

Submission from the Australian Human Rights Institute, UNSW Sydney

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

30 June 2023

1. INTRODUCTION

We write on behalf of the Australian Human Rights Institute (Institute) at UNSW Sydney. The Australian Human Rights Institute produces world-leading research and advances debate on critical human rights issues. The Institute's interdisciplinary research informs our understanding of the root causes of human rights challenges and innovates practical and sustainable solutions to create systemic change.

This submission supports the enactment of a statutory federal Human Rights Act broadly along the lines proposed by the Australian Human Rights Commission (AHRC) in its submission to the Committee and as developed more fully in its *Free and Equal* discussion paper on a federal Human Rights Act. Such an Act should include the rights proposed by the AHRC but should go beyond what the Commission has put forward.

In this submission we propose three additions to what the AHRC has proposed:

- a. The inclusion of economic, social and political rights (ESCR) in a federal Human Rights Act with full equivalence to civil and political rights, which we illustrate by reference to the rights to culture and cultural heritage as an example of rights that should be considered in a more expansive fashion than is currently provided for in the AHRC model;
- b. The explicit inclusion of the human rights of older persons (or human rights in older age) in a federal Human Rights Act; and
- c. The inclusion of a more expansive guarantee of the right to a healthy environment that is currently contained in the AHRC proposal.

We note that while the right to culture and cultural heritage and the right to a healthy environment are to some extent included in the AHRC proposal, our submission suggests that these be expanded. The Institute notes that there is no specific reference to the human rights of older persons in the AHRC model.

The AHRC has also proposed that an Australian Human Rights Act impose a positive duty on federal public authorities to act compatibly with the human rights expressed in the Charter and to consider human rights when making decisions. (AHRC, *Free & Equal*, Position Paper, pp139-161) The Institute supports this proposal.

2. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

2.1 Overview

A national Human Rights Act should cover the human rights Australia has already promised to uphold under international law, including civil, political, economic, social and cultural rights under the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the rights of children and people with disabilities, and other obligations under international treaties Australia has ratified. The inclusion of ESCR is critical because they affect rights and values that are key to people's well-being, and as noted in the 1993 Vienna Declaration and Programme of Action '[a]ll human rights are universal, indivisible and interdependent and interrelated'.¹ The justiciability of important dimensions of ESCR is beyond doubt² and a traditional approach that assumes that ESC rights are not justiciable 'has been overtaken in the last decades' and is 'an approach which fails to appreciate the current state of international law on these issues.'³

Civil and political rights are generally well-covered by the proposed AHRC model. The Institute's concern is to ensure that economic social and cultural rights (ESCR) are also included with full equivalence in a future federal Human Rights Act. We urge the adoption of a broader approach to ESC rights than the 'somewhat narrow[er]'⁴ approach of the AHRC and recommend that ESCR should be included as fully justiciable rights consistent with our obligations under the international human rights treaties to which Australia is a party.⁵

The Institute supports the inclusion of all ESCR rights as set out in ICESCR. We submit that the AHRC model fails to protect important dimensions of ESCR and that these would be better protected by more generous and explicit protection of ESCR. This section focuses on the specific rights to culture and cultural heritage, as examples of ESCR that should be included in a more expansive manner than is currently provided for in the AHRC model.

2.2 Rights to culture and cultural heritage

2.2.1 Overview

¹ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993).

² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)*, 5th CESCR sess, UN Doc E/1991/23 (1990); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant* (1998) UN Doc E/C.12/1998/24

³ Andrew Byrnes, 'Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *University of New South Wales Law Journal*, 193, 220-221.

⁴ Australian Human Rights Commission, *Position Paper: A Human Rights Act For Australia* (2023), 128 <https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_main_report_rgb_0_0.pdf>.

⁵ On this point we endorse the submission of the ESCR Network which discusses the justiciability of ESCR.

The rights to culture and cultural heritage are closely intertwined. Broadly conceived, the right to culture means recognition of people's right to access, manifest, participate in the development of, and enjoy their own culture. It also means, crucially, the right to enjoy other people's cultures, with a view to forming bonds of dialogue that lead to better, more resilient societies.

Within the right to culture more broadly, the two primary dimensions are the right to education, and the right to participate in cultural life (which is the focus of this section), Cultural heritage allows those functions of the right to culture described above to be enlivened in concrete ways for everyone. Cultural heritage is also a defining element of identities, as it enables all Australians to come together as individuals, groups, and as a nation. Australians of all colours, national origins, genders, abilities, and religions have their own cultural heritage and share in different elements of cultural heritage. To safeguard this right is integral to cohesive societies, and to strengthen the bonds that make us all Australian.

