



Save the Children

54 reasons

Children's rights and Australia's human rights framework

Submission to Parliamentary Joint Committee on Human Rights
inquiry into Australia's human rights framework

10 July 2023

We acknowledge the Traditional Custodians on whose land we live and work, honouring their continued connection to land, sea, skies and water.

We pay respects to Elders and Ancestors of Country and celebrate their role in passing down sacred cultural, spiritual and educational practices.

We also acknowledge the strength and commitment of First Nations practitioners who work alongside children and young people to support and guide leaders of the future.

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Save the Children and 54 reasons – our perspective on Australia's human rights framework

Save the Children is a leading global non-government organisation focused on children's rights which has been active in Australia for over 100 years. Our founder, Eglantyne Jebb, wrote the first ever international declaration of children's rights in 1923, a vision ultimately adopted in the United Nations Convention on the Rights of the Child (CRC).

54 reasons is Save the Children's Australian service delivery arm. We work directly with children, alongside them and their families and communities, to provide services and support to make their rights real in accordance with the 54 articles of the CRC.

Our perspective on Australia's human rights framework is grounded in our experience as Australia's leading child rights organisation.

- We work with children, their families and communities in every State and the Northern Territory to provide services spanning early childhood development, parenting and family support, domestic and family violence, youth justice, school engagement and wellbeing, child rights education, disaster response and recovery, and collective impact and place-based initiatives.
- We advocate for reform to protect, promote and fulfil children's rights in Australia. Our positions are strongly informed by our experience as a service provider, and based in our experience translating child rights principles into practical policy and system change within Australia.

Our focus is on realising children's rights across Australia, informed by an understanding of child development and in the context of children's families, communities and broader ecologies. This includes addressing, and responding to the impacts of, underlying structural and systemic factors such as poverty, intergenerational disadvantage and the continuing effects of colonisation, dispossession and institutional racism.

Summary of recommendations

Save the Children and 54 reasons recommends that the Australian Government:

1. Enact a federal Human Rights Act.
2. Comprehensively and explicitly protect the rights of children in a federal Human Rights Act, including provisions to:
 - a. Recognise the Australian Government's responsibility for upholding children's rights, including by addressing root causes and underlying conditions leading to those rights being violated
 - b. Include all rights set out in the United Nations Convention on the Rights of the Child (CRC) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
 - c. Fully uphold children's participatory rights in line with the CRC.
3. Implement the key human rights institutional reforms needed to uphold children's rights in Australia and meet Australia's obligations under the CRC:
 - a. Fully incorporate the CRC into Australian law and policy
 - b. Establish a National Children's Plan
 - c. Facilitate a national conversation on children's rights, including a national program of child rights education, which incorporates community based education, education in school settings, and training and education for the Commonwealth public sector
 - d. Create and support mechanisms for children's meaningful participation in decisions affecting them.
4. Accept Australia's international human rights obligations affecting children:
 - a. Ratify the 3rd Optional Protocol to the CRC
 - b. Withdraw Australia's reservation to Article 37(c) of the CRC.
5. Ensure Australia's human rights framework supports self-determination of Aboriginal and Torres Strait Islander peoples and aligns with decision-making of Aboriginal and Torres Strait Islander people and communities.
6. Establish a National Commissioner for Aboriginal and Torres Strait Islander Children.
7. Ensure that the Australian Human Rights Commission is provided with appropriate resourcing to fulfil its mandate. This should include a review of the funding provided to the National Children's Commissioner, consistent with recommendations from Senate Standing Committee on Legal and Constitutional Affairs.
8. Ensure children meaningfully participate in developing Australia's human rights framework.

In addition, Save the Children and 54 reasons:

- Support SNAICC's submission to this Inquiry
- Endorse the Australian Child Rights Taskforce's submission to this Inquiry, as a member of the Taskforce's Policy Working Group.
- Endorse the Charter of Rights campaign submission to this Inquiry, as a member of the campaign coalition.

We encourage the Committee to adopt the recommendations in those submissions and to engage with SNAICC and the Taskforce as its Inquiry progresses.

