



**Submission to the Social Development Committee of the
Parliament of South Australia's Public Inquiry into the Potential for
a Human Rights Act for South Australia**

February 2024

Acknowledgement

We acknowledge the traditional lands of the Kurna people and acknowledge the Kurna people as the custodians of the Adelaide region and the Greater Adelaide Plains, and also acknowledge the traditional custodians of lands beyond Adelaide and the Adelaide Plains. We pay our respects to Elders past and present.

We acknowledge and pay our respects to the cultural authority of Aboriginal and Torres Strait Islander communities, organisations and colleagues and recognise the cultural expertise that they represent.

About SACOSS

The South Australian Council of Social Service (SACOSS) is the peak non-government representative body for health and community services in South Australia, and has a vision of justice, opportunity and shared wealth for all South Australians.

Our mission is to be a powerful and representative voice that leads and supports our community to take actions that achieve our vision, and to hold to account governments, businesses, and communities for actions that disadvantage vulnerable South Australians.

SACOSS aims to influence public policy in a way that promotes fair and just access to the goods and services required to live a decent life. We undertake research to help inform community service practice, advocacy and campaigning. We have 75 years' experience of social and economic policy and advocacy work that addresses issues impacting people experiencing poverty and disadvantage.

Title: SACOSS Submission to the Social Development Committee of the Parliament of South Australia's Public Inquiry into the Potential for a Human Rights Act for South Australia.

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SACOSS Submission to Social Development Committee – Potential for a Human Rights Act for SA

1. Introduction

The South Australian Council of Social Service (SACOSS) welcomes the Public Inquiry being led by the South Australian Parliament's Social Development Committee to consider the potential for a Human Rights Act in South Australia.

In responding to the focus of the Inquiry, our submission highlights the importance of having a Human Rights Act in South Australia, and the ways in which such an enactment would improve the everyday lives and rights of people living in this State, as well as enabling more effective governance.

SACOSS supports the view that 'The act of considering human rights is no more or less than putting people at the heart of decision-making'.¹ Informed by this perspective, we are calling for the introduction of a Human Rights Act for South Australia because every person – no matter their ethnicity, abilities, political beliefs, gender identification, religion, age or cultural background or other characteristic – should be treated equitably. To acknowledge this is to acknowledge that we all have human rights, and that these rights are universal, inalienable and should not be taken away, and are indivisible and interdependent – they are for everyone, everywhere, all of the time, and one set of rights cannot be enjoyed fully without the others.

Having a Human Rights Act and a comprehensive and assertive approach to human rights would also enable the South Australian Government to meet its obligations under the various international human rights instruments that Australia has ratified, and to respect, protect, and fulfil people's rights in this State.

A South Australian Human Rights Act would create a legislated values-based framework that would significantly improve the way our Parliament, Government and public entities develop laws and policies, and make decisions. It would help to create a much-needed culture of human rights in our state that will, in turn, work to improve wellbeing, dignity and equality in everyone's day-to-day lives.

A Human Rights Act is an ordinary piece of legislation; it is not constitutionally enshrined and can be amended. It is therefore not stuck in time and can be changed to respond to and reflect who we are, what we believe and what we aspire to protect and uphold as a community.

This submission acknowledges and draws on the ongoing work and collaboration that SACOSS has undertaken with the Rights Resource Network SA (RRNSA), Australian Lawyers for Human Rights (ALHR), Human Rights Law Centre and a host of our member organisations and networks across Australia and South Australia. We would like to indicate our support for the *Designing a Human Rights Framework for South Australia Report* (facilitated by the RRNSA and a group of 36 expert delegates)²; and the Australian Human Rights Commission's Position Paper regarding a Human Rights Act for Australia.³ We also want to indicate our support for the submissions prepared by the RRNSA; the joint submission from Child and Family Focus SA (CAFFSA), Connecting Foster and Kinship Care SA, and the Reily Foundation; Academic

¹ Victorian Ombudsman, *The Ombudsman for Human Rights: A Casebook*. August 2021.

<https://assets.ombudsman.vic.gov.au/assets/The-Ombudsman-for-Human-Rights-A-Casebook-Aug-2021.pdf>

² *Designing a Human Rights Framework for South Australia - Final Report* (February 2022)

https://www.rightsnetworksa.com/files/ugd/8cf77c_33045f4455014d5aa55dc22c40a39d92.pdf

³ Australian Human Rights Commission (2023) *Position Paper: A Human Rights Act for Australia*

<https://humanrights.gov.au/human-rights-act-for-australia>

Members of the University of South Australia Justice and Society Unit; the SA Network of Drug and Alcohol Services (SANDAS); and the Mental Health Coalition of SA.

This submission is structured according to the terms of reference and key focus areas as set out by the Inquiry's Committee.

2. Responses to the Committee's Focus Areas

a) The effectiveness of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms

Everyone in South Australia deserves to have their human rights legally protected, however, the current laws and mechanisms that enable protection are not effective and require considerable attention. There are inherent flaws in the current arrangements, which are piecemeal, inconsistent and fail to adequately respond to the rights of all communities. These failings are partly due to the lack of enforceability and accountability to the international human rights instruments that Australia has signed up to. A Human Rights Act for SA would reinforce the rights included in many of these international instruments, and would enable improved efficacy in realising people's rights.