2.2.2 Existing Protections

International position

The key international treaty of general applicability to include cultural rights is the ICESCR, in Article 15(1)(a).⁶ It is also, for those persons belonging to minorities, covered in Article 27 of the ICCPR. Other treaties around the world such as the *San Salvador Protocol to the American Convention on Human Rights*, the *Faro Convention on the Value of Cultural Heritage for Society*, and the *African (Banjul) Charter on Human and People's Rights* also refer to the rights to culture, cultural identity, and cultural heritage.

Culture, and cultural heritage, are also integral to the 2007 UN *Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which Australia has endorsed. Because of the centrality of culture as a threshold question for Indigenous people and peoples to access the full range of rights available to them, it is essential to take cultural rights seriously in any Human Rights Act in Australia. At the same time, however, for Indigenous peoples, culture and cultural heritage operate more often than not as a gateway to all rights instead of autonomous rights.⁷ Further, it is unproductive to think of cultural rights only in the context of Indigenous peoples, as all Australians and persons in Australia have their own culture and are entitled to enjoy cultural rights.

The UN Committee on Economic, Social and Cultural Rights (CESCR) which is the international body of experts monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, issued a General Comment (GC21) in

⁶ "Article 15. 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; [...]"

⁷ This is despite some specific provisions in the UNDRIP on rights to culture and heritage, like Articles 11-12 and 31.

2009,⁸ which explained that cultural heritage is an essential part of the right to participate in cultural life. GC21 starts by framing the right to participate⁹. In defining culture, GC21 develops the interpretation of the ICESCR and emphasizes the importance of interpreting culture as including living culture which can and should be allowed to change. While GC21 recognises that the right to take part in cultural life has important collective dimensions,¹⁰ ultimately, the right is that of the individual.¹¹

GC21 also sets out the three main components to the right to participate in cultural life: participation; access; and contribution to cultural life.¹²

There are a number of necessary conditions for the exercise of the right to cultural life: availability; accessibility; acceptability; adaptability; and appropriateness.¹³ These reflect in a number of legal obligations by states parties to the ICESCR, which, like all other rights, include obligations to respect, protect, and fulfil.¹⁴ Out of those obligations, in the view of the CESCR, heritage features most prominently in the obligation to protect, indicating that the CESCR perceives heritage as a passive object of protection, rather than something that is constantly and actively (re)created. But the Guidelines on Treaty-Specific Documents to the ICESCR also discusses the obligation to enhance access, as well as the intergenerational transmission of knowledge about heritage.¹⁵

The obligation to respect includes in particular the freedom to choose one's cultural identity, as well as the right to have access to cultural heritage, and, importantly, the right to take part in all decision-making processes with respect to culture.¹⁶ The obligation to fulfil includes awareness-raising programs with respect to cultural heritage (a common goal of international cultural heritage law treaties),¹⁷ as well as the obligation upon states to have programs "aimed at preserving and restoring cultural heritage."¹⁸

The obligation to protect, where heritage features most prominently, includes the obligation to "respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters"; the obligation to "respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups in economic development and environmental policies and programmes"; and the obligation to protect the cultural productions of Indigenous peoples.¹⁹ This relatively static character of heritage is denied not only by the very definition of culture in GC21, but also by other international documents that suggest

⁸ Committee on Economic, Social and Cultural Rights, General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/21 (21 December 2009) (GC21).

⁹ *Id.*, para. 1.

¹⁰ GC21, *cit.*, para. 9.

¹¹ *Id.*, para. 7.

¹² GC21, *cit.*, para. 15.

¹³ *Id.*, para. 16.

¹⁴ *Id.*, para. 48.

¹⁵ Saul et al., *cit.*, 1191.

¹⁶ GC21, *cit.*, para. 49.

¹⁷ *Id.*, para. 53.

¹⁸ *Id.*, para. 54.

¹⁹ *Id.*, para. 50.

heritage (understood as tangible and static) needs should be reconciled with current cultural creation and other social needs.²⁰

Domestic protection

The Victorian Charter provides that the cultural rights of every person in Victoria shall be protected.²¹ . The adoption of cultural rights in the Victorian Charter has made some positive impact.²² .

