



# **‘Free and Equal’: An Australian conversation on human rights**

## **SUBMISSION TO AUSTRALIAN HUMAN RIGHTS COMMISSION**

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**November 2019**

## ACKNOWLEDGEMENTS

Save the Children Australia acknowledges Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of the land on which we work. We pay our respect to their Elders past, present and emerging.

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## Save the Children's submission

As a leading independent international organisation for children and child rights, Save the Children has deep expertise in service delivery, policy and advocacy promoting and protecting children's rights. In Australia, we deliver children's and family services that support highly vulnerable and marginalised children in every State and the Northern Territory, and we are committed advocates for children and their rights. Our Australian services and programs directly support around 30,000 children and adults each year, and our public and private advocacy for children's rights reaches countless more members of the general public as well as decision-makers and others with influence on children's rights and outcomes.

We believe that children are the most important bearers of human rights, for who they are today and for who they will become tomorrow. This year is the 100<sup>th</sup> anniversary of Save the Children's establishment and the 30<sup>th</sup> anniversary of the Convention on the Rights of the Child (**CRC**). Indeed, the 1924 Geneva Declaration on the Rights of the Child, drafted by our founder Eglantyne Jebb and a direct predecessor to the CRC, was the first declaration of human rights adopted by any inter-governmental organisation, preceding the Universal Declaration of Human Rights by 24 years.<sup>1</sup> We are proud of our long history working to protect children's rights, and delighted to participate in this conversation about the future of human rights in Australia.

## The need for human rights reform in Australia

Australia is a developed and prosperous country, yet many children in Australia are denied basic human rights. The necessary conditions and supports are often not in place to realise rights, and there are also instances of laws and policies that directly infringe rights. Some of the deficiencies in Australia's human rights performance have recently been highlighted by the United Nations Committee on the Rights of the Child (**Committee**).<sup>2</sup> In its concluding observations issued on 30 September 2019, the Committee expressed concerns with:

- the high rates of violence against children at home, and an insufficient focus on preventing violence against children and family violence prevention and responses related to Aboriginal and Torres Strait Islander children;<sup>3</sup>
- the high number of children in out of home care, inadequate support for children in the child protection system, insufficient investment in prevention measures to avoid child removal, excessive reliance on police interference and the criminal justice system, and limited access to mental health and therapeutic services;<sup>4</sup>
- the administration of youth justice, including the very low age of criminal responsibility, the high number of children in detention, and children's treatment while in detention;<sup>5</sup>
- the particular harm to Aboriginal and Torres Strait Islander children from being disproportionately affected by violence, over-represented in out of home care and in the justice system, and facing significant barriers to accessing health services and education;<sup>6</sup>
- asylum, refugee and migration processes not having the best interests of the child as a primary consideration;<sup>7</sup> and

<sup>1</sup> Buck, T., Gillespie, A., Ross, L. and Sargent, S., 2019. *International child law* (2<sup>nd</sup> ed), p 23.

<sup>2</sup> Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 30 September 2019 (**CRC Concluding Observations**).

<sup>3</sup> CRC Concluding Observations paras 29 and 30(a), (e), (f).

<sup>4</sup> CRC Concluding Observations paras 33 and 34.

<sup>5</sup> CRC Concluding Observations paras 47 and 48.

<sup>6</sup> CRC Concluding Observations paras 29(e), 33(b), 36(a), 43(a), (b) and 47(b).

<sup>7</sup> CRC Concluding Observations para 45(e).

- lack of support for children's rights to express their views about policies addressing climate change, and insufficient government action to address climate change.<sup>8</sup>

These failings reflect gaps in Australia's protection and promotion of human rights. The Committee's observations and recommendations, many of which repeat its previous calls for action as well as those of other UN human rights committees,<sup>9</sup> provide a reminder of how far we have to go in protecting children's rights in Australia. They also provide a roadmap of practical measures to address these deficiencies.

It is important to note that support for such measures has been reflected through several national reports over the last decade, recommending legislative reform to comply with Australia's international human rights law commitments and fundamental rights protected in common law. The landmark 2009 National Human Rights Consultation Report was the product of extensive consultation to seek the views of the Australian community on human rights in Australia. That Report recommended a wide range of measures for the Australian government, including the enactment of a Human Rights Act. Additionally, the 'Freedoms Inquiry' by the Australian Law Reform Commission, which took place during 2014 to 2016, highlighted the limitations on fundamental rights and freedoms in Australia under Commonwealth laws.<sup>10</sup> It found there are a wide range of laws that warrant further consideration or review, including legislation which impacts upon children.

In this submission, Save the Children will draw on the Committee's observations, recent reports on human rights reforms in Australia, our unique experience in working on children's rights issues, and the CRC, to describe the reforms that would most enhance protection and promotion of children's rights in Australia.