The next section of this submission focuses on the piecemeal nature of the current arrangement; the lack of enforceability of people's rights that already exist under international human rights instruments; and the need for increased certainty, legislative harmonisation, and a consideration of the scope and powers of parliament at both a State and Federal level.

- ***The current arrangement is piecemeal and people are falling through the cracks***

In the absence of a comprehensive Human Rights Act, people are more likely to fall through the cracks and have little or no recourse to having their rights addressed. Our current state-based and national approach to human rights is *ad hoc* and piecemeal and does not serve to prevent or protect people from harm or from their rights being violated. This arrangement inconsistently recognises some rights and not others, with some having legal standing while others have limited or no enforceability. Currently, there is a confusing mix of mechanisms that recognises rights – some of which have legal standing (e.g. Equal Opportunity Act) and some which have limited enforceability (e.g. Rights Statements/Charters).

Through our work across the public health, justice, family wellbeing and community services sector, SACOSS is acutely aware of the ways in which our society continues to fail and neglect people's rights and needs, more especially for people who are marginalised or coping with poverty and the direct effects of inequality. We talk about 'everyone deserving a fair go', however, millions of South Australians are not having a 'fair go' and deserve better. Their material needs, dignity and rights are not being met and need to be safe-guarded by a Human Rights Act.

While we understand that the fundamental reason these needs and rights are not being met is a product of structural inequality and the ways in which our global and domestic socio-economic system is structured, and that there are vested interests maintaining the status quo, we believe that having recourse to a Human Rights Act would bring attention to the neglect and denial of people's rights, and would support advocacy efforts to improve the lives of people doing it tough.

Having a Human Rights Act in place would give organisations such as ours, and the organisations and communities we care about and work with, appropriate legal mechanisms and tools to ensure that the Parliament considers people’s human rights when making laws and designing policies; that governments and departments respect human rights when making decisions about policies, programs and people’s lives; and individuals have access to justice and legal support when their rights are ignored or breached.

- ***People’s rights under international human rights instruments are not enforceable***

Australia has signed up to a range of international conventions and human rights instruments – such as the United Nations International Covenant on Civil and Political Rights; the International Convention on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (UNCROC); the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and the Sustainable Development Goals – many of which are not enforceable and lack accountability mechanisms in the absence of political will and enforceability through a South Australian and/or an Australian Human Rights Act.

These obligations and commitments include civil and political rights such as the right to life, equality before the law, freedom of speech, freedom of religion, property rights, the right to a fair trial, and the right to vote. And rights which are fundamentally social and economic in nature, guaranteeing citizens equal conditions and treatment – these include the right to be employed under just and favourable conditions; rights to food, housing and health care, as well as social security and unemployment benefits.

There is also a broader suite of rights – sometimes referred to as third-generation human rights – that extend the civil, political, social, and economic framework of individual rights to focus on collective concepts, such as a community or group of people. These include a broad spectrum of rights, including rights to self-determination, economic and social development, a healthy environment, natural resources, to communicate and communication rights, to participation in cultural heritage, intergenerational equity and sustainability.

By way of example, the four key principles of the UNDRIP⁴ – which set out the fundamental and foundational human rights of First Nations peoples – include self-determination; participation in decision-making; respect for and protection of culture; and equality and non-discrimination. The recent Referendum for a First Nations Voice to Parliament highlighted the important link between these human rights and the Voice:⁵

A Voice to Parliament is consistent with international human rights standards, and would provide for better human rights protections by promoting equality and self-determination for First Nations people.

In addition, a fourth generation of human rights is emerging, and includes rights relating to technological development and information and communication technologies and cyberspace. These include digital rights, digital inclusion and a focus on the right to: equitable access to

⁴ United Nations Declaration of the Rights of Indigenous Peoples <https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1>

⁵ Queensland Human Rights Commission, Statement of Support for establishing a First Nations’ Voice to Parliament at <https://www.qhrc.qld.gov.au/about-us/our-position-on-the-voice-to-parliament>

computing and digital devices and spaces, digital self-determination, digital security, and the right to sovereignty over one's own digital data.

The issue of digital inclusion is the focus of a recent SACOSS report,⁶ which found that people living in the State's regions are being left behind in an increasingly online world and that low-income people's digital capacities are particularly affected by budget pressures, such as having limited data or relying on limited access to devices. As one Terowie JobSeeker indicated: 'You chew up your data, which chews up your food budget' (p. 31).

Digital inclusion has recently also been highlighted with families being unable to afford internet access and digital devices, such as laptops, for their children at the start of the new school year. The Smith Family's annual survey of 2,200 families with disadvantaged children, found that 88% believed they wouldn't be able to afford everything their children needed for school in 2024, including digital devices, internet access, uniforms and shoes. One in six families said their children would miss out on internet access needed for schoolwork. The Smith Family Chief Executive says: ⁷

... Laptops and internet have become as essential as pens and paper in the 21st-century classroom. Without them, students will struggle to do their schoolwork and keep up with their peers. Research shows that children who start school behind ... are, on average, four years behind in maths and more than five years behind in reading by the time they reach year nine.