In Queensland, cultural rights have been recognised as part of civil and political human rights.²³ Most importantly, the 2019 Charter has divided cultural rights into two parts and allocated them under two sections, 'Cultural rights - generally'²⁴ and 'Cultural rights – Aboriginal peoples and Torres Strait Islander people'²⁵, to better highlighting the importance of protecting First Nation People's distinct cultural rights.²⁶ .²⁷ ²⁸

The Charter of the ACT adopts the protection for cultural rights of Aboriginal and Torres Strait Islander peoples and other minorities,²⁹ by which it has highlighted the necessity for protecting the distinct cultural rights of Aboriginal and Torres Islander peoples.³⁰

²⁰ 1976 Recommendation, cit., Recommendation 4: "4. It is recommended that Member States, if they have not already done so, adopt legislation or regulations in conformity with their national constitutional procedures, or otherwise modify existing practices in order to: [...] (p) reconcile the duty to protect and enhance everything connected with the cultural heritage, traditions and the past with the need to allow the endeavours of the present and the modern outlook to find expression; [...]."

²¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1). It also points out the distinct cultural rights of Aboriginal persons: at s 19(2).

²² For example, the Homelessness Advocacy Service has successfully negotiated with the service to assist a Muslim woman in moving into an all-women accommodation: Victorian Equal Opportunity & Human Rights Commission, *2014 Report on the operation of the Charter of Human Rights and Responsibilities* (Report, June 2015) 31.

²³ *Human Rights Act 2019* (Qld) ss 27, 28.

²⁴ *Ibid* s 27.

²⁵ *Ibid* s 28.

²⁶ For example, the Queensland Department of Education has made Aboriginal and Torres Strait Islander peoples' significant dates and events be celebrated at schools: Queensland Human Rights Commission, *The First Annual Report on the Operation of Queensland's Human Rights Act 2019-20* (Report, 2020) 109. Also, the Queensland Police Service has made a statement of regret for preventing Adrian Burragubba and his extended family from practicing their culture and performing traditional ceremonies in a pastoral area: Queensland Human Rights Commission, *The Second Annual Report on the Operation of Queensland's Human Rights Act 2020-21* (Report, 2021) 162.

²⁷ Queensland Human Rights Commission, *The First Annual Report on the Operation of Queensland's Human Rights Act 2019-20* (Report, 2020) 109.

²⁸ Queensland Human Rights Commission, *The Second Annual Report on the Operation of Queensland's Human Rights Act 2020-21* (Report, 2021) 162.

²⁹ *Human Rights Act 2004* (ACT) s 27.

³⁰ *Ibid* s 27(2). For example, the ACT Human Rights Commission has intervened in a court case and made the ACT Government apologise to an Aboriginal young woman for removing the

2.2.3 AHRC's Recommendation

The AHRC's model recommendation is to recognise, within a Human Rights Act, 'cultural rights', both in general and specifically for Indigenous peoples. That right, as currently expressed, provides:

Cultural rights

Cultural rights—generally

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.

Cultural rights — First Nations peoples

(1) First Nations peoples hold distinct cultural rights.

(2) First Nations 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) First Nations peoples have the right not to be subjected to forced assimilation or destruction of their culture.

As currently expressed, the general provision on cultural rights draws directly from Article 27 of the ICCPR. While that is a central provision in international law, in our view it is not sufficient to optimally accommodate the full scope of the right to culture. Specifically, the general provision frames cultural rights as essentially a minority question by speaking of persons "with a particular cultural ... background", which has in practice only covered those in minority positions within a society and misses an opportunity to bring all segments of society together around their different and shared cultures to build more resilient and cohesive communities. Further, the provision does not make specific reference to cultural heritage, which is a central part of how all our identities are shaped and safeguarded.

RECOMMENDATION

1. The AHRC model provision should be rewritten:

artwork of Koori Mail from her cell: ACT Human Rights, *Annual Report 2019-20* (Report, 2021)
23.c ACT Human Rights, *Annual Report 2019-20* (Report, 2021) 23

“All persons have a right to their culture and cultural heritage. This right comprises the right to access, enjoy, participate in the development of, and manifest their cultures.”

The specific provision on Indigenous cultural rights is strongly worded. It covers the important issues of access, ownership, and control over heritage. It might be useful to be clearer about the relationship between these rights and the rights of the rest of society, particularly when it comes to economic development.

2. Additional language on Free, Prior, and Informed Consent of Indigenous peoples for all projects having an impact on their culture and heritage would be a welcome addition. Suggested language could include:

“First Nations peoples have the right to negotiate uses of their heritage, or to allow activities that have an impact on their heritage. These impacts are subject to the free, prior, and informed consent of First Nations peoples, exercised in accordance with their own traditions and institutions.”