We would welcome the opportunity to speak to any of the matters in this submission at a Committee hearing.



Children's rights in Australia

Children's rights are enshrined in the CRC, which establishes an inspiring vision for children, childhood and child development, and global minimum standards for achieving this vision for all children aged up to 18.

The CRC is the most widely ratified of all human rights treaties and one of the seven core human rights treaties to which Australia is party, having ratified it in 1990.

Childhood is a unique period in life which is rightly given particular focus through the CRC. Children's rights are special, like children themselves.

- It is particularly important that children are recognised as active agents, and as inherently valuable, in their own right. Children should be seen as rights-holders who are capable and entitled to actively shape their own lives rather than as passive objects of adult action and care or merely 'adults in waiting'. Their dignity, agency and worth should be promoted and upheld, along with their right to develop, thrive and flourish to their fullest potential.
- It is crucial to provide particular support for children – as a distinct group of people within society – to access their rights, taking into account the barriers and challenges created by their developmental stage, individual circumstances, and vulnerability to adult assumptions and exercise of power. Without specific recognition – in the CRC, and in domestic law and policy – children are particularly likely to have their rights breached and ignored.
- It is critical that the rights of children to participate and be heard are central to the development of policy and laws, as well as their evaluation. Participation should be the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.¹

Children are also entitled to all other human rights as recognised in other treaties, declarations and instruments. UNDRIP is particularly significant in this respect.

The CRC requires the Australian Government to focus on children in their own right and put children at the centre of all policy-making and other decisions that affect children, so that children's best interests are a primary consideration in all decisions affecting them and all children can access their rights without discrimination.

The CRC recognises that children's capacities evolve as they develop. It provides guidance, and requirements, about how this should be supported and recognised, including when hearing children's views and preferences about their own lives.

The CRC emphasises that children's lives are fundamentally shaped by their families, communities, cultures and other environments and that these should be supported as a source of strength for children's development and access to their rights.

¹ Committee on the Rights of the Child, General Comment No. 12 (2009), *The right of the child to be heard*, CRC/C/GC/12, 20 July 2009.

Substantial commentary is available describing how child rights principles and standards can be meaningfully and practically applied through policy, services, systems and institutions in Australia, both federally and at a state and territory level.²

CHILDREN'S RIGHTS AND AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Establishing a federal Human Rights Act was a central recommendation of the 2009 National Human Rights Consultation Report (the NHRC Report). However, the Australian Government rejected the recommendation.³ Other measures introduced as part of the Human Rights Framework in 2010 as a response to NHRC Report, included the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR), human rights education, and human rights training for the public sector. These reforms, whilst important, have not had a transformational impact on children's rights.

Under the PJCHR – the most prominent of the new measures introduced under the Framework – the role of assessing federal laws against human rights standards and protecting against infringements was vested in the Parliament.⁴ While it has performed, and continues to perform, a valuable function in its rigorous human rights analysis and enhancing human rights dialogue in Parliament,⁵ there remains limited evidence that it has helped prevent the most serious intrusions upon rights,⁶ including

² See, eg, Save the Children and Child Wise, 2021, *Children's rights, wellbeing and protection: A new paradigm – Implementing the successor plan to the National Framework for Protecting Australia's Children*; Save the Children, 2021, *Take them seriously: Children's experiences of domestic and family violence – Developing the next National Plan to Reduce Violence against Women and their Children*; Save the Children and 54 reasons, 2023, *Getting to the root of it: How a child rights approach can end child poverty in Australia*; Save the Children and 54 reasons, 2023, *Putting children first: A rights respecting approach to youth justice in Australia*; Australian Child Rights Taskforce, Save the Children and 54 reasons and UNICEF Australia, 2023, *A Blueprint for a National Children's Plan* (forthcoming).

³ The then Attorney-General, Robert McClelland, said in a foreword to the Australian Human Rights Framework that: *"While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community."* However, there was little more provided in the way of public explanation as to why a Human Rights Act was not progressed, including outlining how such an Act would "divide" communities.