A lack of access to digital resources and technology widens inequalities faced by disadvantaged children and families, particularly in regional and remote areas that lack connectivity. This has significant implications for children's rights to education and for them and their families to fully participate in learning, employment and society more generally.

All these different types of rights, while recognised through international instruments, are currently not adequately realised or enforceable in South Australia, and would be significantly enhanced by a Human Rights Act.

The work of the Australian Human Rights Commission (AHRC), in its *A National Human Rights Act for Australia* report,⁸ usefully documents and models how a human rights act would help with enforceability. Its model would create legal protections for the human rights of all Australians, and provide ways to seek justice if people's rights are breached. It would also provide options for people to challenge decisions that breach their human rights, and opportunities to go to court if their issues can't be resolved through conciliation. This model would also increase the responsibility that governments hold and the requirement to consider how their laws, policies, and actions might affect people's human rights.

⁶ SACOSS (2023) *Keys to the Digital World: The Critical Role of Regional Libraries and Community Centres in Building Regional Digital Inclusion*, at [https://www.sacoss.org.au/sites/default/files/public/Keys To The Digital World Final Report.pdf](https://www.sacoss.org.au/sites/default/files/public/Keys%20To%20The%20Digital%20World%20Final%20Report.pdf)

⁷ <https://www.theguardian.com/australia-news/2024/jan/17/australia-public-school-education-cost-rises-government> and <https://www.thesmithfamily.com.au/media/centre/releases/2023/nine-in-ten-families-surveyed-worried-they-will-struggle-to-afford-school-essentials>

⁸ Australian Human Rights Commission (2022) *Free and Equal – An Australian Conversation on Human Rights* <https://humanrights.gov.au/human-rights-act-for-australia>

This AHRC report provides further useful detail regarding enforceability, indicating that a Human Rights Act would create a legislative obligation for public authorities to act compatibly with the human rights expressed in the Human Rights Act, and give proper consideration to human rights when making decisions (p. 139). This is also known as a ‘positive duty’ and applies to public authorities. The requirement to give ‘proper consideration’ to human rights is a procedural obligation and applies to making decisions and implementing legislation and policy. The requirement to ‘act compatibly’ with human rights is a substantive obligation on public authorities, and they would also be required to engage in participation processes where the ‘participation duty’ is relevant, as part of the ‘proper consideration’ requirement. Compliance with the positive duty would be reviewable by courts (and possibly by tribunals in relation to administrative law remedies). The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

SACOSS supports the principle of individuals and communities participating in processes that affect their lives – ‘nothing about us without us’. The following extract from the AHRC report regarding the participation duty on public authorities is instructive, and provided here in full, for ease of reference (p. 21-22):⁹

The participation duty would require public authorities to ensure the participation of certain groups and individuals in relation to policies and decisions that directly or disproportionately affect their rights. The ‘participation duty’ addresses a fundamental problem in the development of federal policies and decisions – inadequate engagement with the very people to whom those decisions directly apply.

The Commission’s proposal for a participation duty draws on international human rights law standards and common law procedural fairness principles. It would synthesise procedures concerning consultations and set clear standards, fleshing out what participation means in relation to certain groups that are often overlooked in decision-making processes.

International law requires specific participation measures to be undertaken regarding decisions affecting the rights of First Nations peoples, children and persons with disability. The participation duty would be a means of realising key procedural elements of the existing rights in the Human Rights Act, in relation to these three groups.

The duty will apply differently to each of these groups, as defined by the relevant international instruments. However, the same underlying requirement applies — when decisions will affect the rights of members of these groups, public authorities have a duty to ensure their participation in those decisions.

- *Where decisions of public authorities will affect the rights of First Nations peoples and communities, participation processes should be facilitated in line with UNDRIP principles and standards relevant to consultation and participation.*
- *When individual children are affected by a decision, the ‘best interests’ principle should be applied, and the child should be heard, with their views given due weight in accordance with their age and maturity. When children as a group are affected by proposed policies or laws, the best interests of children should be proactively considered, and children should be consulted as part of the development process.*

⁹ Australian Human Rights Commission (2022) *Free and Equal – An Australian Conversation on Human Rights* pp. 21-22 <https://humanrights.gov.au/human-rights-act-for-australia>

- *Individual persons with disability should be supported to make their own decisions in all aspects of their lives, and public authorities should have processes in place to facilitate supported decision making. When decisions have an impact upon people with disabilities as a group, persons with disability, including through their representative organisations, should be consulted as part of the process.*

The participation duty would arise when public authorities are developing policies, or making decisions, that affect the rights of these three groups. The duty would arise when decisions are being made that directly concern these groups, or where the decision is likely to have a disproportionate impact on the group in question. For example, changes to planning policies may have a disproportionate impact on people with disabilities if they affect accessibility.