3. It would also be useful to include language on the rights of Indigenous peoples to own and seek the restitution of cultural objects taken from them during colonialism. The return of these objects does not mean that cultural institutions will be devoid of them. To the contrary, Indigenous peoples can choose to enter into arrangements with these institutions for long-term loans or other forms that allow these items to still be displayed and studied. But these practices should happen in accordance with the desires of Indigenous peoples, and not cultural institutions currently in possession of these artefacts. Relatedly, language on the position of government in assisting Indigenous peoples in this sphere, in relation to cultural institutions located in Australia or abroad, would also be welcome. Some suggested language could include:

“First Nations peoples have the right to own and control the physical artefacts that symbolize their culture. They have the right to seek the restitution of their heritage currently held by cultural institutions in Australia and abroad. They also have the right to negotiate loans and transfer of ownership of these artefacts to the institutions that currently hold them, or to other institutions, subject to their free, prior, and informed consent in the terms outlined above. The government will provide assistance to First Nations peoples in undertaking these negotiations.”

3. HUMAN RIGHTS OF OLDER PERSONS

3.1 The background – violations of the human rights of older persons in Australia

Like many other societies, Australia is undergoing demographic ageing: people are living longer and the number of older persons³¹ and their proportion of the overall

31 While the meaning of “older persons” and “older age” is socially constructed and is not necessarily determined by chronological age, for many statistical purposes the age of 65 is used as a threshold for older age.

population is increasing to a level not previously seen.³² This means new challenges for individuals and the community. Individuals, who now often are likely to live for decades longer than their parents or grandparents, expect to be able to continue active and productive lives as engaged members of their communities. And our society has to deal with the opportunities and challenges that an ageing population presents, including the budgetary challenges that arise from a larger older population, as well as the economic and other social benefits that arise from their continuing engagement in and contributions to the community.

While older persons are entitled to enjoy all human rights on an equal basis with others, in practice they do not. While the COVID-19 pandemic has had significant and differing impacts on many groups in our society, its impact on older persons' human rights has been particularly severe and is well-known.³³ The findings of the Royal Commission into the Quality and Safety of Aged Care provided devastating accounts of systematic violations of fundamental human rights of many aged care residents before and during the height of the pandemic.³⁴ The rights included the right to life, right to be free from torture and cruel, inhuman or degrading treatment (use of restrictive practices), the right to physical and mental health (access to hospital and other health services), the denial of liberty of movement (physical restraint including locked dementia wards), the right to adequate food, and the right to respect for family life and privacy, among others.

Yet the violations of rights that took place during the pandemic highlighted and exacerbated longstanding patterns of discrimination against older persons and exclusion on the basis of older age in our society. A recent inquiry by the Australian Institute of Family Studies showed a widespread prevalence of elder abuse in Australia, including financial abuse as well as physical and psychological abuse.³⁵ Other reports, including those by the Australian Human Rights Commission, researchers and civil society organisations have documented the widespread patterns of discrimination

³² Australian Government, *Intergenerational Report 2021* (2021), Chapter 2, 'Population', 'Population ageing will present economic and fiscal challenges', pp 29-31, https://treasury.gov.au/sites/default/files/2021-06/p2021_182464.pdf.

³³ United Nations, *Policy Brief: The Impact of COVID-19 on older persons*, May 2020, <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-The-Impact-of-COVID-19-on-Older-Persons.pdf>.

³⁴ *Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect* (2021), 8 vols, <https://agedcare.royalcommission.gov.au/publications/final-report>.

³⁵ Qu, L., Kaspiew, R., Carson, R., Roopani, D., De Maio, J., Harvey, J., Horsfall, B. (2021). *National Elder Abuse Prevalence Study: Final Report*. (Research Report). Melbourne: Australian Institute of Family Studies. See also John Chesterman, 'The Abuse of Older Australians (Elder Abuse): Reform Activity and Imperatives' (2020) 73(3) *Australian Social Work* 381-389.

against older persons in employment,³⁶ access to health care,³⁷ access to housing,³⁸ laws relating to capacity and guardianship,³⁹ among other areas.

3.2 Ageism

Underlying many of these forms of discrimination and rights violation is the phenomenon of *ageism*: the individual, communal and institutional practices that embody stereotypes about the abilities, capacities, interests and contributions of older persons that homogenise and devalue them and often lead to their exclusion from economic and social opportunities on the basis of their older age.⁴⁰ In a major study published in 2021 the World Health Organization documented the extent of ageism globally, finding that ageism was widespread around the world.⁴¹ This report described ageism against older persons as the one major form of discrimination that is still seen as socially acceptable, one that affects hundreds of millions of people and noted its adverse consequences of older persons' mental and physical health and economic security as well as for the well-being of the whole community. Research by the Australian Human Rights Commission has also documented the pervasiveness of ageism directed against older persons in Australia, including in the fields of employment;⁴² other reports by civil society organisations have shown discrimination in areas such as access to health services.

3.3 The failure of existing laws to address effectively the widespread and continuing violation of the human rights of older persons

In Australia these patterns of human rights violation have been seen both in jurisdictions with generally worded legislative human rights acts and in jurisdictions that have not adopted statutory bills of rights.

