



Indigenous Law and Justice Hub
University of Melbourne

Inquiry into Australia's Human Rights Framework

Submission to the Parliamentary Committee on Human Rights

1 July 2023



Acknowledgement

The Indigenous Law and Justice Hub acknowledges the Wurundjeri peoples of the Kulin Nation, the Traditional Owners of the unceded land on which our University building sits and on which this work was produced. We acknowledge the ongoing work of Aboriginal and Torres Strait Islander people, organisations and nations to unravel the injustices imposed on First Nations people since colonisation, and to continue to bring community benefit through their legal traditions.

Table of Contents

Table of Contents

Who we are.....	4
Introduction.....	5
Indigenous Rights are Human Rights: This Inquiry must pay central attention to the rights of Aboriginal and Torres Strait Islander peoples ..	7
Recommendation 1 – A Human Rights Act to protect cultural rights across Australia.	11
Recommendation 2- A Human Rights Act to recognise Indigenous peoples rights to self-determination.	15
Recommendation 3 – the UNDRIP has a place in our Parliamentary processes.	18
Conclusion.....	19

Who we are

The Indigenous Law and Justice Hub, Melbourne Law School

The Indigenous Law and Justice Hub (ILJH) brings together legal experts and community leaders to produce rigorous legal research that can be directly applied in Indigenous advocacy and self-governance.

We are educators who play a central role in developing our law students' understandings of Indigenous cultures, legal systems, and Indigenous experiences of settler law. This includes overseeing a review of the compulsory Juris Doctor curriculum to increase the representation of Indigenous knowledges and perspectives, as well as developing new subject offerings and learning opportunities.

The ILJH's research focus is two areas of law and policy that are of pressing importance for Indigenous peoples: Criminal In/justice and Treaty. Our aim is to support and amplify Indigenous voices in these fields by performing two chief functions:

***Research:** Production of high-quality, rigorous legal research; and*

***Access:** Improvement of community access to research and advice*

For more information about the ILJH [visit our website](#).

Contact us

This submission was prepared students participating in the ILJH's Law and Advocacy Program - Maggie Blanden (Palawa), Shashwat Makhija, Ebony Minicozzi, Kieran Akula and Edie McAsey, under the supervision of Eddie Cubillo (Larrakia, Wadjigan and Central Arrente, Centre Director) and Jaynaya Dwyer (Research Fellow).

We welcome enquiries at mls-indigenous@unimelb.edu.au.

Introduction

The Indigenous Law and Justice Hub strongly supports an [Australian Human Rights Charter](#) or Act ('Charter') as articulated by the Australian Human Rights Commission (AHRC) *Free and Equal* position paper.¹

As a Larrakia, Wadjigan and Central Arrente man, I have long advocated for genuine and respectful engagement to support Indigenous self-determination.² The time to clearly articulate our national human rights values is long overdue.

A Human Rights Charter is a powerful tool for First Nations peoples to realise their rights. Each of the three times the *Racial Discrimination Act 1997* (Cth) has been suspended in this Country, it has been to the detriment of Indigenous Australians.

I was Anti-Discrimination Commissioner of the Northern Territory during the period of the *Northern Territory National Emergency Response* – better known as 'the NT intervention'.³ I saw how sweeping measures curtailing Indigenous rights could be announced by the Commonwealth Government, without even the Northern Territory Government being informed prior to the Prime Ministers Press Conference, let alone genuine consultation with Indigenous peoples who the measures targeted.⁴ The sweeping measures, greatly affecting Aboriginal people's life experiences across land rights, income management, housing, criminal defence processes and more, were then passed through the Federal Parliament in a mere ten days.⁵ A Charter could be a much-needed brake on this type of action.

As Territory Anti-Discrimination Commissioner under this regime, working with Commissioners at the National level, I also saw First Nations peoples lacking trust and faith in the ability of existing human rights organisations to provide effective response and remedies where breaches of their rights do occur. This lack of faith was justified based on the structural elements – my office's legislative powers and budget amongst them. A Charter could provide a place to go.

Following this role, I worked on the Royal Commission into the Detention and Protection of Children in the Northern Territory.⁶ This is one of a long list of reports on the lack of respect for Indigenous rights in this Country, whose careful recommendations sit largely unimplemented. Disturbingly, our overincarceration and experience of child removal persists and intensifies, even in the face of a multitude of comprehensive recommendations put forth by royal commissions, state-level inquiries, national reports, and international assessments. The persistent disregard for these vital recommendations and the escalating loss of life underscores a deep-seated failure to address the root causes of this crisis, fuelling justified outrage and an urgent demand for systemic change.

A Charter would be a powerful tool for us to hold governments to account in relation to our individual and collective rights. It could enable some long overdue equity for First Nations.

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

² See Eddie Cubillo, 'The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help' (2011) 13(1) *Flinders Law Journal* 137.

³ I served in this role from 2010-2012 when the *Northern Territory Emergency Response Act 2007* (Cth) and the *Stronger Futures in the Northern Territory Act 2012* (Cth) was in place.