## A Federal Human Rights Act

Save the Children supports the enactment of a Federal Human Rights Act as the central instrument to fill the gaps in Australia's human rights protection. It would represent a clear commitment by the Federal Parliament to protecting human rights and be a strong statement of Australia's values and beliefs. It would have the potential to embed consideration of human rights at every stage of the policy-making, legislative and parliamentary process, as well as in administrative and judicial decision-making, while strengthening the remedies for breaches of rights. It would be able to comprehensively protect human rights in Australia and assist in protecting those most in need. For these reasons and others, there have been repeated calls over many years through the 2009 National Human Rights Consultation and by multiple UN human

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<sup>8</sup> CRC Concluding Observations paras 40 and 41.

<sup>9</sup> Recommendations in the Committee's 2019 concluding observations which also appeared in its previous concluding observations on Australia in 2012 include enacting comprehensive national child rights legislation fully incorporating the CRC, adopting a comprehensive national policy and strategy on children, and raising the minimum age of criminal responsibility to an internationally acceptable level: see Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 28 August 2012.

<sup>10</sup> Australian Law Reform Commission, *Traditional rights and freedoms – Encroachments by Commonwealth laws*, Final Report, ALRC Report 129, December 2015 [tabled 2 March 2016].

rights committees<sup>11</sup> and foreign governments<sup>12</sup> for Australia to enact a Human Rights Act. Save the Children supports these calls.

The need for a Federal Human Rights Act is compelling in relation to children's rights. Due to their age, vulnerability and lack of practical agency, children are particularly likely to have their rights sidelined, overlooked or violated. This extends to children's interests and views more broadly. A truly rights-based approach to matters affecting children would have the effect of ensuring that children's best interests are at the heart of all laws, policy and government activity affecting them by requiring genuine consideration of children's rights. It would also make explicit and transparent any limitations on children's rights, enabling these limitations to be publicly assessed and tested. Further, it would contribute to a culture of respect for children's rights, and to raising awareness of children's rights in practice and 'mainstreaming' those rights. While there are pieces of existing legislation that refer to children's best interests, a Federal Human Rights Act and an associated rights-based approach would provide substance, rigour, depth and consistency to these concepts in a way that does not currently exist.

Realising children's participatory rights can be particularly powerful. The CRC recognises specific rights for children, including a right to be heard and have due weight given to their views on matters affecting them.<sup>13</sup> Children are the only people who have such a right.<sup>14</sup> In practice, it is a challenging right to realise, especially when it has not been incorporated into domestic law.<sup>15</sup> A Human Rights Act could explicitly recognise this and other rights of children, thereby giving children and their rights the visibility to which they are entitled but which they rarely receive. This would have a compounding effect; where children have a real voice, decisions affecting them will be better-informed and more likely to be truly in their interests. Additionally, as highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse, such participation is also a protective factor against abuse.<sup>16</sup>

A rights-based approach also provides a sophisticated framework for assessing and balancing competing considerations in pursuing the best interests of a child and children. For example, a child's entitlement to exercise agency about their own life might conflict with their other rights to provision of welfare where the child is making choices about smoking or nutrition, or a child's right to family life and connection might conflict with the right to survival in cases where the child's family home environment is unsafe. These competing considerations and trade-offs have been extensively analysed to develop an international consensus about their application towards the goal of pursuing the child's best interest. A Human Rights Act can be drafted such that consideration can be had of foreign jurisprudence to assist in drawing upon best practice

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<sup>11</sup> In just the last two years, this has included: Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 25 July 2018, para 12(a); Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, 8 December 2017, para 6; *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia*, 8 August 2017, paras 32 and 107(f); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, 11 July 2017, para 6.

<sup>12</sup> During the second cycle United Nations Universal Periodic Review, several states recommended Australia enact a Federal Human Rights Act. This includes Indonesia, Iceland, Turkey and Canada. See United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Australia*, A/HRC/31/14, 13 January 2016.

<sup>13</sup> CRC art 12. See also arts 5, 9(2), 13, 14, 15, 16, 17, 21, 22, 23 and 29.

<sup>14</sup> Marshall, C., Byrne, B. and Lundy, L., 2015. 'Face to face: Children and young people's right to participate in public decision-making' in Gal, T. and Duramy, B. F. (eds), *International perspectives and empirical findings on child participation: From social exclusion to child-inclusive policies*, pp 357-380, at 357.

<sup>15</sup> See Parkes, A., 2013. *Children and international human rights law: The right of the child to be heard*, esp pp 57-70.

<sup>16</sup> Commonwealth Government, 2017. *Final report of the Royal Commission into Institutional Responses to Child Sexual Abuse*, vol 2, 'Nature and causes', pp 200-4 (factors that minimise the risk of a child being sexually abused), vol 6, 'Making institutions child safe', pp 157-64 (Child Safe Standard 2: children's participation and empowerment), and vol 13, 'Schools', pp 151-8 (children's disempowerment), 216-22 (child safe schools)

internationally.<sup>17</sup> We have provided two case studies of how this balancing can occur in practice below.