³⁶ Australian Human Resources Institute in collaboration with the Australian Human Rights Commission, *Employing and Retaining Older Workers*, May 2023, <https://www.ahri.com.au/wp-content/uploads/230427-Employing-Older-Workers-Report.pdf>.

³⁷ Health Care Consumers NSW and Older Women's Network NSW, "What Can You Expect at Your Age?!" – an investigation of recent experiences of age discrimination by older adults accessing health care, 2021, pp 26-46 https://www.hcnsw.org.au/wp-content/uploads/2021/03/Ageism-in-Health-Care_final.pdf

³⁸ Australian Human Rights Commission, '[Risk of Homelessness in Older Women](#)' and *Older Women'' Risk of Homelessness – Background Paper*, (April 2019).

³⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124) (August 2014), https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf

⁴⁰ F Snellman, 'Whose ageism? The reinvigoration and definitions of an elusive concept' (2016) 68 *Nordic Psychology* 148-159.

⁴¹ World Health Organization et al, *Global Report on Ageism* (2021), <https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>.

⁴² Australian Human Rights Commission, *What's age got to do with it? A snapshot of ageism across the Australian lifespan*, September 2021, https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wagtdwi_2021.pdf.

While there are legislative protections against age discrimination in Australia at the Commonwealth level (in particular the *Age Discrimination Act 2004* (Cth) and the *Fair Work Act 2010* (Cth)) and in the general anti-discrimination laws of the States and Territories,⁴³ these statutory frameworks have largely failed to effectively deliver protection in practice against discrimination in older people's everyday lives. This is because of their limited scope, narrow anti-discrimination focus and the long list of exceptions or exemptions in areas which in many cases are designed to immunise from challenge exactly the areas where existing law and policies discriminate on the basis of older age.

Nor have the existing State and Territory human rights acts, which do not contain specific older-age focused provisions, made significant inroads on the violations of older persons' human rights. The experience suggests that there are many specific dimensions of rights or circumstances that are of particular concern to older persons in general or particular subgroups of older people that are not effectively protected by generally worded guarantees of human rights; they would be better protected by explicitly formulated guarantees rather than forcing older people to rely on general guarantees that contain no explicit references to older age.

The Australian experience of the inadequacy of generally worded charters of rights to address human rights in older age reflects what has been seen at the international level. Both the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Human Rights Council's Independent Expert on the Human Rights of Older Persons have published recent studies examining the extent to which the existing international human rights framework effectively engages with the human rights of older persons.⁴⁴ These have found that, although in theory older persons enjoy the rights set out in the existing UN human rights treaties, in fact older persons and their particular circumstances are relatively invisible in the text of the treaties and largely neglected in the practice under them.

The OHCHR has suggested that this is a result of the fundamental conceptual limitations in the existing treaties which were elaborated without regard to the individual and social implications of demographic ageing, the social construction of older age and the devaluation of persons when they attain older age. The OHCHR, the Independent Expert, many experts and civil society organization have argued that the best way to address this situation is the adoption of a comprehensive and coherent

⁴³ See generally Neil Rees, Simon Rice and Dominique Allen, 'Age Discrimination' in Rees, Rice and Allen, *Australian anti-discrimination law* (Federation Press, 3rd ed 2018) 422-481.

⁴⁴ See OHCHR, *Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons*, eleventh session UNGA Open-ended Working Group on Ageing, March-April 2021; OHCHR, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons*, *Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/49/70 (2022); and United Nations, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, Claudia Mahler, A/HRC/48/53, paras 17-30, 38-95 (2021).

United Nations treaty on the human rights of older persons or human rights in older age.⁴⁵

3.4 The absence from the AHRC proposal of explicit references to the human rights of older persons

The draft Human Rights Act proposed by the AHRC contains specific references to the rights of children, the rights of women, the rights of persons with disabilities and the rights of Indigenous peoples. It is no accident that each of these areas is covered either by a thematic UN convention (in the case of children, women and persons with disabilities) or a widely supported normative instrument the UN Declaration on the Rights of Indigenous Peoples (in the case of Indigenous Peoples, who are also covered by the Racial Discrimination Convention), while the human rights of older persons who are not covered by a thematic convention, are not.

3.5 How should a Human Rights Act or the Australian Human Rights Framework protect human rights of older persons?

The lesson to be drawn from international and national experience is that there needs to be explicit reference to older person and older age in any general bill of rights and also that such charters should contain rights which are tailored specifically to the circumstances faced by specific subgroups of older persons such as older women, older persons with disabilities, older LGBTQI+ people or older indigenous persons (among other groups).