⁴ See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report 2007' (report no. 1/2008) 199-211.

⁵ Ibid.

⁶ See Eddie Cubillo, 'On the personal toll for Indigenous advocates and people when governments fail to act' *Croakey Health Media* (online, 18 June 2018) for reflection on this experience.

In this submission our students outline the role a Charter could play in educating the Australian public about the rights we all hold and building a human rights culture in Australia – ‘frontloading rights-mindedness’ as Emeritus Professor Rosalind Croucher of the AHRC terms it.⁷ I now work at a law school, seeking to shape the justice-orientation of the next generation of lawyers. Their writing reminds me of my colleagues’ reflection that in recently published world law school rankings, our workplace — the Melbourne Law School — sat at number 11,⁸ and is the first law school on the list which does not host a dedicated Human Rights program or centre. As Melbourne Law School is the first ranked Australian law school on this list, this is perhaps a reflection on the relative absence of Human Rights discourse in Australian practice, reflected throughout our research and education institutions. The change that would come with the introduction of a Charter is more though, than the academic re-articulation of rights for my people. Building a Human Rights culture in Australia will have real outcomes in improving life chances of Aboriginal and Torres Strait Islander people.

Recommendations

As a centre working on Aboriginal and Torres Strait Islander justice matters, we draw the Committee’s attention to the following matters in support of the AHRC model:

Recommendation 1 – The Charter should play a strong role in supporting individual human rights, including the specific cultural rights of Aboriginal and Torres Strait Islander people.

Recommendation 2 – The Australian Parliament should adopt a federal Human Rights Act with a key focus on Indigenous rights supporting the self-determination of Aboriginal and Torres Strait Islander Peoples.

Recommendation 3 – Parliamentary Human Rights procedures should include greater scrutiny of legislative compliance with Indigenous rights.

A Human Rights Charter can and should not be expected to be a panacea in relation to First Nations rights; but an important measure to sit alongside other structural mechanisms to support First Nations sovereign rights. These mechanisms include Voice, Treaty and Truth-telling.



Eddie Cubillo
Director, Indigenous Law and Justice Hub

1 July 2023

⁷ Australian Human Rights Commission, above (n1) 8.

⁸ See Quacquarelli Symonds Limited, *QS World University Rankings by Subject 2023: Law and legal studies* <<https://www.topuniversities.com/university-rankings/university-subject-rankings/2023/law-legal-studies>>

Indigenous Rights are Human Rights: This Inquiry must pay central attention to the rights of Aboriginal and Torres Strait Islander peoples

Australia's history with Aboriginal and Torres Strait Islander people has been stained by discrimination, dispossession, systematic and institutionalised racism, constituting significant breaches of Indigenous people's human rights.⁹ Our submission reflects the imperative for comprehensive and genuine reform of Australia's human rights framework to adequately address the unique rights, concerns, and aspirations of Aboriginal and Torres Strait Islander peoples.

Seeing Australia in Context

We should not downplay the severity of the lack of protection of human rights in Australian domestic law, or the lack of effective access to justice available to Australians where their Human Rights are breached.

Australia's piecemeal approach to human rights protections reflects a fragmented array of state and Federal statutory and common law protections, which do not provide effective access to justice or fully reflect our international obligations.¹⁰ This scattered 'framework' raises serious concerns about the cohesiveness and effectiveness of human rights protections available to Australians. This lack of protection has particularly acute consequences for First Peoples.

Aboriginal and Torres Strait Islander people experience low levels of formal recognition of their distinct rights, such as cultural and self-determination rights, compared to Indigenous peoples of other Commonwealth countries; Australia is both the only Commonwealth country not to make a Treaty with the relevant First Nations, and the only Commonwealth country which has not since introduced a national Human Rights instrument. On this basis, Australia is an international outlier in its approach to Indigenous-settler relations. On the international stage, United Nations Human Rights Council Universal Periodic Reviews have consistently called for action to rectify Australia's breaches of Indigenous peoples Human Rights on several key basis.¹¹

The alarmingly disproportionate incarceration of Aboriginal and Torres Strait Islander people constitutes a pressing and egregious human rights violation. This amounts to Aboriginal and Torres Strait Islander peoples being the most incarcerated peoples in the world.¹² It is a deeply disturbing reality that within this settler colonial landscape, Aboriginal and Torres Strait Islander women and girls represent the fastest-growing segment of the prison population in Australia.¹³ Alarmingly, Indigenous children are over 20 times more likely to be detained than non-Indigenous children.¹⁴

⁹ See e.g. *Royal Commission on Aboriginal Deaths in Custody* (National Report, 1991); Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, March 2018) ; Human Rights and Equal Opportunity Commission 'Bringing them Home' (Final Report, April 1997). See also Law Council of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Submission, 24 June 2022) 6.

¹⁰ Australian Human Rights Commission (AHRC), *A Human Rights Act for Australia: Free and Equal* (Position Paper, December 2022), 45.

¹¹ For most recent Universal Period Review of Australia see Human Rights Council, 'Report of the Working Group on the Universal Periodic Review of Australia (A/HR/47/8, 24 March 2021).