⁴ That includes the Convention on the Rights of the Child as outlined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

⁵ Rice, Simon, *Allowing for Dissent: Opening up Human Rights Dialogue in the Australian Parliament* (August 31, 2020). Julie Debeljak, Laura Grenfell (eds) *Law Making and Human Rights* Thomson Reuters 2020. Available at SSRN: <https://ssrn.com/abstract=3981870>. Sarah Moulds, 'From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law-making' (2020) 31 *Public Law Review* 264. See also related contained in Sarah Moulds, 'Scrutinising COVID-19 laws: An early glimpse into the scrutiny work of federal parliamentary committees', (2020) 45(3) *Alternative Law Journal* 180, Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?', Ch 2 in Julie Debeljak and Laura Grenfell (eds) *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions*, 2020, Thomson Reuters, and Lisa Burton Crawford, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth): A Failed Human Rights Experiment?', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 143-162

⁶ Reynolds, Daniel; Hall, Winsome; Williams, George, *Australia's Human Rights Scrutiny Regime*, [2020] *Monash University Law Review* 8; (2020) 46(1) *Monash University Law Review* 256.



child rights. This is in part due to the PJCHR's inherent constraints – notably its reliance on political good will, usually from ministers, when scrutinising bills and legislative instruments.

However, even beyond the failure to establish a Human Rights Act, the Human Rights Framework was a limited response to the NHRC Report. It is important to reflect on these and other missed opportunities more than a decade later. The Human Rights Framework did not respond to and rejected a recommendation from the NHRC Report to compile a definitive list of Australia's international human rights obligations and that it conduct an "audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations". It did not respond to and rejected the NHRC Report's recommendation that the government should develop "a whole-of-government Framework" to ensure that human rights better integrated into policy and legislative decision making. Additionally, it did not respond to and rejected a recommendation to amend the *Acts Interpretation Act 1901* (Cth) to ensure that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with Australia's human rights obligations. All of these measures taken together could have made a greater difference to the protection and promotion of children's rights, alongside a Human Rights Act.

As such, more than a decade on since the NHRC Report was handed down and the Human Rights Framework was released, violations of children's rights are widespread, acute and long-standing across Australia. These have consistently been highlighted by the United Nations, Australia's peer countries, extensive research and data generated by Australian governments and civil society, as well as children themselves. Taken as a whole, it is difficult to argue that there has been meaningful progress across key domains of children's rights since 2009. For example:

- Over 1 in 6 children in Australia lives in poverty, and children live in poverty at higher rates than adults⁷
- 1 in 5 children in Australia reaches school developmentally vulnerable⁸
- Children are receiving statutory child protection services, and being removed from their families, at very high rates, with Aboriginal and Torres Strait Islander children over 10 times more likely to be in out-of-home care than other children⁹
- Children as young as 10 are in contact with the criminal justice system and detained at high rates, with Aboriginal and Torres Strait Islander children about 19 times as likely to be under supervision as other children¹⁰

⁷ Davidson, P, Bradbury, B and Wong, M, 2022, *Poverty in Australia 2022: A snapshot*, Australian Council of Social Service and UNSW Sydney.

⁸ Australian Early Development Census, *2021 National Report*.

⁹ Family Matters and SNAICC – National Voice for Our Children, *The Family Matters Report 2022*.

¹⁰ Australian Institute of Health and Welfare, *Youth justice in Australia 2021-22*, 31 March 2023.

- There is a high crossover between children receiving child protection services and those in contact with youth justice, with Aboriginal and Torres Strait Islander children significantly over-represented in this cohort¹¹
- Children's experiences of domestic and family violence are largely invisible in policy-making and services¹²
- The impact of climate change as a child rights crisis in Australia is disproportionately felt by children, who are particularly vulnerable to escalating climate-driven natural hazards and disasters.¹³

Improving these outcomes, and others relating to children's rights, is at the core of our purpose as a society. These are also core domains of children's rights that have evidently not been adequately protected, in many cases despite significant government effort and investment through specific national plans, frameworks, strategies and supporting action plans.