***R v McLaughlin*<sup>18</sup> (sentencing), ACT Supreme Court**

The matter concerned a young mother of two children who was found guilty for the offence of assault with intention to wound. She had been in a long-term violent relationship with her de facto partner. Shortly after their separation, the complainant seriously assaulted her at home and the following day she attempted to assault the complainant. During sentencing, Justice Refshauge considered her role as a single mother to her youngest child, and her ongoing contact with her other child. His Honour determined this to be a consideration based on section 11 of the *Human Rights Act 2004* (ACT) and section 33 of the *Crimes (Sentencing) Act 2005* (ACT), incorporating what would be in the best interests of the child. In considering the rights of the child, Justice Refshauge also noted a decision by the Constitutional Court of South Africa in *M v The State* [2007] ZACC 18, “namely that there is a right for the interests of the children to be taken into account even in cases of serious offences”. These considerations, among others, influenced the decision to impose a suspended sentence of six months imprisonment, subject to a two year good behaviour order.

***ZD (A Pseudonym) v Secretary to the Department of Health*,<sup>19</sup> Victorian Supreme Court**

The Department of Health and Human Services had instituted an application to vary an interim accommodation order for three young children to be vaccinated. The mother objected to this variation. The grounds of appeal were directed to whether the relevant power to impose conditions under the *Children, Youth and Families Act 2005* (Vic) enabled the Magistrate to impose the condition he did. Section 17 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was considered, notably section 17(1) which protects families as the fundamental group unit of society and section 17(2) which provides for the protection of the best interests of the child. Justice Osborn found that the Magistrate had the power to permit immunisations as in the best interests of the child. Furthermore, he noted that even if section 17(1) of the Charter grants parents rights to make decisions regarding children’s medical treatment, such a right does not permit parents to make decisions that are not in the best interests of the child under section 17(2).

As such, a rights-based approach is uniquely well placed to provide a principled and transparent basis for legislation, policy and administrative decisions affecting children. Properly applied, such an approach is fully consonant with evidence-based policy approaches to improving children’s outcomes, including focuses on preventive and early intervention approaches and place-based, community-focused initiatives to address disadvantage and need. These decisions would otherwise be more heavily shaped by political, institutional and other factors, including inertia, which are not transparent and do not have children at their centre. In other words, a rights-based approach can underpin, enhance and guide evidence-based policy reform and investment by government.

<sup>17</sup> For example, section 31(1) of the *Human Rights Act 2004* (ACT) provides that: ‘International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right’.

<sup>18</sup> SCC No 222 of 2008. See also ACT Human Rights Act Portal, ANU College of Law, ‘Case Summary: *R v McLaughlin* SCC NO 222 of 2008’, 7 August 2009, available from [https://acthra.anu.edu.au/cases/case\\_summary.php?id=119](https://acthra.anu.edu.au/cases/case_summary.php?id=119).

<sup>19</sup> [2017] VSC 806.



For the reasons above, a rights-based approach to children's interests and outcomes has significant potential to disrupt intergenerational cycles of disadvantage.<sup>20</sup> Comprehensive protection of children's rights is critical to address the complex and inter-related factors which too often set the course for a lifetime of marginalisation and poorer outcomes, and can guide difficult policy and funding decisions across the children's and families service system and more broadly. Government, civil society and community action to enhance human rights and make society more equitable will have the greatest impact when directed at children. Through early intervention and provision of the support needed for children to develop and flourish as active members of society, children will be able to fully enjoy their rights throughout their lives. A Federal Human Rights Act would provide the underpinnings for such an approach.

Yet there are significant gaps in child rights protection at a national level, as well as inconsistencies between States in laws and policies dealing with fundamental matters such as child protection arrangements.<sup>21</sup> These gaps lead directly to violations of children's rights such as those recently highlighted by the Committee.<sup>22</sup> Civil society organisations and service providers like Save the Children who work on a daily basis to protect children's rights across Australia regularly confront these difficulties and witness their detrimental effects for children, both individually and system-wide. The lack of a national, principled approach to promoting children's interests (in the broadest sense) is clear on the ground. Comprehensive national protection and the framework provided by an explicit rights-based approach, which could be provided by a Federal Human Rights Act, would make a large difference in improving children's outcomes.