- ***The need for certainty, legislative harmonisation, and the scope and powers of Parliament***

Based on the examples above, and a consideration of the legislative landscape in South Australia, it is clear there are limited, if any, protections of people's human rights in legislation, more so in the absence of a Human Rights Act. Instead, we rely upon a combination of constitutional limitations on legislative power, specific legislative provisions (such as anti-discrimination laws) and common law principles to protect and promote the individual rights of citizens. This means that, in effect, the parliament has the final say on any conflicting rights issues and, provided it stays within the legislative limits set out in the Constitution, it can override common law protections and amend statutory provisions. The court's role in enforcing or upholding individual rights is far more limited and indirect than in jurisdictions which have constitutional or legislated Bills of Rights.

A reliance on a parliamentary model of rights protection fails to adequately protect people's rights. The key features of the Australian Federal legal system, which were complemented in 2011 by the establishment of the Federal Parliamentary Joint Committee on Human Rights, have been described as an 'exclusively parliamentary model of rights protection'.¹⁰ According to Reynolds et al. (2020) and Professor George Williams AO, this parliamentary scrutiny regime is not capable of providing an adequate mechanism for protecting fundamental rights, and they note that relying on a 'self-enforcement regime was flawed from the start'.¹¹ In South Australia, we do not even enjoy the limited benefits of a parliamentary model of rights protection – we do not have a Human Rights Committee or any other committee which has responsibility for scrutinising proposed new laws for compliance with human rights at the pre-enactment stage of the development of legislation. This makes the gaps in the protections for human rights even more pronounced, as was strikingly evident in May 2023 when the South Australian Legislative Assembly introduced, and passed, the Summary Offences (Obstruction of Public Places) Amendment Bill (commonly referred to as the 'Anti-Protest Law'), ostensibly in response to protest activity in Adelaide. This Bill was passed by the Lower House in 22 minutes without public scrutiny or the necessary checks and balances being brought to bear by appropriate parliamentary committees.

The changes contained in the Bill will ultimately undermine the ability of people in South Australia to exercise their right to freedom of association and peaceful protest. In its submission to the

¹⁰ Williams, G. Burton, L. (2013). Australia's Exclusive Parliamentary Model of Rights Protection, *Statute Law Review*, Volume 34, Issue 1, February 2013, Pages 58–94, <https://doi.org/10.1093/slr/hms048>

¹¹ Reynolds, D. Hall, W. Williams, G. (2020) 'Australia's Human Rights Scrutiny Regime' *Monash University Law Review* 256 <http://classic.austlii.edu.au/au/journals/MonashULawRw/2020/8.html>

Attorney-General, the Law Society of South Australia said the law changes created ‘a potential for chilling implications for freedom of association and political communication’.¹²

While we acknowledge the right of Parliament to determine and pass legislation that may at times include what it deems to be necessary restrictions, the passing of this Bill highlights that – unlike the specific human rights legislation that exists in the ACT, Victoria and Queensland – South Australia has no human rights compliance and protective mechanisms in place – these would include debating any restrictions in the context of balances, rights and responsibilities. However, while wholly insufficient and reliant on parliamentary processes, there are some very limited features of the current South Australian law-making system that attempt to promote and protect human rights. These include:

- Independent statutory commissions and office holders with mandates to review government action and respond to complaints that include a focus on individual rights. However, access to such complaints processes is often dependent on the administrative character of the decision being made, and the legal literacy of the complainant. Even where a government decision is found to be unfair, it rarely gives rise to directly enforceable legal remedies for individuals, more often resulting in the matter being referred back to the government decision maker for reconsideration.
- Parliamentary committees that scrutinise proposed laws and policies, sometimes against rights-based criteria. However, once again, in practice this is limited and no parliamentary committee in South Australia is currently *required* to review proposed laws for compliance with human rights principles.
- Policy commitments to observing certain individual rights in policy making and service delivery. Again, this is limited to particular service delivery contexts (such as aged care), and is rarely accompanied by oversight mechanisms to monitor government performance against human rights criteria.
- Specific legislative provisions designed to protect or promote certain individual rights, such as the Equal Opportunity Act which protects against unlawful discrimination on certain grounds, but which brings with it a range of exceptions and complex legal tests that mean that often those experiencing multi-layered or intersectional forms of discrimination or human rights abrogation fall through the gaps, or struggle to access the provisions designed to protect them from harm.

While these mechanisms offer a degree of protection, they do not go far enough and exhibit inherent flaws and omissions. They are limited in their scope and enforceability, and do not provide for universal, inalienable, indivisible and interdependent rights – they can only be accessed by *some people, some of the time and in specific circumstances*. In addition, they lack a coherent framework and are not easy to communicate or promote across the public sector and broader community.

There is an expectation on the part of South Australians that Parliament and government decision-makers must and will carefully consider the impact that new laws and policies will have on their rights, interests and wellbeing, and that they will do so in a systematic, consistent and evidence-based way. However, the lack of a comprehensive, systematic and formalised framework or Human Rights Act undermines this entitlement being met.