The experience of COVID-19 has brought these concerns into stark focus. While the pandemic is an extraordinary event, and its negative impacts on children and their rights have been similarly extraordinary, ultimately it is best understood as having primarily exacerbated and compounded existing challenges and adversities rather than creating completely new ones.

COVID-19's impacts on children have been severe and will be far-reaching, given that children have been largely overlooked in government responses to the pandemic and measures to support recovery from its effects. To provide just a few examples:

- There is clear evidence that the pandemic has driven thousands of families – and children – into **poverty**, and deepened the poverty experienced by many others.¹⁴ Poverty is the underlying cause of untold harm to children. It affects every aspect of a child's life and is probably the single greatest root cause of breaches of children's rights in Australia.¹⁵ Yet the impact of the pandemic in driving child poverty has been largely overlooked or considered primarily through the lens of 'families', rather than focusing on children themselves.

¹¹ AIHW, *Young people under youth justice supervision and their interaction with the child protection system 2020–21*, 2 December 2022.

¹² Save the Children, *Take them seriously*, above n 2.

¹³ Save the Children, 2020, *Children's experiences and needs in the 2019-20 bushfires*; Australian Institute for Disaster Resilience, World Vision, Oaktree, UNICEF Australia, Plan International, Save the Children and Australian Red Cross, 2020, *Our world our say: National survey of children and young people on climate change and disaster risk*; Save the Children, 2021, *Born into the climate crisis*.

¹⁴ B Phillips, M Gray and N Biddle, 2020, *COVID-19 JobKeeper and JobSeeker impacts on poverty and housing stress*, ANU Centre for Social Research and Methods; B Phillips and V Narayanan, 2021, *Financial stress and social security settings in Australia*, ANU Centre for Social Research and Methods; P Davidson, 2022, *A tale of two pandemics: COVID, inequality and poverty in 2020 and 2021*, ACOSS/UNSW Sydney Poverty and Inequality Partnership, Build Back Fairer Series, Report No 3; Save the Children, 2022, *The true cost of COVID-19: A generation left behind – A recovery plan for Australian children and families*; S Bessell and C Vuckovic, 2022, 'How child inclusive were Australia's responses to COVID-19?', *Australian Journal of Social Issues*, DOI: 10.1002/ajs4.232; Davidson, Bradbury and Wong, above n 7.

¹⁵ Save the Children and 54 reasons, *Getting to the root of it*, above n 2.



- COVID-19 has created a genuine crisis for children's **wellbeing**. Children's routines have been broken, their sources of security and stability dislodged, and their social connections and emotional wellbeing disrupted. Stress, uncertainty and anxiety have become the norm. A national focus on supporting children's wellbeing, recovery and resilience is needed, yet there is no concerted national strategy or approach in this direction.
- One of the pandemic's most visible and harmful impacts has been the enforced school closures and other interruptions to **education**, and the resultant disengagement from education and learning loss experienced by children. This has included academic, social and emotional learning. The toll that this will take for a generation of children is difficult to fathom, although early indications are emerging of its severity and long-term – potentially lifelong – nature. Yet when governments were making critical decisions about these matters, their focus was almost exclusively on considerations for adults such as infection and transmission between adults and economic impacts relating to adult workforce participation and productivity, rather than the implications for those who were most directly affected – children themselves. Similarly, there continues to be a significant underinvestment in support for children to re-engage with education and catch up on what they have lost.
- It is striking that children's **voices** have been very little heard throughout the three and a half years of the pandemic, despite children being in many respects the most vulnerable to, and most affected by, its impacts. Children have largely not been prioritised during the pandemic, and they know it. The absence of their voices from the public discussion has directly contributed to sub-optimal social and other outcomes that have resulted for children and more broadly through the pandemic.