In the absence of an agreed comprehensive and coherent international catalogue of relevant rights such as those that exist in other areas, it is difficult to provide a definitive list of particular rights or specifically tailored provisions. Nevertheless, the discussion at the United Nations Open-ended Working Group on Ageing⁴⁶ and the Human Rights Council, the United Nations Principles for Older Persons 1991,⁴⁷ regional treaties on the subject (in particular the *Inter-American Convention on Protecting the*

⁴⁵ See, eg, HelpAge International, *Time for a UN convention on the rights of older persons, August 2020*, <https://www.helpage.org/download/5f314d4161bbd/>; William Mitchell, 'Making the case for a convention on the human rights of older persons', (2021) 27(3) *Australian Journal of Human Rights* 532-553; Rights of Older Persons Australia (ROPA), *Towards a United Nations Convention on the Human Rights of Older Persons: A discussion paper*, October 2022, https://www.rightsofolderpersons.org.au/wp-content/uploads/2022/11/ROPA-Towards-a-United-Nations-Convention-on-the-Human-Rights-of-Older-Persons_v01.pdf.

⁴⁶ Website of the UN General Assembly Open-ended Working Group on Ageing: <https://social.un.org/ageing-working-group/>

⁴⁷ United Nations Principles for Older Persons 1991, General Assembly resolution 46/91 of 16 December 1991, annex, <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons>

*Rights of Older Persons*⁴⁸) and the Madrid International Plan of Action on Ageing 2002⁴⁹ (to the implementation of which Australia has committed) provide some guidance.

The rights that should be considered for inclusion in a Human Rights Act would include:

1. The right not to be subjected to discrimination in any field on the basis of ageism or age discrimination
2. The right to autonomy and independence
3. The right to be free from torture and other cruel, inhuman treatment (including in relation to restrictive practices)
4. The right to be free from elder abuse, including financial abuse
5. The right to life-long learning and education
6. The right to continue to work without discrimination on the basis of older age
7. The right to reasonable accommodation in terms and conditions of employment'
8. The right to economic security, including necessary social support
9. The right to live independently and in the community and to have access to the financial and other forms of support required to make this possible.
10. The right to freedom of movement and an accessible physical and social environment
11. The right to digital inclusion and the right of access to public and other services in various formats
12. The right to palliative care
13. The right to access technology and the benefits of other scientific developments
14. The right to be included in decision-making about matters that affect older persons, including but not limited to disaster and emergency planning.

In addition, given the diverse nature of the older population, it is necessary for any human rights law to provide protection against intersectional or multiple bases of discrimination.

RECOMMENDATION

The Institute recommends:

(a) that the PJCHR recommend the enactment of an inclusive federal Human Rights Act that:

(i) includes explicit reference to the human rights of older persons (including the specific right listed above) and guarantees protection against discrimination against discrimination on the basis of older age; and

⁴⁸ Inter-American Convention on Protecting the Human Rights of Older Persons (2015), http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf.

⁴⁹ United Nations, *Madrid International Plan of Action on Ageing 2002*, <http://www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf>.

(ii) reflects the experiences of older persons generally and the diverse experiences of particular groups of older persons; and

(b) that the PJCHR urge the Australian government to support the elaboration of a new United Nations convention on the human rights of older persons and engage actively and constructively in the United Nations processes considering this matter.

4 RIGHT TO A HEALTHY ENVIRONMENT

4.1 Overview

In July 2022, the UN General Assembly recognised in an historic move the right to a ‘clean, healthy, and sustainable environment’ and affirmed: ‘the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights.’²⁵ Australia joined 160 other nations to vote in favour of the resolution and now is the opportunity for it to implement its commitment by including the right to a clean, healthy and sustainable environment in an Australian Human Rights Act. The UN resolution, passed with an overwhelming majority, means that the right is now universally recognised as a human right and, as human rights are indivisible, is important to the realisation of all rights. Similarly, realisation of the right to a healthy environment requires recognition and protection under Australian law of all human rights, including economic, social and cultural rights.