¹² Referendum Council, 'The Statement', *Uluru Statement from the Heart* (Web Page, 26 May 2017) < <https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf>> ; Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices): Securing our Rights, Securing our Future* (Report, October 2020), 165.

¹³ Victoria Tauli Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/ (8 August 2017), 13.

¹⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2020-21* (Report, 31 March 2022).

Since British colonisation, the practice of forcibly removing Aboriginal and Torres Strait Islander children from their families and communities has persisted, inflicting untold harm and perpetuating a legacy of profound intergenerational trauma.¹⁵ The projected trajectory indicates that the number of Aboriginal and Torres Strait Islander children in out-of-home care is poised to nearly triple by 2035.¹⁶ Hence, there is a growing conviction within communities that we are witnessing the emergence of a ‘second Stolen Generation’, marked by the alarming removal and separation of Aboriginal and Torres Strait Islander children from their families and communities.

Australia’s deficit safeguards for human rights have given rise to particularly high levels of violence perpetrated against Indigenous women. The harsh reality in Australia is that Indigenous women are 11 times more likely to die of violent assault, and are 34 times more likely to be subject to violence-related assault leading to hospitalisation compared with non-Indigenous women.¹⁷ Furthermore, these alarming statistics likely represent a gross underestimation, as there exists a pervasive issue of underreporting instances of violence inflicted upon Indigenous women.¹⁸

These disproportionate experience of rights violations by First Peoples in Australia requires urgent and prioritised action, and should be specifically reflected, including through a contextualised elaboration of the human rights of all Australians, in the Australian Charter.

The United Nations Declaration on the Rights of Indigenous Peoples

When we refer to ‘Indigenous rights’ throughout this submission, we refer to the catalogue of rights contained in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹⁹ The UNDRIP was born on 13 September 2007, when it was adopted by resolution of the United Nations General Assembly (UNGA).²⁰

The United Nations Economic and Social Council Permanent Forum on Indigenous Issues describes the declaration as a ‘new foundation for the rights of Indigenous peoples’ through a ‘universal, comprehensive, and fundamental instrument.’²¹ While a declaration rather than a binding treaty, the UNDRIP contains strong language of state accountability, with the Economic and Social Council recommending that states include adequate reporting on the implementation of the declaration in their reporting to human rights treaty bodies and recommends that relevant treaty bodies take account of the Declaration through the Universal Periodic Review.²²

This landmark Declaration is made up of over 46 Articles, reflecting both:

- Individual rights owed to all people under key human rights treaties, articulated in relation to Indigenous peoples; and,

¹⁵ Amnesty International Australia, Submission No 25 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (19 October 2022), 4.

¹⁶ Family Matters, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal*, (Report, 2016), 7.

¹⁷ Victoria Tauli Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/ (8 August 2017), 1.16.

¹⁸ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women’s Voices): Securing our Rights, Securing our Future* (Report, October 2020), 124.

¹⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

²⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RESS/61/295 (2 October 2007, adopted September 2007).

²¹ United Nations Economic and Social Council, Permanent Forum on Indigenous Issues eight session (22 May 2009 E/C.19/2009/L.3) [2].

²² United Nations Economic and Social Council, Permanent Forum on Indigenous Issues eight session (22 May 2009 E/C.19/2009/L.3) [2] – [3].

- Collective rights of Indigenous polities, through specific articulations of the right to self-determination.

In ‘recognition of the urgent need to respect and promote the inherent rights of indigenous peoples’ the UNDRIP reaffirms as its first article that:

‘Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.’

The individual human rights of Indigenous people have a symbiotic relationship to the collective rights of Indigenous polities; Self-determining Indigenous polities are better able to realise the individual economic, social and cultural rights of Indigenous people.

The development and adoption of the UNDRIP was a formidable undertaking, involving a lengthy drafting and negotiating process spanning more than two decades.²³ This process witnessed an unparalleled level of engagement, input, and invaluable contributions from Indigenous peoples worldwide, including the influential participation of the Aboriginal and Torres Strait Islander Commission (ATSIC).²⁴ UNDRIP is today regarded as the ‘milestone of re-empowerment’ for Indigenous peoples owing to the determination and resilience of the drafters.²⁵

Despite this, in 2007, when the UNDRIP was adopted with an overwhelming 143 votes in favour, Australia was among the four nations that objected to its adoption.²⁶ Two years later in April 2009, the Australian government reversed its position and finally endorsed the UNDRIP.²⁷ However, despite this declaration of support, the UNDRIP has not been comprehensively, formally, or substantively reflected in domestic Australian law.²⁸

Australia’s flagrant disregard for Indigenous people’s human rights, specifically its failure to enshrine UNDRIP, has been extensively and damningly documented by distinguished UN Special Rapporteurs on the Rights of Indigenous Peoples, namely Victoria Tauli Corpuz and James Anaya.²⁹ The Charter provides an important opportunity to provide domestic recognition of the UNDRIP rights and mechanism for seeking remedy where they are breached.