Save the Children acknowledges that there is a range of views about the benefits of a Federal Human Rights Act in Australia. In this respect, we draw attention to the experience in Australia with the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Far from leading to unintended consequences, both Acts have expanded protection of human rights incrementally and moderately. Professors Rosalind Dixon and George Williams from the Gilbert + Tobin Centre of Public Law captured common themes in many submissions to the eight-year review of the Victorian Charter: 'First, the Charter has not given rise to the fears expressed at the time of its enactment. ... Second, the Charter can be criticised on the basis that its impact outside of government, such as in the courts, has been too modest.'<sup>23</sup> Moreover, the benefits of both Acts have been particularly felt by those most in need of their rights being protected, including children in particularly vulnerable situations. This includes protection of individuals,<sup>24</sup> protection through specific policy reviews,<sup>25</sup> and systemically.<sup>26</sup>

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<sup>20</sup> In Moira Rayner's words, '[t]he special quality of the human rights of children is that if they are not protected and promoted the damage can never be undone, and will be perpetuated for generations': Rayner, M., 1995. 'Children's rights in Australia' in Franklin, B. (ed), *The handbook of children's rights: Comparative policy and practice*, pp 188-200, at 198.

<sup>21</sup> The Committee recently highlighted this issue: CRC Concluding Observations paras 33 and 34.

<sup>22</sup> See footnotes 3 to 8 above.

<sup>23</sup> Dixon, R. and Williams, G., 'Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)', letter to Michael Brett Young, Independent Reviewer, 20 May 2015, available from <https://engage.vic.gov.au/human-rights-charter-review>.

<sup>24</sup> For example, *Re Beth* [2013] VSC 189, where the Victorian Supreme Court referenced the Charter in ordering that a 16 year old girl with intellectual disabilities who had been sexually abused be independently represented in future proceedings relating to protection orders applying to her.

<sup>25</sup> For example, the Victorian Equal Opportunity and Human Rights Commission's (VEOHRC) 2012 review of policy relating to the transfer of youth justice clients to adult prison: see VEOHRC, 'Submission to the eight-year review of the *Charter of Human Rights and Responsibilities Act 2006*', 2015, p 28, available from [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7806/Submission\\_90\\_Victorian\\_Equal\\_Opportunity\\_and\\_Human\\_Rights\\_Commission.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7806/Submission_90_Victorian_Equal_Opportunity_and_Human_Rights_Commission.pdf).

<sup>26</sup> Save the Children notes that human rights legislation has some of its greatest impact through its influence on the development of laws and policies and at the level of day-to-day service delivery and administrative action. We agree with the Human Rights Law Centre's observation that such legislation can have the its 'greatest practical impact at the

We also note that some will question the benefits of such an Act when Australia is, by at least some measures, already achieving better child outcomes than some other countries which already have partial constitutionally enshrined or legislative protection of human rights (such as the United States). We believe that there continue to be many egregious examples of children not enjoying their rights in Australia due to the significant deficiencies in our existing mechanisms for promoting children's interests. As explained above, a rights-based approach is likely to make a significant and systemic difference to children's outcomes in practice.

**Recommendation 1:** Australia should fully reflect its international human rights obligations and commitments in a comprehensive and enforceable Federal Human Rights Act.

## Protecting children's rights in Australia

As Nelson Mandela famously said, there is no keener revelation of a society's soul than the way in which it treats its children.<sup>27</sup> As a group, children are the most affected by a government's decisions to act, or its failure to act. They are also most affected by broader technological, economic and social forces and change. At the same time, because of how children are perceived and treated in society, they are among those least able to exercise and enjoy their rights. Given their stage of development, it is important for the rights and needs of children to be seen holistically, including rights associated with children's protection and rights associated with their autonomy and agency.<sup>28</sup> Taken together, it is clear that children have characteristics as a group which make them uniquely in need of human rights protection.

### Children's rights in a Federal Human Rights Act

It follows that children's rights must be prominent in a Federal Human Rights Act, and particularly any Human Rights Act that aspires to be forward-looking and enduring and to have legitimacy across all sections of society.

At a minimum, a Federal Human Rights Act should explicitly recognise and protect the following rights and principles, many of which already have some form of recognition in the existing Australian Capital Territory, Victorian and Queensland Human Rights Acts:

- the CRC's four general principles of non-discrimination, the child's best interests as a primary consideration, the right to life, survival and development, and the right to be heard and participate;<sup>29</sup>
- the principle that families and children are entitled to be protected and assisted;<sup>30</sup>

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interface between service delivery providers and decision makers and the ... community, particularly with respect to marginalised or disadvantaged individuals and groups': Human Rights Law Centre, 'More accessible, more effective and simpler to enforce: Strengthening Victoria's human rights charter', submission to the 2015 Review of the Victorian Charter of Human Rights, June 2015, para 14, available from [https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7809/Submission\\_95\\_Human\\_Rights\\_Law\\_Centre.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7514/8609/7809/Submission_95_Human_Rights_Law_Centre.pdf).

<sup>27</sup> Address by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Pretoria, 8 May 1995, available from [http://www.mandela.gov.za/mandela\\_speeches/1995/950508\\_nmcf.htm](http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm).

<sup>28</sup> Freeman, M., 2011. 'The value and values of children's rights' in Invernizzi, A. and Williams, J. (eds), *The human rights of children: From visions to implementation*, pp 21-36, at 31.