The UN Special Rapporteur, Mr. David Boyd, previously identified specific elements of which the right is substantively comprised; namely, (i) clean air; (ii) a safe climate; (iii) healthy and sustainably produced food; (iv) access to safe water and adequate sanitation; (v) non-toxic environments amenable to human activity and life; and (vi) healthy eco-systems and biodiversity.⁵⁰

In addition to such substantive entitlements and protections, the right to a healthy environment is also commonly understood to engage a related yet distinct procedural aspect.²⁷ Procedurally, it entails the ability of individuals or groups to participate, broadly construed, in the decision-making processes surrounding the legal and political governance of the environment. Among the Special Rapporteur’s ‘good practices’ bearing on the right, taken in a procedural sense, were its legal recognition, access to relevant information and increased public participation⁵¹

4.2 All human rights ultimately depend on a healthy environment. The present, heightened significance of the right to a healthy environment can be attributed to the increasingly dire characterisation of the (ill-)health of the natural world, and

50 Summary Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Doc. A/HRC/43/54; A/HRC/43/53 (23 January 2020), 8-18.

51 Summary Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Doc. A/HRC/43/54; A/HRC/43/53 (23 January 2020), 4-8.

the ecosystems and biodiversity of which it is compromised, which is under significant strain as a result of human actions. The IPCC's Sixth Assessment Report (2021) has relevantly identified such actions as directly responsible for increasing global surface temperatures by 1.2 °C in the period since the Industrial Revolution.²⁸ Conversely, it is now well-understood that, short of profound structural and societal changes, the environment will only become increasingly less hospitable and amenable to human life. **Existing Protections**

Presently, the right to a healthy environment is not systematically provided for under either international or Australian law. However, the right is recognised in law by more than 80 per cent of nations, with Australia still among the minority that does not yet do so.⁵²

International, regional and overseas positions

By way of exception rather than rule as to existing international protections, Principle 1 of the *Stockholm Declaration* relevantly states: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being (emphasis added).'⁵³

Some jurisdictions have constitutionally enshrined the relevant right, as is the case in, for example, South Africa,⁵⁴ Costa Rica,⁵⁵ France,⁵⁶ Korea⁵⁷ and Fiji.⁵⁸ The right also appears in domestic legislation, for example, in Canada,⁵⁹ and in certain regional treaties, notably the *African Charter on Human and Peoples' Rights* (1981)⁶⁰ and *Aarhus Convention* (1998)⁶¹. The Inter-American Court of Human Rights has issued an advisory opinion finding that the right to a healthy environment is a human right.⁶²

In other instances, articles of international treaties provide for rights that are co-extensive with the right to a healthy environment. For example, the European

52 Summary Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Doc. A/HRC/43/54; A/HRC/43/53 (23 January 2020), 3-4.

53 *Stockholm Declaration on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972). See too *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992)

54 *Constitution of the Republic of South Africa* (1996), s. 24

55 , Costa Rica 1949 (rev. 2020) Constitution, art. 46.

56 *The French Constitution*, Adopted by the Referendum of September 28, 1958 and Promulgated on October 4, 1958, 'Charter on the Environment'

57 *The Constitution of the Republic of Korea*, promulgated on July 17, 1948, and last revised on October 29, 1987, art. 35.

58 *Constitution of the Republic of Fiji*, 2013, art. 40

59 Bill S-5, Strengthening Environmental Protection for a Healthier Canada Act (2023).

60 *African Charter on Human and Peoples' Rights* (1981), art. 24.

61 *Aarhus Convention* (1998), art. 7.

62 Inter-American Court of Human Rights, *Request for an Advisory Opinion Presented by the Republic of Colombia Concerning the Interpretation of Article 1(1), 4(1) And 5(1) of The American Convention on Human Rights*, 2016 (OC-23/17).

Convention on Human Rights (“ECHR”) provides for, under arts. 2 and 8, the right to life and private and family life, respectively.⁶³ In *Urgenda Foundation v Netherlands*, the Dutch Government was held to be in breach of those provisions, inter alia, on account of its national greenhouse gas emissions,⁶⁴ and was thus required to reduce the total volume of such emissions.

Domestic position

A network of domestic laws, systems and procedures protect elements of our environment in Australia and some of our human rights, but it is evident from the 2021 ‘State of the Environment Report’ that the present protections are inadequate and piecemeal. Domestically, the right to a healthy environment is not directly provided for under the respective Human Rights Acts or Charters of Victoria or Queensland, respectively. The ACT is currently the only jurisdiction that is intending to insert an explicit provision recognising the right to a healthy environment into its Human Rights Act.

Otherwise, the right has indirectly arisen in the context of a consideration of breaches of other human rights, as was the case in *Waratah Coal Pty Ltd v Youth Verdict*,⁶⁵ which considered whether to recommend approval for a new thermal coal mine in the Galilee Basin. In that case, the President of the Queensland Land Court concluded that the impact of such a mine on various human rights in Queensland — including the right to life, cultural rights of First Nations peoples and children—lacked a sufficient and proportionate justification in the ‘public interest’ to enable its approval. Rather, the Court, which is obligated to consider such rights, found that ‘the balance weighs against approving the applications taking into account the s13(2) factors for each of the right to life, First Nations cultural rights, the rights of children, the rights to property and to privacy and home, and the right to enjoy human rights equally.’⁶⁶

The right to a healthy environment has also arisen tangentially in the context of novel, climate change proceedings. While ultimately overturned on appeal, a single judge of the Federal Court in *Sharma* expanded the scope of the law of negligence such that the Minister for the Environment, when exercising discretion under the *EPBC Act*⁶⁷ as to whether to grant an extension to a coal mine, could be said to owe a duty of care to a representative class of children, noting the foreseeable risk of harm to the latter that could be said to arise were the former to be approved.⁶⁸

63 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.html>> (accessed 19 June 2023).