A stronger human rights framework, including a federal Human Rights Act, would likely have created better conditions for rights to be protected and outcomes to be improved across all of the domains and contexts described above, by embedding a focus on children's rights – and requirements to act to uphold those rights – across the activities of government, as well as enabling stronger oversight and the ability to take action where rights are violated.¹⁶ Among other things, such a framework and Act would have focused attention on children themselves and made them visible when policy and other crucial government decisions were being made, rather than – as actually occurred – children being largely invisible and disregarded.

In relation to COVID-19 in particular, the existence of a stronger framework and legislated protections and requirements to take into account children's rights would

¹⁶ For examples on how human rights acts in states and territories have had a positive impact on the protection and promotion of human rights, including children's rights, see n5. As well as more generally on the effectiveness of domestic human rights legislation; Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, State of Victoria, 2015. Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade on*, 2017, Federation Press. Simon Rice, 'Culture, What Culture? Why We Don't Know if the ACT Human Rights Act is Working', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 185-205.

have enabled a much better informed, more comprehensive and more effective policy response than has actually been delivered. In extraordinary circumstances characterised by significant uncertainty and rapid developments in the external environment such as the global pandemic, the existence of strong, principled institutions grounded in a coherent framework organised around fundamental rights can be of particular importance and value in not just safeguarding rights but also assuring good decision-making processes and better policy and social outcomes.

In summary, Australia's Human Rights Framework introduced in 2010 and the National Human Rights Action Plan introduced in 2012 was inadequate, as evidenced by the history and current state of children's rights in Australia. Nor was there ever a review or evaluation of its effectiveness, a consequence in part of the change in leadership in the Australian Government in 2013, which viewed them as being a policy priority of the previous Australian Government. There is great opportunity and need to better protect children's rights in Australia, avoid yet another missed opportunity, and thereby to realise the enormous individual and social gains that would follow.

In this submission, we summarise the key actions needed for the Australian Government to discharge its responsibilities for upholding children's rights by establishing a strong and fit for purpose Australian human rights framework.

A federal Human Rights Act

A legislated federal Human Rights Act would fundamentally improve the realisation of children's rights in Australia.

As we noted in our submission to the Australian Human Rights Commission's 'Free and Equal' consultation in 2019,¹⁷ the enactment of a federal Human Rights Act would represent a clear commitment by the Federal Parliament to protecting human rights whilst also serving as 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. In doing so, it would help prevent human rights violations from occurring.

It would help to protect fundamental human rights in Australia and assist in protecting those most in need. Among other things, it would enable individuals to take action when their rights are violated.

In doing so, a federal Human Rights Act would address the glaring omission that, unlike other comparable countries, Australia lacks a legislated Charter or law setting out the basic rights and freedoms that should be protected for everyone in Australia.

¹⁷ Save the Children, 'Free and Equal': An Australian conversation on human rights, 2019. Available at: [https://www.savethechildren.org.au/getmedia/6d6bab16-f219-47b5-b0b6-68ffc88057d4/save-the-children-submission-protecting-human-rights-in-australia-final-\(1\).pdf.aspx](https://www.savethechildren.org.au/getmedia/6d6bab16-f219-47b5-b0b6-68ffc88057d4/save-the-children-submission-protecting-human-rights-in-australia-final-(1).pdf.aspx).



At present, children in Australia are required to rely on a patchwork array of laws, which only partially protects their rights, at a state, territory and federal level. The legal protection of child rights in Australia is not comprehensive and does not provide an effective remedy for violations. Over the last three decades, there have been very limited attempts to ensure that children's rights are enforceable under Australian law, creating substantial implementation gaps for rights contained under the CRC.

There have been repeated calls over many years, including through the 2009 National Human Rights Consultation and by multiple UN human rights committees, civil society organisations and foreign governments for Australia to enact a Federal Human Rights Act.¹⁸ There has also been extensive research and reporting highlighting how human rights acts could be enacted, including a Federal Human Rights Act.¹⁹

The development of a federal Human Rights Act would be able to draw on the experiences of the Victorian, ACT and Queensland Human Rights Charters and Acts that are currently operating effectively, as well as on the Australian Human Rights Commission's (AHRC) proposed model for a federal Human Rights Act.²⁰ Each of these state and territory human rights acts reflects, to some degree, certain child rights contained in the CRC, such as the right to education²¹ or certain rights when children are deprived of their liberty.²²

While not the focus of this Inquiry, we also note the importance of each state and territory enacting comprehensive human rights legislation in its own jurisdiction.