The inexcusable absence of adequate human rights protections and the ongoing refusal to genuinely implement the UNDRIP have inflicted a multitude of profoundly distressing realities upon First Nations people in Australia.

Federal Charter as an education tool

Australia has a civic deficit — a lack of public understanding and sophistication in human rights dialogue — which hinders major law reform for social justice and Indigenous rights. A Charter can inculcate new respect for promoting and upholding human rights in Australia. It can enhance public

²³ Anna Cowan, ‘UNDRIP and the Intervention: Indigenous self-determination, participation, and racial discrimination in the Northern Territory of Australia’ (2013) 22(2) *Pacific Rim Law & Policy Journal* 247.

²⁴ Ibid.

²⁵ Ibid, 248.

²⁶ The other states that voted against the adoption of UNDRIP were New Zealand Canada and the United States.

²⁷ Australian Human Rights Commission, ‘2009 Media Release: United we stand – Support for United Nations Indigenous Rights Declaration a watershed moment for Australia’ (Media Release, 3 April 2009).

²⁸ Gabrielle Appleby et al, Submission No 26 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (31 October 2022) 6.

²⁹ James Anaya, *Report by the Special Rapporteur on the situation on human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc A/HRC/15/37/ (1 June 2010); Victoria Tauli Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/ (8 August 2017), 1.

understanding of the duties we are owed and owe each other, and can act as a moral force by providing an accessible statement of the rights that we recognise as a community. We should not have to go hunting amongst caselaw and UN document repositories to understand our Human Rights.

While public understanding of human rights is generally low, there appears to be particularly low levels of understanding of the distinct collective rights as they apply to Aboriginal and Torres Strait Islander Peoples, such as the right to self-determination. When Indigenous polities assert their rights in Australia, there is a sense of antagonism and suspicion to such claims. The Law Council of Australia recently noted in a submission to a Parliamentary Committee, that its Expert Indigenous Legal Issues Committee advise ‘there is little evidence that self-determination is well understood or recognised across Australian governments and parliaments generally.’³⁰ Broad education on Indigenous rights, supported by a Charter, has an important and potentially a transformative role in supporting better experiences for Aboriginal and Torres Strait Islander people.

In our particular context of education of legal professionals, a Charter would be an important educational instrument. Part of the Indigenous Law and Justice Hub’s ongoing work is in supporting efforts to enhance understanding of Indigenous peoples’ rights in Australian legal education, through broad advocacy work as well as curriculum development in our law school. This work responds to the Council of Australian Law Deans acknowledgement of ‘the part that Australian legal education has played in supporting, either tacitly or openly, the law’s systemic discrimination and structural bias against First Nations people’ and calls for ‘all Australian Law Schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs’³¹ As legal educators we confirm in strong terms that a Charter which embeds the UNDRIP rights would be an important tool in this work, enabling a sense of coherence to the domestic articulation of Indigenous law and rights, otherwise fragmented across various instruments and educational focuses.

³⁰ Law Council of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Submission, 24 June 2022) [14].

³¹ Council of Australian Law Deans, ‘CALD Statement on Australian Law’s Systemic Discrimination and Structural Bias Against First Nations Peoples’ (3 December 2020).

Recommendation 1 – A Human Rights Act to protect cultural rights across Australia.

Australia's experience of protecting Indigenous rights and effecting State accountability through State and Territory charters has been an overall positive one, providing a sound basis for Australia to take the next step in this journey through the introduction of a Federal Charter. Our journey with State and Territory charters, however, has also seen important learnings for a Federal Charter, such as the importance of not overlooking collective Indigenous rights in the development of the Charter, and how a Charter might provide better causes of action and remedies.

The protection and promotion of human rights is a fundamental responsibility of all levels of government in Australia. At the state and territory level, three charters have been enacted: the *Human Rights Act 2004* (ACT) in the Australian Capital Territory ('ACT Act'), the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) in Victoria ('Vic Charter'), and the *Human Rights Act 2019* (Qld) in Queensland ('Qld Act'), which is the most recent of the three. These charters provide a framework for legislative protection and promotion of human rights at a sub-national level and partially-fill the gap left by the lack of a federal framework.

In specific instances of the abuse of First Nations peoples' human rights, charters have been a powerful tool in promoting State accountability and improving individual's circumstances. For example, in Victoria in 2016 the state charter was utilised to protect Aboriginal children who were being held in an adult prison facility, which had been gazetted by the Minister as the site of detention for the children.³² In a series of litigation the Supreme Court³³ and then the Court of Appeal³⁴ found that the Minister failed to consider the children's rights under the charter, including their right to protection of the child's best interest,³⁵ and humane treatment when deprived of liberty.³⁶ Follow the decision by the Court of Appeal, the Minister changed the unit's status and kept children there, prompting a final proceeding by children to the Supreme Court.³⁷ The Court determined that the Minister again breached the children's rights and ordered for the Minister to stop detaining children at the unit and to transfer all children back to the Youth Justice Centres.³⁸

State and Territory charters have done an imperfect job of recognising Indigenous peoples' rights as Indigenous peoples, as distinction from their useful role in protecting the general human rights owed to all people which are disproportionately breached for First Nations people. None of the Charters protect the breadth of Indigenous rights protected under the UNDRIP. The ACT Charter explicitly recognises this limitation.³⁹ Fundamentally for Indigenous peoples, to date State and Territory

³² Human Rights Law Centre, 'Case 86: Supreme Court finds that children held in maximum security prison were deprived of their human rights', *Charter of Rights* (Forum Post) <<https://charterofrights.org.au/101-cases/2022/10/25/case-86-supreme-court-finds-that-children-held-in-maximum-security-prison-were-deprived-of-their-human-rights>>.