64 *Urgenda Foundation v Netherlands* (19/00135), at [7.1-7.6.2]. The Supreme Court, affirming the District Court’s initial finding, accordingly upheld injunctive relief sought by the plaintiff requiring on the part of the Dutch Government a 25% of total emissions by 2020 as compared with 1990 rates.

65 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21

66 *Ibid*, at [1655]

67 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

68 *Sharma v Minister for the Environment* [2021] FCA 560; Cf. *Minister for the Environment v Sharma* [2022] FCAFC 65.

Moreover, in the *Gloucester Resources* case decided in the NSW Land & Environment Court, 43 Preston CJ upheld the initial decision of the (now) IPC not to grant an extension to an ‘open cut’ mine on the basis of ⁽¹⁰⁰⁾inter alia, ecologically sustainable development (“ESD”).⁴³ He concluded that permitting the mine’s extension would be contrary to such development, noting its various adverse social and environmental consequences. Here, however, absent a Bill or Charter of Rights, the matter was decided on a merits basis, having regard to the correctness of the original decision, necessarily limiting the scope for curial intervention.

4.3 AHRC’s Recommendation

The AHRC has recommended that the right to a healthy environment be included within a Statutory Human Rights Act. That right, as currently expressed, provides:

Every person has the right to an environment that does not produce adverse health consequences in the following respects:

(a) Every person has the right not to be subject to unlawful pollution of air, water and soil.

(b) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.

(c) No unjustified retrogressive measures should be taken with regard to this right.

No one should be subject to discrimination regarding the realisation of this right.

As currently expressed, sub-ss. (a), (b) both point to *substantive* sub-rights, relating to the absence of pollution and access to safe water and food, and hence are negatively and positively framed, respectively. Sub-section (c) and the final sentence prohibit either unjustified attacks upon, or discrimination with respect to, the stated substantive right(s).

The Institute recommends that the role of the AHRC should be expanded to include consideration of environmental human rights. The Commission’s role should include conducting research into environmental human rights, promoting understanding of the relationship between environmental protection and human rights protection, and assisting the Commonwealth and States to formulate strong statutory definitions of the right to a healthy environment.

RECOMMENDATIONS

The Institute broadly supports the AHRC’s recommendation, subject to the following constructive amendments.

1. The substantive provisions of any proposed right to a healthy environment ought to be expressed broadly, rather than limited to an exhaustive list of substantive or procedural elements (as the AHRC’s proposed provision is currently). Particularly in light of the Special Rapporteur’s six substantive protections, limiting such protection to

‘unlawful’ pollution resulting from ‘air, water and soil’, or access to ‘safe’ food and water, is unduly narrow. A fuller and broader expression of the right would offer a more holistic suite of protections, inclusive of healthy eco-systems and biodiversity for example, consistent with view of the Special Rapporteur and ought to be embraced. The term ‘unlawful’ should not be adopted as it implies that lawful pollution is acceptable even where it produces adverse health consequences, an implication which contradicts the very definition of the right to a healthy environment.⁶⁹.

2. Further procedural protections ought also to be advanced, such as enabling the access to relevant information from governmental organs or greater public participation, again consistent with the Special Rapporteur’s Report. The Aarhus Convention protects rights that are essential, procedurally, to the enjoyment of the right to a healthy environment, including the ‘good practices’ identified by the Special Rapporteur as well as the procedural right of access to justice. These procedural rights must be included in any Australian Human Rights Charter or Act.

In each case, if the legislative implementation of rights-protection is to be adequate to the threat posed by climate change, then both the substantive and procedural aspects of such protection ought not simply *complement* but rather genuinely *build upon* and *extend* existing legislative protections. Such an extension would mark a much-needed reform domestically, as well as assist in Australia’s standing on the international plane.⁷⁰

Thank you for your consideration.

Sincerely

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69 *The Constitution of the Kingdom of the Netherlands* 2018, art. 21.

70 *New South Wales v The Commonwealth (“Seas and Submerged Lands Case”)* (1975) 135 CLR 337, at 503 (Murphy J)