<sup>29</sup> CRC arts 2, 3, 6 and 12 (and other articles supporting the right to participate). This recognition should extend beyond the narrower provisions in the *Human Rights Act 2004* (ACT) s 11(2) (**ACT Act**), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2) (**Victorian Act**) and the *Human Rights Act 2019* (Qld) s 26(2) (**Queensland Act**), which are all limited to a right, without discrimination, to the protection needed by a child because of being a child (drafted in varying language in each Act).

<sup>30</sup> CRC preamble and various articles; *International Covenant on Civil and Political Rights* art 23(1). This principle is recognised in the ACT Act s 11(1), the Victorian Act s 17(1) and the Queensland Act s 26(1).



- the rights of children in the criminal process;<sup>31</sup>
- the right of the child to education;<sup>32</sup>
- the right of the child to the highest attainable standard of health and access to health services;<sup>33</sup>
- the right of the child to an adequate standard of living;<sup>34</sup> and
- the cultural rights of Aboriginal and Torres Strait Islander peoples, including children.<sup>35</sup>

In relation to protection of the family – which is, in the words of the CRC, ‘the fundamental group of society and the natural environment for the growth and well-being of its members and particularly children’ – we note that realising this right will often require active measures to preserve the family unit, and that the concept of ‘family’ is broad and flexible in line with contemporary understandings across Australian communities. In this sense, some guidance can also be drawn from General Comment 19 on article 23 of the International Covenant on Civil and Political Rights, which notes the diverse concepts of family within states parties.<sup>36</sup>

While there is no hierarchy of human rights, the rights and principles listed above represent the core requirements without which children’s rights in Australia cannot be fully enjoyed and realised. They reflect the unique characteristics of children, including the necessary balance between, on the one hand, children’s greater dependence and need for protection and support in attaining their rights and, on the other hand, their entitlement to participate and exercise agency in matters affecting them. They also reflect the basic conditions, supported by socio-economic rights, that must be present for children to attain their human rights in Australia in particular. Without them, a Federal Human Rights Act would risk providing for children’s rights in legal form but not in substance or in practice.

Some of those provisions are not already recognised in existing State and Territory Human Rights Acts. It would be useful for a Federal Human Rights Act to establish a broader national framework for children’s rights. Such a framework would also best reflect the interpretation of the CRC, as influenced by general comments from the Committee since the adoption of State and Territory Human Rights Acts, as well as relevant judgments of foreign and international courts and tribunals.

A Federal Human Rights Act should explicitly require courts to consider international law, including treaties, declarations, authoritative commentary and other material, when interpreting and applying the rights in the Act. This already operates in practice through State and Territory Human Rights Acts, as noted in the case of *R v McLaughlin* cited above. However, in these Human Rights Acts there is no requirement to do so. As such, the level of mainstreaming of awareness of rights discourse through the judiciary can vary. Requiring such consideration would help to more effectively protect the rights of those most at risk of marginalisation, even if not all relevant provisions and principles of international law relevant to their rights appear in the Act. For example, many children who are most at risk of having their rights abused have come to

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<sup>31</sup> CRC arts 37 and 40; ICCPR arts 10(2) and 14(4). The rights in the ICCPR, but not the broader set of rights in the CRC, are recognised in the ACT Act ss 20 and 22(3), the Victorian Act ss 23 and 25(3) and the Queensland Act ss 32(3) and 33.

<sup>32</sup> CRC arts 28 and 29; *International Covenant on Economic, Social and Cultural Rights* art 13. The right of the child to education is recognised in the ACT Act s 27A and the Queensland Act s 36.

<sup>33</sup> CRC art 24; ICESCR art 12. The right to health services is partially recognised in the Queensland Act s 37, but not specifically the right of the child.

<sup>34</sup> CRC art 27; ICESCR art 11.

<sup>35</sup> CRC art 30; *United Nations Declaration on the Rights of Indigenous Peoples* especially arts 25 and 31. Some cultural rights of Aboriginal and Torres Strait Islander people are recognised in the ACT Act s 27(2), the Victorian Act s 19 and the Queensland Act s 28, but with no specific reference to children.

<sup>36</sup> Human Rights Committee, *General Comment No 19: Article 23 (The family)*, Thirty-ninth session (1990).

Australia from overseas, such as children of recent migrants or who are themselves recent migrants, and those of refugee background. The additional context provided by international law and jurisprudence can be valuable in the understanding and realisation of children's rights in Australia.

Save the Children would be pleased to share with the Commission our thoughts about how children's rights could best be recognised and protected in a Federal Human Rights Act in more detail.

**Recommendation 2:** An Australian Federal Human Rights Act should explicitly recognise children's rights, including, at a minimum, core principles and rights from the Convention on the Rights of the Child.

**Recommendation 3:** An Australian Federal Human Rights Act should require courts to consider relevant international law, and the judgments of foreign and international courts and tribunals, when interpreting the rights recognised in the Act.