³³ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796.

³⁴ *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343.

³⁵ *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s17(2).

³⁶ *Ibid* s22(1); *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796, 321(1); and *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343, 16(a).

³⁷ *Certain Children v Minister for Families and Children* [2017] VSC 251.

³⁸ *Ibid*.

³⁹ *Human Rights Act 2004* (ACT) s 27(3).

charters have failed to recognise collective rights of Indigenous people, such as the right to self-determination.

Recognition of First Nations cultural rights under State and Territory Charters

An effective Charter requires a substantive framework for the protection of Indigenous cultural rights given the unique cultural, spiritual, and historical connections that Indigenous people have with their Country and heritage.

While all people have cultural rights, Aboriginal and Torres Strait Islander peoples cultural rights manifest in specific ways based on the elements of their cultural life as custodians of the oldest living culture on earth, such as rights relating to caring for and maintaining relationship to Country. In speaking about a charter as a mechanism for domestic UNDRIP implementation, the Law Council of Australia recently noted the importance of specific articulation of Indigenous rights:

‘Particular attention ought to be paid to the unique history, background and purpose of the UNDRIP, including that it was considered a necessary mechanism for recognising and affirming that Indigenous peoples are entitled without discrimination to all human rights existing in international law; for elaborating on those rights as they apply to the specific situation of Indigenous people; for the articulation of collective rights, whereas other international instruments have focused on individual rights; and that Indigenous peoples led and were directly involved in the beginnings, development and drafting.’⁴⁰

While all three sub-national Charters include cultural rights, there is a significant disparity in the how cultural rights are articulated within the three Charters.⁴¹ The Queensland Charter is the only one of the three jurisdictions charters which specifically articulates First Nations cultural rights, as distinct from the general cultural rights available to all people. It is positive to see that the AHRC’s model contemplates the specific and enumerated articulation of First Nations peoples’ distinct cultural rights, and that ‘First Nations peoples have the right not to be subjected to forced assimilation or destruction of the culture.’⁴²

Case example – The right to equality and cultural rights

In the Victorian matter of *Cemino v Cannon*⁴³ the Victorian *Charter of Human Rights and Responsibilities* 2006 (Vic) was utilised to secure access to culturally appropriate court venues for an Aboriginal person being sentenced in criminal proceedings. The case demonstrates the utility of the Victorian charter in ensuring that there is accountability that cultural rights are taken into account in day-to-day decision making by the state relating to Indigenous people.

The matter involved a Yorta Yorta man from regional Victoria, Mr Cemino, whose application to have his criminal hearing transferred from the Magistrates’ Court in Echuca to the Koori Court Division of the Shepparton Magistrates’ Court had been refused by the presiding Magistrate.⁴⁴ The Magistrates reasons were influenced by ‘proper venue’ considerations related to hearings

⁴⁰ Law Council of Australia (n 27) [51].

⁴¹ *Human Rights Act 2004 (ACT)* s 27(2); *Human Rights Act 2019 (Qld)* s 28(1); and *Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 19(2).

⁴² Australian Human Rights Commission (n 1) 114.

⁴³ *Cemino v Cannon* [2018] VSC 535.

⁴⁴ *Cemino v Cannon* [2018] VSC 535, 1.

occurring in local communities, contemplating that a Koori Court venue was not available as locally as the mainstream venue of the local Magistrates Court.

The Koori Court is a division of a Victorian criminal court where a judge sits with local Aboriginal elders or respected persons, who advise on matters and take part in a justice process of community accountability with an Indigenous person who has pleaded guilty.

In his affidavit, Mr Cemino described his reasons for wanting his matter to be heard by the Koori Court:

'The Elders know who I am and who my family is. Talking to the Elders is like talking to my family. They can speak to me about my mother and her family, about who I am, and what it means to be Yorta Yorta ... The Elders understand my feelings, that there is a 'shame job' there related to my mum because I treated her poorly and now she's gone. The Elders know what this means for me. I can speak to them about this, in a way I can't speak to the mainstream Court.'⁴⁵

Mr Cemino's appeal argument relating to the charter was that the Magistrate had acted contrary to the Victorian Charter of Human Rights in failing to consider his right to culture⁴⁶ and right to equality⁴⁷ as an Aboriginal man. The Supreme Court found that the Magistrate should have considered the distinct cultural rights of Mr Cemino and his right to equality before the law when making a decision about his request to be transferred to the Koori Court.⁴⁸

The decision was the first time that Aboriginal cultural rights were considered to apply directly to the Courts,⁴⁹ highlighting the import role that the Koori Court plays in the criminal justice system and emphasising the importance of culturally appropriate hearings for Aboriginal people. The decision demonstrates the positive impact that Charters can have and their ability to effectively protect the rights and freedom of Aboriginal people. However, the lack of a widespread adoption of charter/acts together with a federal charter means that not all Aboriginal people are afforded the opportunity to rely assert their cultural rights in this way in other jurisdictions.

