context adequate?

No. As noted by Amnesty International and others, Australia is the only liberal democracy without national human rights protections.⁷ As Dr Ed Wensing has said:

‘Without a Human Rights Act, Australia is increasingly isolated from the shared legal standards in countries with domestic human rights instruments, such as Canada, New Zealand and the United Kingdom. Enacting a national Human Rights Act in Australia would not only bring us into line with these countries and help repair our credibility on the international stage, but embed transparent, human rights-based decisions into our democratic culture and work to prevent breaches of human rights from occurring.’⁸

Australia has considerable work to do to make its stated values match its ambition for the elevation and protection of human rights. We should be global leaders in human rights.

ANTAR recommends that a significant boost in funding for the Australian Human Rights Commission is essential to ensuring Australia lives up to expectations on human rights protections. The Commission should be funded adequately to fulfil its independent, statutory obligations. We note that core funding for the Commission has been decreasing for years.

⁷ Amnesty International (2022) Australian Human Rights Barometer - <https://www.amnesty.org.au/report-amnesty-international-australia-human-rights-barometer-2022/>

⁸ Wensing (2023)

Additionally, the return to arms length shortlisting of appropriately experienced peoples to be placed in the Commissioner roles is welcome and this should continue to ensure the credibility of the Commission.

How effective are the existing human rights ACTS/Charters in protecting human rights in the ACT, Victoria and QLD?

Human Rights Acts have been enacted in the Australian Capital Territory (ACT), Victoria and Queensland and in many respects, these existing human rights acts represent good models to follow. The relevant provisions relating to the human rights of Aboriginal and Torres Strait Islander peoples in each of these Acts are included in an Appendix to this submission.

The *Human Rights Act 2004* (ACT) (ACT Human Rights Act) was introduced first, setting out key rights in the *International Covenant on Civil and Political Rights* (ICCPR, adopted by the United Nations in 1966). The ACT Act has been updated to include additional rights in the years since it was first introduced (discussed below). The ACT Human Rights Act influenced the *Charter of Human Rights and Responsibilities 2006* (Vic) (Victorian Charter), and the *Human Rights Act 2019* (Qld) (Queensland Human Rights Act) was influenced by both ACT and Victorian models.

The ACT, Victorian and Queensland models are very similar to each other in terms of rights-content and the dialogue model of distributing responsibilities between the Parliament, the Executive and the Judiciary, as discussed in the Australian Human Rights Commission's *Free & Equal Position Paper*. These acts bind the relevant state and territory public authorities, including government departments, statutory authorities and public servants. They have worked to protect individual rights and improve the human rights culture within those jurisdictions.

The ACT's *Human Rights Act* recognises a range of civil, political, economic, social, and cultural rights; requires that all legislation be assessed for compatibility with those rights; and that all public authorities have obligations to act compatibly with those rights and give them proper consideration when making decisions. The *Human Rights Act 2004* (ACT) contains twenty human rights based on International instruments and agreements about how to protect values such as freedom, respect, equity and dignity. ACT Government agencies and other ACT public authorities must act and make decisions consistently with these rights.

What makes the ACT *Human Rights Act* interesting is section 31. Under s.31, international law and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in interpreting a human right in the ACT. Similar provisions exist in the Victorian and Queensland statutes, but not as eloquently as in the ACT statute. The definition of 'international law' in the Dictionary in the ACT *Human Rights Act 2004*, states that it includes:

- a. the *International Covenant on Civil and Political Rights* and other human rights treaties to which Australia is a party; and
- b. general comments and views of the UN human rights treaty monitoring bodies; and
- c. declarations and standards adopted by the UN General Assembly that are relevant to human rights (including the UN Declaration on the Rights of Indigenous Peoples) (UN, 2007).

Following a review of the Act in 2014 (ACT Government, 2014), Section 27 of the Act was amended to insert additional provisions to protect the distinct cultural rights of Aboriginal and Torres Strait Islander peoples and specifically cites the UN Declaration on the Rights of Indigenous Peoples.

Section 27(2) specifically provides that:

Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right:

- a. to maintain, control, protect and develop their–
 - cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - languages and knowledge; and
 - kinship ties; and
- b. to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The provision also contains the following Notes:

Note: The primary source of the rights in s (2) is the UN Declaration on the Rights of Indigenous Peoples, Article 25 and Article 31.

Note: The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.

The starting point for introducing Aboriginal and Torres Strait Islander cultural rights into the *Human Rights Act 2004* (ACT) in 2016 was Section 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). S.27(2) of the ACT's Act recognises the fact that Aboriginal and Torres Strait Islander peoples have a set of rights which are distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Act (Corbell, 2015:4).

Section 27(2)(a) reflects the aspirations of Article 31 of UNDRIP, which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge. Section 27(2)(a) properly

provides formal recognition of the existence and continuing contribution of the cultural heritage of the First Peoples to the Canberra region, but this provision does not intend, and is not designed, to confer or create real or intellectual property rights over the expressions or manifestations of that cultural heritage, as regulation of those property rights is a matter for the Commonwealth (Corbell, 2015: 4).