¹² SA Law Society submission to the SA the Attorney-General – Summary Offences Obstruction of Public Place Bill <https://lssa.informz.net/lssa/data/images/Website/Submissions/SummaryOffencesObstructionofPublicPlaceAmendmentBill.pdf>

People's entitlements to realising their rights and interests are experienced unevenly across our society. Many South Australians routinely experience exclusion, a restriction of their rights, and a poor standard of living. In many instances, the current laws and mechanisms fail to secure the dignity of individuals and groups of South Australians who fall outside their scope or prescribed criteria. This includes, for example, South Australians experiencing mental distress, those who are incarcerated, people with disabilities, Aboriginal children in care or correctional facilities, older people in aged care facilities, regional and remote communities who live without a clean and reliable water supply or who have to pay more or travel further for basic services or essentials, and people experiencing housing stress or homelessness.

Me and my kid often don't have a roof over our heads. Housing should be a human right and an essential thing. When I'm stressed about finding a safe place to live, I don't even have the energy to think about all the other rights that we're supposed to have but usually don't get and we can't find the energy to fight for them to happen when we're just trying to survive from one day to the next [SACOSS interview].

The failings of our existing laws and mechanisms to support the basic rights of people indicate a range of flaws and omissions, and point to the urgent need to enact a rights-focused law, such as a Human Rights Act for South Australia.

b) The operation and effectiveness of human rights legislation in other jurisdictions

South Australia is not the first jurisdiction seeking to address the issue of enacting a Human Rights Act. Human Rights Acts have already been passed in the Australian Capital Territory (2004), Victoria (2006) and Queensland (2019). South Australia could model its legislation on the approaches and outcomes of the implementation of human rights legislation operational in other Australian jurisdictions, as well as international examples.

Professor George Williams AO, highlights that the enactments in these jurisdictions, along with similar laws in New Zealand and the United Kingdom, have been effective in providing necessary additional protections for human rights. He reminds us, however, that such laws are not failsafe and also 'depend on a supportive political culture', but have demonstrated that they do improve people's lives.¹³

- **Lessons from jurisdictions with a Human Rights Act – an illustration of the benefits**

The Human Rights Acts in the ACT, Victoria and Queensland provide protection for specific rights and are based on the United Nations International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These include the cultural and other rights of First Nations peoples, and the right to education, health services, and the right to work and rights at work.

These three jurisdictions expressly recognise that human rights may be subject to reasonable limits that can be justified as proportionate in a free and democratic society. As such, they are not

¹³ Professor George Williams AO, (2023) Submission to the Federal Inquiry p. 2.

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions

prevented from passing legislation or implementing policies that are needed and in the public interest. Nor do they override existing rights under law.

In these jurisdictions, human rights have become part of the everyday business of government agencies, and human rights protections have been incorporated into key policies and guidelines to inform decision-making. This is delivering tangible benefits for the people living in those jurisdictions.

The realisation of human rights in Queensland and the operation of their state-based Human Rights Act has made a significant contribution to protecting people's rights. By way of example, the Queensland Council of Social Service (QCOSS) partnered with the Department of Communities, Housing and Digital Economy and the housing and homelessness sector in 2021 to develop an understanding of the Act, increase confidence to work compatibly with the Act, and support the sector to use the Act for person-centred service delivery.¹⁴

The *Human Rights, Housing and Homelessness* project included the development of a series of case studies exploring how the Human Rights Act assisted with good decision-making for housing and homelessness services. These highlight how Queensland's human rights decision-making framework, for example, assisted a crisis housing provider to determine who was most in need when they allocated a crisis accommodation property; and assisted a housing provider to decide whether to enforce a Notice to Leave directive to a tenant, after discovering the tenant was experiencing serious domestic violence for which the tenant was not receiving support, and where there were signs of possible mental ill health.

Approaches in Victoria also provide useful pointers for consideration. Victoria has a *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, and the Victorian Ombudsman works alongside the Victorian Human Rights Commission, and has a uniquely designated role as the human rights complaints and investigation body. In 2021, the Victorian Ombudsman dealt with more than 3,000 complaints about human rights issues, prompting in many cases, reversals of decisions, improved policies and other actions upholding the public's rights. The Victorian Ombudsman has outlined the importance and relevance of understanding and upholding human rights:¹⁵

All too often, human rights are poorly understood both by the public agencies who are obliged to consider them and by the public they are intended to protect. The human rights failures we see are not deliberate – those in authority simply fail to properly consider or balance some of the fundamental principles that underpin our basic freedoms. It is more important than ever that the public understands how their rights may, or may not, be limited, and the requirement of the Victorian Government to get the balance right. The act of considering human rights is no more or less than putting people at the heart of decision-making.

¹⁴ Queensland Council of Social Service, Human Rights, Housing and Homelessness, <https://www.qcoss.org.au/project/human-rights-housing-and-homelessness/>

¹⁵ Victorian Ombudsman, The Ombudsman for Human Rights: A Casebook. August 2021. <https://assets.ombudsman.vic.gov.au/assets/The-Ombudsman-for-Human-Rights-A-Casebook-Aug-2021.pdf>

c) The strengths and weaknesses of adopting a Human Rights Act in SA

The Australian Human Rights Commission's report (p. 8)¹⁶ encapsulates the essential purpose and strengths associated with adopting a Human Rights Act:

The beauty of a Human Rights Act, and other measures that frontload rights-mindedness, is that they are expressed in the positive – and they are embedded in decision making and ahead of any dispute. A Human Rights Act names rights; it provides an obligation to consider them and a process by which to do it – together supporting a cultural shift towards rights-mindedness, becoming part of the national psyche, not just an afterthought.