The AHRC model also takes the positive step of enabling representative standing by organisations, moving towards the ability for First Nations organisations to challenge collective breaches of cultural rights on behalf of a representative group.⁵⁰ The AHRC specifically contemplates that representative standing provisions under the Charter would be utilised in relation to UNDRIP rights.⁵¹

Lessons from State and Territory Charters

Two widespread criticisms of state and territory-based charters are that the circumstances in which they are enforceable are narrowed due to the lack of free-standing cause of action under the

⁴⁵ Cited in Tal Chmerling, 'The Koori Court is a Human Right' *Right Now* (30 May 2019) <<https://rightnow.org.au/opinion/accessing-koori-court-human-right/>>

⁴⁶ *Human Rights Act 2019* (Qld) s 19(2)(a).

⁴⁷ *Human Rights Act 2019* (Qld) s 8(3).

⁴⁸ *Cemino v Cannon* [2018] VSC 535, 12.

⁴⁹ Human Rights Law Centre, 'Case 41: Aboriginal cultural rights need to be considered in decisions around access to the Koori Court', Charter of Rights (Forum Post) <<https://charterofrights.org.au/101-cases/2022/10/26/case-41-aboriginal-cultural-rights-need-to-be-considered-in-decisions-around-access-to-the-koori-court>>.

⁵⁰ Australian Human Rights Commission (n 1) 30.

⁵¹ *Ibid* 133.

Charters, and that compensation in the form of financial damages is not directly available to people whose rights have been breached.

When it comes to access to justice to remedy human rights breaches, one significant limitation is the restricted ability for an individual to seek enforcement of rights. General complaints about a breach of human rights can be made to human rights commissions or ombudsman offices in VIC,⁵² QLD⁵³ and ACT.⁵⁴ However, their role is limited to conducting inquiries, mediating disputes, and making recommendations for resolution. Their recommendations lack legal enforceability, and there is no authority to ensure compliance. As a result, individuals are left with the option of seeking a legal remedy through the court system.

When seeking legal action for a violation of a human right through a court, the ACT Charter is the only one that allows a direct claim to be raised based on a charter violation.⁵⁵ In VIC⁵⁶ and QLD,⁵⁷ individuals seeking redress for a human rights violation must rely on alternative legal claims or causes of action, and then make charter arguments relating to this action. For instance, in the case of Mr Cemino outlined above, the Supreme Court had to find that the Magistrate had made a jurisdictional error and error of law in relation to the decision to give primacy to the proper venue considerations over the purpose of the Koori Court,⁵⁸ before Mr Cemino's cultural rights could be considered under the Charter.

In considering a Federal Charter, it is important for a stand-alone cause of action under the Charter to be available for the Charter to be an accessible and effective instrument, such as the model outlined by the AHRC.⁵⁹

The ability to seek a remedy for a violation is crucial in protecting fundamental rights and ensuring their promotion.⁶⁰ Access to remedies are vital because they represent the tangible realisation of rights the remedy itself.⁶¹ However, in seeking remedies under a legal proceeding in Victoria and the ACT, the available remedies explicitly exclude damages,⁶² and similarly, in Queensland, monetary actions are explicitly excluded.⁶³ These limited remedies are unsatisfactory in promoting a comprehensive human rights framework and adequately protecting people.⁶⁴

⁵² See Victorian Equal Opportunity and Human Rights Commission.

⁵³ See Queensland Human Rights Commission.

⁵⁴ See ACT Human Rights Commission.

⁵⁵ *Human Rights Act 2004 (ACT)* s 40C.

⁵⁶ *Victorian Charter of Human Rights and Responsibilities Act 2006* s 39.

⁵⁷ *Human Rights Act 2019 (Qld)* s 59.

⁵⁸ *Cemino v Cannon* [2018] VSC 535, 8.

⁵⁹ Australian Human Rights Commission, above n(1), 133.

⁶⁰ Ciara Murphy, 'Damages in the Australian human rights context' (2022) 27(2) *Australian Journal of Human Rights*, 311, 312.

⁶¹ Jackie Mapulagna-Hulston, 'The importance of the right to an effective remedy in human rights legislation' (2022) 49(3) *BRIEF*, 49.

⁶² *Victorian Charter of Human Rights and Responsibilities Act 2006* s 39(3); and *Human Rights Act 2004 (ACT)* s 40C(4).

⁶³ *Human Rights Act 2019 (Qld)* s 59(3).

⁶⁴ Ciara Murphy, 'Damages in the Australian human rights context' (2022) 27(2) *Australian Journal of Human Rights*, 311, 312.