### **Comprehensive national laws, policy and strategy to protect children's rights**

The CRC is the most ratified human rights treaty and notable for not only its widespread uptake but also the unique speed of its ratification by states parties.<sup>37</sup> It is nearly thirty years since Australia ratified the CRC. UN human rights entities have repeatedly urged Australia to ensure the rights of children are protected in accordance with Australia's international obligations. Yet we still do not have an overarching framework incorporating children's rights into domestic law and policy.

The current patchwork of approaches is insufficient. Children's rights and needs demand a holistic and focused approach which will not be achieved through a mix of individual State-level and federal efforts across a range of portfolios, as is currently the case. Given the significant barriers that children continue to face in attaining their rights in Australia, and the associated inequities in their outcomes, a comprehensive national strategy on children should be developed, with associated policy settings and reforms. The Committee has been calling for such a strategy since 2012, stating in its recent concluding observations that:

*The Committee recalls its previous recommendations (CRC/C/AUS/CO/4, para. 16) and recommends that the State party adopt a national comprehensive policy and strategy on children that encompasses all areas of the Convention, with sufficient human, technical and financial resources for implementation.*<sup>38</sup>

The strategy should build on and incorporate existing national frameworks and processes, such as the successor to the National Framework for Protecting Australia's Children 2009-2020. It should be galvanised and guided by the CRC and the extensive material that exists to support state parties such as Australia to implement the Convention.<sup>39</sup>

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<sup>37</sup> Muscroft, S. (ed), 1999. *Children's rights: Reality or rhetoric? The UN Convention on the rights of the child: The first ten years*, Save the Children, pp 21-2; Goonesekere, S., 2007. 'Introduction and overview' in UNICEF, *Protecting the world's children: Impact of the Convention on the Rights of the Child in diverse legal systems*, pp 1-33, at 1.

<sup>38</sup> CRC Concluding Observations para 8.

<sup>39</sup> Notably, General Comments issued by the Committee on the Rights of the Child, dealing with matters such as (not exhaustively) the role of independent national human rights institutions (GC 2), general measures of implementation

The strategy's development should include consideration of withdrawing Australia's reservation regarding article 37(c) of the CRC, which has the effect that children in detention can currently be held in the same facilities as adults. While acknowledging that this is ultimately a decision for the Federal Government, it should be informed by the wide expertise that could be marshalled towards developing a holistic strategy on children, and reconsidered in light of that strategy.

The strategy should have, as one output, the development of comprehensive national child rights legislation incorporating the CRC into domestic law.<sup>40</sup> Among other things, this legislation should require courts to take international law into account when interpreting legislation that affects children. It should also address issues created by inconsistent State laws and policies on critical areas such as child protection, youth justice and family violence.

The strategy could be developed in parallel with the development of a Human Rights Act, or ahead of such an Act.

**Recommendation 4:** The Federal Government should work with States and Territories, in consultation with children and civil society, to develop a comprehensive national strategy and associated policy framework on children, and a national law to comprehensively incorporate the Convention on the Rights of the Child into Australian law. Such an approach should provide the framework for States and Territories to adopt similar strategies. The Federal Government should ensure that adequate human, technical and financial resources are provided for the implementation of this comprehensive strategy and plan of action.

### **Mechanisms to enable children to participate in matters affecting them**

The right of children to be heard and taken seriously on matters that affect them, and associated entitlements to participate, is of great importance. Its realisation would contribute significantly to the enjoyment of other rights. It is also a right that has proved difficult to implement and protect and is rarely taken seriously.<sup>41</sup> There is great scope to improve its realisation in Australia.

Save the Children's own theory of change, both globally and in Australia, is built on 'being the voice' for children. Together with the other core elements of our strategy – building partnerships, innovating, and achieving results at scale – this means that we are deeply committed to children's right to be heard and to participate on matters relevant to them. Through our direct service provision, we work with especially vulnerable and marginalised children. This has highlighted to us that the children who most need to be heard are the least able to achieve this, and that government must make particular efforts to engage with children who face difficulties in making themselves heard, including those in vulnerable situations.<sup>42</sup>

Our advocacy and service delivery experience has also reinforced the importance of the right to be heard in all settings and situations – in the family, in out of home care, in accessing basic services and rights such as health, education and social security, having experienced violence, in conflict with the law, in emergency situations, and in public decision-making, to name just a few.

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(GC 4), implementing child rights in early childhood (GC 7), Indigenous children (GC 11), the child's right to be heard (GC 12), public budgeting for the realisation of children's rights (GC 19) and children's rights in the child justice system (GC 24).

<sup>40</sup> CRC Concluding Observations paras 7(a) and 8.

<sup>41</sup> See generally Parkes, above n 15.

<sup>42</sup> Committee on the Rights of the Child, *General comment No 19 (2016) on public budgeting for the realization of children's rights (art 4)*, 20 July 2016, para 52.