The purpose of such an Act is to change the culture of decision making and embed transparent, human rights-based decisions as part of public culture. The outcome needs to be that laws, policies and decisions are made through a human rights lens and it is the upstream aspect that is so crucial to change.

As in the case of other jurisdictions which have a Human Rights Act, having such an Act in South Australia would assist law-makers, policy decision-makers and government departments to consider new laws as they are being developed and identify potential human rights issues before a Bill is introduced into Parliament. Having reference to an Act would create a culture of human rights awareness within and between the three arms of government (Parliament, Executive and Judiciary) and place obligations on each to protect and promote human rights.¹⁷

SACOSS' support for a Human Rights Act is based on a series of key propositions,¹⁸ and that having both one's rights clearly articulated and a mechanism that seeks to help remedy any violation, will help to:

- address inequality and discrimination, particularly against minorities within our community;
- improve the quality, effectiveness and accessibility of government services and government decision-making;
- identify and address complex and systemic social disadvantage including homelessness, domestic violence, and the disproportionate rate at which First Nations peoples are incarcerated; and
- improve public understanding of existing legal rights and remedies and provide new pathways to challenge unfair or inadequate decision-making or treatment.

A potential weakness that might become manifest if a Human Rights Act were to be established for South Australia would be the effects of differing jurisdictional responsibilities – where South Australia is unable to enforce specific rights because they are the responsibility of the Federal Government. State-based human rights acts may be undermined by their inability to enforce Federal accountability for its international commitments. By way of example, given that Australia has signed and ratified the treaties that recognise rights to adequate living standards, including adequate housing, there is a responsibility on governments nationwide to respond.¹⁹ However,

¹⁶ Australian Human Rights Commission *Free and Equal – An Australian Conversation on Human Rights*
<https://humanrights.gov.au/human-rights-act-for-australia>

¹⁷ SACOSS (2023) *Human Rights Legislation Policy*
<https://www.sacoss.org.au/sites/default/files/public/Human%20Rights%2024%20March%202023.pdf>

¹⁸ These propositions are set out in SACOSS (2023) *Human Rights Legislation Policy*
<https://www.sacoss.org.au/sites/default/files/public/Human%20Rights%2024%20March%202023.pdf>

¹⁹ Sandy Duncanson Memorial Lecture, *Housing and human rights – rights where it matters*. Hobart, October 2022
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the realisation of this right is often confounded by resistance or other pretexts on the part of governments, such as ‘How can we fulfil this widespread and increasing demand and obligation – and in a federal system of shared responsibilities?’ What persists, however, is the experience of housing insecurity and homelessness, and the failure of the protection of the right to housing. The presence of both a Federal and state-based Human Rights Act would therefore offer increased leverage, accountability, and an increased likelihood that people’s essential needs and rights are met.

While not an inherent weakness in any future SA Human Rights Act in and of itself, the potential exists that an Act may be established but not adhered to, as is the case of Australia being a signatory to a number of international instruments but not adhering to them. The enforceability of any future Act and the political will to implement the associated rights, as well as the ongoing participation and advocacy of civil society, will be critical to the successful realisation of people’s rights in South Australia.

d) The potential human rights protections in any act

SACOSS supports the full suite of human rights – as set out in the Universal Declaration of Human Rights and the United Nations’ seven core human rights treaties – and the importance of them being recognised and realised. In doing so, we emphasise the importance of particular types of rights and their impacts on the community sectors we advocate with and for, with an emphasis on civil, political and socio-economic rights; the rights of children and young people; and the rights of First Nations peoples.

As already indicated, Australia is a signatory to the ICESCR; the UNCROC; the Sustainable Development Goals (SDG) and, of particular interest, its inclusion of the goal to *end poverty in all its forms everywhere*²⁰; and the UNDRIP. As a nation, we are failing dismally to recognise and realise the rights of people that these international instruments direct us to protect. Examples of this glaring gap between the international support or ratification that Australia has given to these human rights instruments and their domestic implementation are set out below.

Given the ongoing campaign to *Raise the Rate* of social security payments – co-ordinated by the Australian Council of Social Service and its associated state and territory-based organisations and supporters – the SDG goal to end poverty in all its forms everywhere, and the right to social security as set out in Article 9 of the ICESCR have specific relevance. The latter states:

*Implementing the right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. This requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, these minimum obligations.*²¹

²⁰ Sustainable Development Goals <https://www.un.org/sustainabledevelopment/poverty/>

²¹ United Nations, International Convention on Economic, Social and Cultural Rights, Article 9. Social Security <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social->
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Because the issue of social security is treated as a Federal responsibility in Australia and the Australian Government is not adhering to its international commitments, this limits the abilities of states and territories to enforce people's rights to social security, even if they already have their own human rights act.