Recommendation 2- A Human Rights Act to recognise Indigenous peoples rights to self-determination.

None of the existing State and Territory charters recognise the collective rights of Aboriginal and Torres Strait Islander people, including their right to self-determination.

Self-determination remains paramount to the aspirations of Indigenous peoples. A Charter must support self-determination, either as a distinct right in itself or through various rights which underpin self-determination.

We support the AHRC's proposal for inclusion of an interpretive principle in the Charter that requires interpretation of its provisions in light of UNDRIP, as well as other core Human Rights treaties.⁶⁵ We also support the AHRC's proposed participation duty relating to First Nations peoples.⁶⁶ However, we note that these welcome measures do not amount to anything close to a realisation of the right to self-determination for Indigenous peoples.

‘Self-determination is the river in which all other rights swim.’⁶⁷

The foundational right of Indigenous Peoples to **self-determination**, to ‘freely determine their political status, and pursue their economic, social and cultural development’ in article 3 of the UNDRIP, is supported by a sophisticated and specific articulation of self-determination practice throughout the Declaration, including rights in relation to:

- **Land, sea and water Country**, including the right to use and develop their lands (arts 25-26), and the right to have these interests recognised (art 27).
- **Indigenous legal systems and self-government**, such as the right to determine the responsibilities of members (art 35), exercise self-government over internal and local affairs (art 4), and to determine provisions around membership (art 33).
- **Autonomy**, including not to be subjected to forced assimilation or destruction of culture (art 8).
- **Cultural practices** and to manifest and develop traditions (art 12).
- Maintaining control of Indigenous **education systems** (arts 13-14).
- Establishing and maintaining **Indigenous media** (art 16).
- **Cooperation and consultation** by the state (art 19).
- **Political, economic and social structures** (arts 20-21).

Without clear protection, these Indigenous rights held by around three per cent of the Australian population are extremely vulnerable to majoritarian override. Unless there is a specific focus on Indigenous rights in drafting the federal Charter, there is a risk that Indigenous rights will be treated as a minor concern within the larger context. The relationship between individual and collective Indigenous rights is symbiotic; failing to realise self-determination will negatively impact the realisation of the individual rights of Indigenous peoples.

⁶⁵ See Australian Human Rights Commission (n1) 19.

⁶⁶ Ibid 187.

⁶⁷ Michael Dodson, Statement of 24 November 1995, to the first session of the CHR Working Group (on file with *Human Rights Quarterly*), quoted in Scott, C 1996, ‘Indigenous Self-Determination and Decolonization of the International Imagination: A Plea’, *Human Rights Quarterly*, vol. 18, no. 4, 814.

Measures to support self-determination in the AHRC model

The AHRC *Free and Equal* model takes an interpretive approach to supporting self-determination. It proposes that the right to self-determination is articulated as an overarching principle of the instrument.⁶⁸ By speaking to self-determination, the Charter would move beyond the preambular articulation of First Nations 'special-interest' in human rights. The Charter under the AHRC model would also include an interpretive principle that the Charter be interpreted in light of the UNDRIP.

The interpretive provisions are accompanied by a participation duty held under the Charter by public authorities relating to First Nations peoples and other groups outlined in the discussion paper. The AHRC describes the duty as a 'process-based solution to respect the right to self-determination' in the context of a Charter.⁶⁹ The participation process is largely outlined as information and consultation.⁷⁰ We consider that the success of this process in protecting Indigenous rights would rely on the robustness of the processes and resources put in place for consultation. However, the AHRC has mischaracterised consultation processes as a form of self-determination.

While the interpretative principles and participation duty in the AHRC's model are positive steps, they do not correspond to realisation of the right to self-determination for Aboriginal and Torres Strait Islander Peoples.

Case study - Indigenous collective rights and consultation duties in Canada

Our democratic society is founded on the principle that we should have a say in decisions that affect us. In Canada, Indigenous collective rights and consultation duties help to ensure that these values translate into actions.

Section 35 of the Canadian *Constitution Act*⁷¹ recognises collective rights for Indigenous peoples and provides for Indigenous participation in constitutional decisions that impact those rights. These rights are upheld by the Canadian courts through the doctrine of the duty to consult.⁷²

In the *Haida Nation* case,⁷³ the Haida peoples were able to use their collective rights to ensure they could meaningfully participate in decisions that impacted their lands and culture. The Haida people had claimed Aboriginal title over Haida Gwaii, an archipelago off the coast of British Columbia, for over 100 years.⁷⁴ The courts acknowledged that the Haida's title claim was strong but would take many years to prove.⁷⁵

The British Columbian government had issued tree farm licences allowing a large forestry firm to harvest cedar, a culturally and economically significant material for the Haida people,⁷⁶ despite the Haida's persistent objections.⁷⁷ If continued logging was permitted to go ahead, it was likely that the Haida people would win their title claim too late to use the resulting legal rights to

⁶⁸ Ibid 19.

⁶⁹ Ibid 182.

⁷⁰ Ibid 184.

⁷¹ *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*').