Similarly, section 27(2)(b) also reflects the aspirations of Article 25 of UNDRIP, which further acknowledges the distinctive spiritual, material and economic relationships that Indigenous peoples, including Aboriginal and Torres Strait Islander peoples, have with the land and waters and other resources with which they have a connection under traditional laws and customs.

The amendments to the Act in 2016 also included an amendment to the Preamble to change the reference to the special significance of rights from 'indigenous people' to 'Aboriginal and Torres Strait Islander peoples'. This subtle change was important because it recognised that Aboriginal and Torres Strait Islander peoples should not be represented as a homogenous group with a uniform cultural heritage and identity, but rather should be acknowledged and recognised as being a diverse group of peoples with differing histories, aspirations and relationships.

A recent case before the ACT Supreme Court demonstrates the effectiveness of these changes to the *Human Rights Act 2004* (ACT). The local Ngambri people of the ACT claimed the ACT Government was acting contrary to the Act by recognising only the Ngunnawal as the local traditional custodians of land in the ACT and surrounds. Further, they claimed that the ACT Government was in breach of section 27(2) of the Act because their actions denied the Ngambri people and other traditional custodians of the ACT the right to maintain, control, protect and develop their connection to their Country, and be recognised as having that connection to their land.

The matter was settled by mediation because the law included sufficiently explicit references to international human rights law to protect against arbitrary discrimination.

The construct of the Act makes it clear that the relevant provisions were drafted with the intention to reflect the international covenants, conventions and declarations that Australia has ratified or signed up to. International human rights law, including the judgments of foreign and international courts and tribunals, are relevant to the expression and protection of the human rights of the Aboriginal peoples of the ACT.

An earlier case of discrimination brought to the ACT Human Rights Commission by the Ngarigo People in 2011 was referred to the ACT's Administrative and Civil Appeals Tribunal by the ACT Human Rights Commission. This case was not successfully resolved for the Ngarigo People because the relevant provisions providing protections for the human rights of Aboriginal and Torres Strait Islander peoples did not exist in the *Human Rights Act 2004* (ACT) at the time.

What the ACT, Victorian and Queensland Human Rights Acts show is that international human rights norms and standards can be protected in line with Australia's particular democratic structure, and become part of Australian laws.

Enacting a national Human Rights Act in Australia would not only bring us into line with these countries and help repair our credibility on the international stage, but also embed transparent, human rights-based decisions into our democratic culture and work to prevent breaches of human rights from occurring.

Conclusion

Thank you again for the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights on this important issue.

Australia should introduce and enact a national Human Rights Act to more directly protect our human rights, prevent violations, and set the standards for positive implementation of rights such as self-determination as they relate to Aboriginal and Torres Strait Islander peoples. A Human Rights Act offers the chance to transform Australia's tepid approach to implementing the United Nations *Declaration on the Rights of Indigenous peoples* and enliven the principles in our governments' approach to Aboriginal affairs.

Sincerely

Paul Wright

National Director, ANTAR

Extracts from State and Territory Human Rights Acts relating to the human rights of Aboriginal and Torres Strait Islander peoples

Australian Capital Territory (ACT): Human Rights Act 2004 (ACT)

Preamble

1. Human rights are necessary for individuals to live lives of dignity and value.
2. Respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.
3. Human rights are set out in this Act so that individuals know what their rights are.
4. Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation.
5. This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.
6. Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual's rights may also need to be weighed against another individual's rights.
7. Although human rights belong to all individuals, they have special significance for Aboriginal and Torres Strait Islander peoples—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

Section 27 Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

1. Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

2. Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—
 - a. to maintain, control, protect and develop their—
 - i. cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - ii. languages and knowledge; and
 - iii. kinship ties; and
 - b. to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

Note The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.

Note The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.

Section 31 Interpretation of human rights

1. International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.
2. In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
 - a. the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
 - b. the undesirability of prolonging proceedings without compensating advantage;
 - c. the accessibility of the material to the public.

Victoria: Charter of Human Rights and Responsibilities Act 2006 (Vic)

Preamble:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

Section 3 Definitions

1. In this Charter—

Aboriginal means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples;

Section 19 Cultural rights

1. All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.
2. Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
 - a. to enjoy their identity and culture; and

- b. to maintain and use their language; and
- c. to maintain their kinship ties; and
- d. to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Section 32 Interpretation

1. So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
2. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
3. This section does not affect the validity of -
 - a. an Act or provision of an Act that is incompatible with a human right;
or
 - b. a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Queensland: Human Rights Act 2019 (Qld)

Preamble: Clause 6

Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia's first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination.

Section 28 Cultural rights—Aboriginal peoples and Torres Strait Islander peoples

1. Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
2. Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
 - a. to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
 - b. to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
 - c. to enjoy, maintain, control, protect and develop their kinship ties; and
 - d. to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
 - e. to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
3. Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

Section 48 Interpretation

1. All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
2. If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
3. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
4. This section does not affect the validity of—

- a. an Act or provision of an Act that is not compatible with human rights; or
 - b. a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.
5. This section does not apply to a statutory provision the subject of an override declaration that is in force.