We particularly highlight the importance of children being able to participate, individually and in groups, in public decision-making about matters that affect them. This includes at a community, local, State, national and international level, and can pertain to policy, legislation and other government action or inaction. The Committee has identified several priorities in this respect, including:

- ensuring that children's views are taken into account in developing policies and programs addressing climate change, the environment and disaster risk management;<sup>43</sup>
- ensuring that Aboriginal and Torres Strait Islander children and their communities are meaningfully involved in planning, implementation and evaluation of policies concerning them;<sup>44</sup> and
- establishing mechanisms and inclusive processes through which children can participate in all stages of the budget process, including formulation, implementation and evaluation.<sup>45</sup>

Save the Children also highlights the importance of ensuring that children participate in the development of any Federal Human Rights Act and national strategy (and associated policy and legislation) on children, in accordance with their rights under the CRC. The process for developing these instruments and mechanisms must give effect to the rights that they are themselves intended to protect.

Adequately resourced national human rights institutions can play a critical role in supporting children's participation. As the Committee has recently recommended:

- the National Children's Commissioner (NCC) should be adequately resourced;
- there should be mandatory consultation between the NCC and children on issues that affect them, with requirements that the results of those consultations and the NCC's recommendations are taken into consideration in law and policy making; and
- the Parliamentary Joint Committee on Human Rights should be adequately resourced to examine – in consultation with the NCC – the impact of all proposed legislation on children's rights.<sup>46</sup>

Lastly, we highlight technology's potential to support children's participation in decisions that affect them. The youngest members of society are amongst the most enthusiastic, sophisticated and creative users of technology. Government can play a powerful role in unlocking technology's potential to empower children to be visible, heard, and valued – individually and collectively. For example, simple decentralised online platforms and apps can reach children and enable them to mobilise in ways that more traditional 'consultation' measures cannot, including enabling children to self-organise and lead in identifying issues that matter to them and forming and expressing individual and joint positions on those issues. It is also important that government have a strong focus on ensuring that barriers in accessing technology do not reinforce existing inequity between groups of children by further excluding the voices of children who are already particularly vulnerable and marginalised.

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<sup>43</sup> CRC Concluding Observations para 41(a).

<sup>44</sup> CRC Concluding Observations para 46(a). For discussion of considerations that arise in relation to evaluation in particular, see Ronalds, P., 'Indigenous Evaluation Strategy', submission to Productivity Commission, 30 August 2019, available from <https://www.savethechildren.org.au/getmedia/63bdd7ac-b578-4b56-a377-914f8e6fc8a5/save-the-children-submission-productivity-commission-consultation-on-indigenous-evaluation-strategy.pdf.aspx>.

<sup>45</sup> CRC Concluding Observations para 10(c), also making the point that these mechanisms and inclusive processes should extend to civil society and the public as well as children.

<sup>46</sup> UNCRC Concluding Observations paras 7(b) and 12.

Save the Children notes that technology creates broader challenges as well as opportunities for the protection and promotion of children's rights. For example, new technology can create new risks to children's wellbeing, such as through exposure to online harm from cyber-bullying, sexual exploitation, encounters with hate speech, and breaches of privacy.<sup>47</sup> More broadly, technological shifts may precipitate rapid and unpredictable changes in economic and social conditions, such as more fluid and uncertain labour markets and increasingly entrenched social inequality, with significant implications for the realisation of the rights of many children. This is highlighted by a 2017 study by the Salvation Army surveying 1,380 of its clients across Australia who accessed emergency relief. 57 per cent of children surveyed did not have access to the internet and approximately one in three did not have access to a computer or a tablet at home.<sup>48</sup> There are risks that digital exclusion can lead to further marginalisation of disadvantaged children if affordability and access are not sufficiently addressed.

**Recommendation 5:** The Federal Government should explore mechanisms to ensure that children can participate, including exercising the right to be heard and taken seriously, on all matters that affect them, including in public decision-making and development of all relevant policy and legislation.

### Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander children continue to have worse outcomes, and face far greater barriers to enjoyment of their rights, than other Australian children. There is a need for a dedicated focus on their rights. At the recent SNAICC – National Voice for our Children national conference in September 2019, over 1200 delegates supported the call for a national commissioner for Aboriginal and Torres Strait Islander children and young people. Save the Children supports this call, and notes SNAICC and Family Matters' development of a proposed model for the commissioner's establishment, applying the United Nations Principles relating to the Status of National Human Rights Institutions (the Paris Principles).<sup>49</sup>

**Recommendation 6:** The Federal Government should establish a national commissioner for Aboriginal and Torres Strait Islander children and young people, as called for by SNAICC and the Family Matters campaign.