A similar pattern is evident in Australia's approach to protecting the rights and interests of children and young people, as manifested by the contravention and contradiction of its commitment and ratification of the UN Convention on the Rights of the Child.²² This Convention requires member states to establish a minimum age of criminal responsibility. In 2019, the UN Committee on the Rights of the Child (UNCRC) recommended all countries increase the minimum age of criminal responsibility to at least 14 years of age with no exceptions for any offences, and it specifically urged the Australian Government to do so.²³ The Convention also provides guidance about how children and young people are to be treated, whether in the child protection or youth justice systems or not – the primary consideration being the 'best interest of the child', and a focus on early intervention, prevention and rehabilitation rather than punishment.²⁴

Despite Australia being a signatory to UNCROC and, in spite of encouragement and advocacy regarding the imperative to comply with raising the minimum age of criminal responsibility to at least 14 years, it appears that there is very little government appetite to adhere to and implement Australia's international commitment to UNCROC. The recent release of the SA Attorney-General Department's *Minimum Age of Criminal Responsibility – alternative diversion model* discussion paper, proposes that the minimum age be raised to 12 years, with exceptions. This is well below the minimum age of 14 as directed by international requirements, and advocated by medical experts, and human rights and children's rights organisations.

Adherence to the UNCROC and rigorous scrutiny of its application and focus on rehabilitation rather than punishment – coupled with the implementation of the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and establishment of a National Preventative Mechanism (NPM) in all jurisdictions, including South Australia – are central to effecting positive change in the lives of children and young people, more especially those who encounter the child protection and youth justice systems.

This short extract from commentary provided by a young person with direct experience of youth detention in South Australia, and posted on the website of the SA Guardian for Children and

[and-cultural-rights#:~:text=in%20that%20Convention.-,Article%209,social%20security%2C%20including%20social%20insurance.](#)

²² United Nations Convention on the Rights of the Child (1989) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

²³ United Nations Convention on the Rights of the Child, Committee on the Rights of the Child (November 2019) *Concluding observations on the combined fifth and sixth periodic reports of Australia*. <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsk5X2w65LgiRF%2FS3dwPS4NWFNCtCrUn3lRntjFl1P2gZpa035aKkorCHAPJx8blZmDed5owOGcbWFeosUSgDTfKNqA7hBC3KiwAm8SBo665E>

²⁴ According to the Convention (Article 37), '(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.'

Young People,²⁵ highlights the current treatment and long-term harm caused by Australia and South Australia's failure to implement its commitments under the UNCROC:

It has been nine years since I last walked out of the Adelaide Youth Training Centre. As someone who experienced the criminal legal system as a young person, I know how damaging it can be. Nearly a decade on and it's hard for me to see that similar issues are still impacting young people. It's even more concerning that society seems to turn a blind eye to the abuse and suffering that continues to occur within the centre ... To safeguard the fundamental human rights of children and young people within the centre, it is essential to establish transparency and accountability mechanisms throughout the system. Within spaces like these, human rights violations are prevalent, including neglect, mistreatment, abuse, and the silencing of young people's voices. As I've experienced first-hand, the impact extends far beyond the walls of these institutions and becomes even more apparent over time – it casts a long shadow.

This experience highlights the critical importance of South Australia establishing a Human Rights Act and the enforceability of commitments to international human rights instruments – including UNCROC, OPCAT and others – and implementing these through legislation, policy, and practice.

Similarly, the campaign to implement the Uluru Statement from the Heart and the Referendum for a First Nations' Voice to Parliament, would have been eased and enabled by Australia complying with its endorsement of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2009. Since then, Australia has publicly committed to take actions to implement the Declaration and promote First Nations people's rights, but has not taken steps to implement the UNDRIP into law, policy and practice; negotiated with First Nations to implement the UNDRIP; or audited existing laws, policies and practice for compliance with the UNDRIP.²⁶

A Human Rights Act would have the following practical applications for community-focused organisations, such as SACOSS, that advocate with and on behalf of communities whose rights are frequently disregarded, and that are involved in policy and legislative reform processes:

- It would provide a shared way to explain and advocate for the rights and needs of our constituents and the communities we work with. This would include, for example, the right to housing, health, clean and reliable drinking water, and social security.
- It would offer a pathway for sensible reforms and the development of laws and policies, by: facilitating consultation with communities, considering rights impacts in the design of legislation or policy, supporting decision-makers to gather and consider the correct information, and to determine the least restrictive options when attempting to balance rights.
- It would provide an opportunity to reduce costs and improve efficiencies, by consulting with communities about their priorities, build partnerships and longer-term funding arrangements, monitor rights benefits and outcomes to improve efficacy and optimise resources.
- It would result in significant benefits for individuals and communities, by pre-empting complex complaints, enable work being undertaken with key decision-makers to develop feasible options and alternatives to decisions that could potentially impact on people's rights; and offer and establish defined pathways for remedies and redress if rights are compromised.²⁷

²⁵ Robinson, L. (June 2023) *Prioritising young people's voices: a call for change*, Guardian for Children and Young People, accessed at <https://gcyp.sa.gov.au/2023/06/22/prioritising-young-peoples-voices-a-call-for-change/>

²⁶ Australian Human Rights Commission (2021) *Implementing UNDRIP*
https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf

²⁷ Rights Resource Network SA & Australian Lawyers for Human Rights (May 2023) *Human Rights SACOSS Submission to Social Development Committee – Potential for a Human Rights Act for SA*

e) The potential implications of any act for the making of laws, courts and tribunals, public authorities and other entities

Consideration needs to be given to the ways in which the introduction of a Human Rights Act might impact on law-making and various government, judicial and public institutions. The Expert Delegates Workshop (facilitated by the Rights Resource Network SA, held in December 2021), identified a number of features of a South Australian Human Rights Framework that could be achieved without legislative change and should be actioned immediately, while the drafting and consultation on a Human Rights Act is undertaken.²⁸ Ideally, these accompanying features towards the development of a Human Rights Act would include:

- Prioritising and highlighting the existing Scrutiny Principles for the Legislative Review Committee which already include a reference to reviewing whether certain delegated legislation trespasses unduly on personal rights and liberties, and allocating additional secretariat resources to this Committee to undertake more systematic scrutiny of rights-impacting regulations and proposed legislation.
- Publishing the Explanatory Statements or Explanatory Notes that are currently drafted and circulated to members of parliament when a new Bill is introduced and including a description of the extent to which the Bill trespasses unduly on personal rights and liberties and/or impacts or complies with human rights standards.
- Embedding rights into Key Performance Indicators for public servants and integrating human rights considerations within Cabinet approval processes for proposed policy and legislation.
- A requirement that all public servants, government officials, members of parliament and judicial officers undertake regular human rights training, with a focus on the most prevalent human rights issues confronting South Australia. This could be supported by a Human Rights Advocate or Commissioner within the Public Service or a separate Statutory Office of Human Rights Commissioner with a mandate to undertake this type of training and public awareness.
- A requirement that human rights principles are considered in all forms of government decision making and parliamentary law-making. This could include establishing a Parliamentary Committee on Human Rights or an Independent Expert Panel on Human Rights to review existing and proposed laws for compliance with human rights standards and provide advice to Parliament. This would require that Bills and legislative instruments are introduced with a Statement of Compatibility with Human Rights setting out the extent to which they comply with the rights listed in the Human Rights Act.
- An indication of clear pathways for individuals and groups to challenge government decisions on the basis that government authorities have failed to consider human rights principles, or acted in a way that unjustifiably burdens or breaches individuals' or groups' human rights. Meaningful remedies need to be available to individuals and groups that can show that their human rights have been ignored or unjustifiably burdened or breached.

Submission Writing Workshop: Designing a Human Rights Framework for SA.

<https://www.rightsnetworksa.com/team-4>

²⁸ Designing a Human Rights Framework for South Australia - Final Report (February 2022)

https://www.rightsnetworksa.com/files/ugd/8cf77c_33045f4455014d5aa55dc22c40a39d92.pdf

3. In conclusion

In advocating for a Human Rights Act we remain acutely cognisant that the persistence of poverty and inequality provides a far-reaching assault on people being able to realise their human rights. These features of our society erode a suite of economic and social rights such as the right to health, decent housing, food and safe water, digital inclusion, social security, and education. Similarly, the realisation of civil and political rights, such as the right to free association, political participation, a fair trial, privacy, and security of the person will be enabled by the potentiality of a Human Rights Act. Such an Act, accompanied by procedural safeguards and responsibilities, will result in more effective responses to the features and impacts of poverty and inequality.

SACOSS does not labour under any illusion that a Human Rights Act will, in and of itself, miraculously transform inequality, poverty and a range of persistent socio-economic problems, but we do believe that our society will be in a far stronger position to address these challenges if we have a Human Rights Act. On its own, an Act will not necessarily or automatically change people's lives, and needs to be accompanied by a decent social safety net and 'a supportive political culture',²⁹ but it will offer legal remedies and mean that the laws and policies that are developed under a rights framework will be required to enhance people's rights and dignity.

Having recourse to a Human Rights Act would bring attention to the current neglect and denial of many people's rights, and would support advocacy efforts to improve the lives of people who are doing it tough. Such an Act would serve to protect human rights, prevent violations of human rights, and provide effective relief in instances of breaches. Through the establishment of a Human Rights Act, increased citizen participation and strengthened engagement about people's rights will deliver positive outcomes for everyone who lives in this State.

A Human Rights Act would give organisations such as SACOSS, and the organisations and communities we care about and work with, appropriate legal mechanisms and tools to ensure that the Parliament considers people's rights when making laws and designing policies; that governments respect human rights when making decisions about policies, programs and departmental practices that affect people's lives; and that individuals have access to justice and legal support when their rights are ignored or breached.

SACOSS encourages your Committee to consider the proposals contained in our submission and to support the realisation of the rights of everyone living in South Australia, thereby creating a more equal and integrated society for everyone.

We would also like to encourage your Committee to seek additional ways to hear from community interest groups whose voices may not have been heard through the submissions process. SACOSS would be willing to assist the Committee to bring people together to share their views and direct experiences.

Should your Committee require further information or wish to invite SACOSS to present at an Inquiry hearing, we would welcome the opportunity to engage with you in more detail.

²⁹ Professor George Williams AO, (2023) Submission to the Federal Inquiry p. 2.

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Submissions