⁷² See generally Isabelle Brideau, *The Duty to Consult Indigenous Peoples* (Background Paper No. 2019-17-E, 12 June 2019).

⁷³ *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511.

⁷⁴ Ibid [1].

⁷⁵ Ibid [7].

⁷⁶ Ibid [2].

⁷⁷ Ibid [4].

protect their cultural heritage.⁷⁸ The old-growth forests would already be lost and could never be replaced.⁷⁹

The Canadian Supreme Court found that the government had not only a moral duty, but a legal duty to consult with the Haida people.⁸⁰ The collective rights guaranteed by section 35 of the *Constitution Act* were found to represent a “promise” by the Crown to act honourably,⁸¹ implying a duty to consult where the Crown has real or constructive knowledge that potential Indigenous rights might be adversely affected by their conduct.⁸²

People and communities should be put on a more equal footing with large corporations. Collective duties to consult helped to achieve this for the Haida people.

Getting Self-Determination Right

Consultation with Aboriginal and Torres Strait Islander peoples will identify what self-determination should look like in the federal Charter and the institutional architecture supporting it. Consultation must be widespread, culturally appropriate, and deliberate. A Charter which is nurtured through First Nations Communities will be a more effective instrument.

We must be upfront about what self-determination is and halt the watering-down of this important principle; participation duties must not be equated with self-determination. Such an approach has better prospects of creating a Charter which speaks to all Australians.

⁷⁸ Ibid [7].

⁷⁹ See *ibid*, and [33].

⁸⁰ Ibid [10].

⁸¹ Ibid [20].

⁸² Ibid [35].

Recommendation 3 – the UNDRIP has a place in our Parliamentary processes.

Prevention is better than cure; investing properly in our law-reform processes and particularly the human rights scrutiny process of legislation will support better and more rights-compliant laws. We support the AHRCs proposed alteration to the existing Human Rights scrutiny processes and Statement of Compatibility to include stronger consideration of Indigenous rights, and specifically to consider compliance with the UNDRIP.⁸³

Currently the parliamentary scrutiny process of bills does not require the consideration of proposed laws in relation to how they will impact Aboriginal and Torres Strait Islander Peoples rights under the UNDRIP. Australia has long been criticised for its lack of compliance with the UNDRIP by United Nations authorities.⁸⁴ The basis on which these criticisms are made should be visible to all decision makers on Australian legislation through the Parliamentary process through formal advice, at the same time that advice is made available on the bill's compatibility with other human rights instruments.

Noting the AHRCs concerns regarding the resourcing of the parliamentary scrutiny process,⁸⁵ we urge that the mechanisms put in place to support scrutiny of bills for Indigenous rights concerns are robust and appropriately resourced.

This issue of resourcing the AHRC identifies is evident as the analysis offered in the reports are primarily based on legal advice regarding which rights are affected and providing a theoretical analysis of the consequences of the rights. The theoretical analysis disengages from the practical consequences of the legislative instrument and allows legislative instrument to get away with conclusive statements about human rights compatibility with no evidence to support the claims. The position paper refers to this as the 'iceberg phenomenon', by which the parliamentary scrutiny only deals with most pressing features, which are a small portion of the overall issue.⁸⁶

For example, the scrutiny of the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth)* bill supporting the Voice to Parliament through the statement of compatibility was cursory in its consideration of UNDRIP, concluding that the bill would promote and support self-determination rights. The statement does not contain a sophisticated engagement with the UNDRIP rights as to whether and how the Voice to Parliament as a consultation body could support self-determination, as distinct from some other First Nations right or interest.⁸⁷ The mechanism proposed would see a much more robust attention to how the bill would support Indigenous rights in such circumstances, providing an opportunity to build greater trust and accountability with First Nations.

⁸³ Australian Human Rights Commission, above n(1) 316.

⁸⁴ See James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, UN Doc A/HRC/15/37/ (1 June 2010); Victoria Tauli Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc A/HRC/36/46/ (8 August 2017), 1. See also consideration of Australia's Human Rights record generally through the Universal Periodic Review process.

⁸⁵ Australian Human Rights Commission, above n(1) 303.

⁸⁶ Australian Human Rights Commission, above n(1) 301.

⁸⁷ Parliament of Australia, *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth)* (Bill digest no 80 2022-23, 19 May 2023)

Conclusion

Against the distressing backdrop of systemic injustices and the continual denial of Aboriginal and Torres Strait Islander rights, this submission has argued for an urgent and overdue reform of Australia's human rights framework. The Charter is an opportunity for genuinely acknowledgement, respect and support for Aboriginal and Torres Strait Islander people's inherent rights and dignity.

The establishment of comprehensive human rights protections for Aboriginal and Torres Strait Islander people through the Charter must include attention to the realisation of both individual and collective Indigenous rights, and particularly the right to self-determination. It must also seek to provide effective access to justice and remedies, in a way which goes beyond existing State and Territory charters. The AHRC model is a strong building block for better human rights protections for First peoples and for Australia to finally attend to the rights it has acknowledge through the UNDRIP.

.