It is beyond this submission's scope to comment in detail on matters of Indigenous recognition, representation and reconciliation. However, Save the Children highlights that the UN Declaration on the Rights of Indigenous Peoples recognises that Indigenous peoples have the right to self-determination, and meaningful progress towards recognition, representation and reconciliation in Australia is required to give effect to this right. This has been raised by multiple UN human rights committees, which have called for recognition of Indigenous peoples in Australia's constitution and highlighted the importance of the Uluru Statement from the Heart.<sup>50</sup>

<sup>47</sup> Some of these issues were canvassed in the Australian Human Rights Commission's 2018 *Human rights and technology Issues Paper*.

<sup>48</sup> The Salvation Army, 2017. *The hard road: National economics and social impact survey 2017*, p 7.

<sup>49</sup> SNAICC and Family Matters, 2019. *Position paper: Establishment of a national commissioner for Aboriginal and Torres Strait Islander children and young people*, available from [https://www.familymatters.org.au/wp-content/uploads/2019/10/SNAICC\\_Family-Matters\\_Position-Paper\\_national-commissioner\\_FINAL.pdf](https://www.familymatters.org.au/wp-content/uploads/2019/10/SNAICC_Family-Matters_Position-Paper_national-commissioner_FINAL.pdf).

<sup>50</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, 8 December 2017, paras 19 and 20; *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia*, 8 August 2017, paras 22-6 and 107(a); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, 11 July 2017, paras 15 and 16.



Accordingly, Save the Children supports all efforts to advance these aims in genuine partnership with Aboriginal and Torres Strait Islander peoples and communities, highlights that they are human rights concerns of the utmost importance and urgency, reiterates our support for the Uluru Statement, which provides a pathway to constitutional recognition, and recalls the Statement's inspiring words: 'When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

**Recommendation 7:** Indigenous recognition, representation and reconciliation should be a high priority in all human rights reform processes in Australia.

### **Recognising economic, social, cultural and children's rights in practice**

To protect and enhance human rights in Australia, explicit protection through law such as in a Federal Human Rights Act and incorporation through other domestic legislation is critical. Yet just as important to the realisation of rights in Australia is recognising rights in practice.

Many of the worst infringements of human rights in Australia relate to economic, social and cultural rights – for children and others particularly in need of rights protection.<sup>51</sup> It is notable that, even though the Victorian Charter is largely limited to civil and political rights, its greatest relevance and impact has largely been in relation to economic and social rights.<sup>52</sup> This highlights the need for greater protection of those rights in Australia. As a party to the International Covenant on Economic, Social and Cultural Rights and to the CRC, Australia is legally obliged to take all available measures to realise the rights recognised in those treaties.<sup>53</sup> At the same time, all attempts to adopt rights-based approaches create significant challenges for policy-makers in an inevitably political and resource-constrained environment.<sup>54</sup>

Save the Children is uniquely placed to comment on this interface between human rights and their recognition in practice through policy and service delivery, as a rights-based organisation with extensive social policy and service delivery expertise in Australia and overseas. In our experience, social policies and the enjoyment of economic, social and cultural rights are inherently interconnected. There is increasing recognition that traditional 'welfarist' approaches to social policy relating to children, which treat children as vulnerable members of society needing protection and care, should be balanced with more contemporary understandings of children as active agents who are entitled to express themselves and make choices.

As noted earlier, a child rights approach can provide a coherent framework for balancing what may otherwise appear to be inconsistent objectives.<sup>55</sup> There is extensive guidance from the Committee and others about how to interpret the principle of the child's best interests and its interaction with rights such as the child's right to have due weight given to their views. More than this, mainstreaming the idea that children have rights can transform the relationship and power dynamics between children, adults and the state so that children both become seen as, and

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<sup>51</sup> For example, article 11 of the ICESCR recognises the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and requires states parties (including Australia) to take appropriate steps to ensure the realisation of the right. Other examples are the rights to enjoyment of the highest attainable standard of health and the right to education. In Australia, many children are denied the ability to enjoy these rights, including because of inadequacies in service provision and other government measures.

<sup>52</sup> Human Rights Law Centre, above n 26, para 88.

<sup>53</sup> ICESCR art 2(1); CRC art 4.

<sup>54</sup> Tobin, J., 2011. 'Understanding a human rights based approach to matters involving children: Conceptual foundations and strategic considerations' in Invernizzi and Williams, above n 28, pp 61-98, at 83.

<sup>55</sup> This contrasts to the more traditional view of 'welfarist' and 'rights-based' approaches to social policy being mutually exclusive: Buck et al, above n 1, p 16.



actually are, active agents able to pursue their individual rights and entitlements.<sup>56</sup> These considerations should be part of the development of the proposed national strategy on children and its associated policy and legislation.

**Recommendation 8:** The Federal Government should work with States and Territories and other partners, including civil society and non-government organisations, to adopt a child rights approach to policy and service delivery relating to children that recognises economic, social, cultural and children's rights in practice.

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<sup>56</sup> Tobin, above n 54, p 89.