¹⁸ For recent examples, see Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, 11 July 2017, [6]; *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia*, 8 August 2017, [32] and [107](f); Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia*, 8 December 2017, [6]; Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia*, 25 July 2018, [12](a); Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 24 March 2021, [146.49].

¹⁹ See for example: National Human Rights Consultation, *Report on Consultation into Human Rights in Australia*, Commonwealth of Australia, September 2009. Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland Report No. 30*, 55th Queensland Parliament, June 2016. Julie Debeljak, 'The Fragile Foundations of the Human Rights Landscape: Why Australia needs a Human Rights Instrument', in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia: Volume 1*, 2021, Thomson Reuters, 39-78. Scott Stephenson, 'Designing an Australian Bill of Rights: The Normative Trade-offs', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia*, 2019, Hart Publishing, 411-430. Various, 'Special Edition: A Bill of Rights for Australia?' (2003) 9(1) *Australian Journal of Human Rights*.

²⁰ Australian Human Rights Commission, 2022, *Position paper: A Human Rights Act for Australia*.

²¹ Section 27A, *Human Rights Act 2004*(ACT) and section 36, *Human Rights Act 2019*(Qld).

²² Section 20, *Human Rights Act 2004*(ACT), section 23, *Charter of Rights and Responsibilities Act 2006* (Vic) and section 33, *Human Rights Act 2019*(Qld).



RECOMMENDATION 1

The Australian Government should enact a federal Human Rights Act.

Children's rights in a federal Human Rights Act

As noted earlier, children's rights are part of the core set of human rights obligations to which Australia has agreed, and the CRC is a core human rights treaty. At the same time, children's rights are in many respects distinctive, and require specific focus in a federal Human Rights Act for such an Act to achieve its objectives.

Elements needed for a federal Human Rights Act to comprehensively protect children's rights are summarised below.

RECOGNISE THE AUSTRALIAN GOVERNMENT'S RESPONSIBILITY

A federal Human Rights Act should explicitly recognise the Australian Government's responsibility for upholding children's rights. This should include recognising that the responsibility extends to addressing the root causes and underlying conditions leading to children's rights being violated. Among others, this includes a responsibility to take measures to address:

- poverty and its impacts on the realisation of children's rights
- the historical and continuing impacts of colonisation, dispossession and violence committed against Aboriginal and Torres Strait Islander peoples
- entrenched socio-economic disadvantage of all kinds and its intergenerational transmission and impacts
- the impacts of climate change
- the implications of digital and online environments and technologies for children's rights.

It also includes a responsibility to act to ensure children's rights are upheld nationally, including through using all available levers to ensure this, even in domains beyond the traditional sphere of action of the Australian Government vis-à-vis the state and territory governments.

We recognise that, in some cases, these matters may not be able to be readily expressed as specific rights that are, in themselves, amenable to specific direct remedies of the type available for other rights. Nonetheless, they are essential preconditions for children's rights to be respected, protected and fulfilled in Australia, and the international human rights framework to which Australia is committed makes it very clear that the Australian Government is responsible for addressing them. This should be explicit in a federal Human Rights Act.

INCLUDE ALL RIGHTS IN THE CRC AND UNDRIP

A federal Human Rights Act should include all rights set out in the CRC and UNDRIP.

We recognise there are challenges associated with including the full expression of these rights in a federal Human Rights Act, including challenges associated with constitutional requirements relating to the exercise of judicial power.

Nonetheless, it is important that a federal Human Rights Act be as comprehensive as practicable in protecting human rights. This has a particular significance for children's rights, given the nature of those rights and the rationale for specifically protecting the rights of children.

There are examples to draw upon from the Australian states and territories which have sought to incorporate some of the rights of CRC and UNDRIP into their human rights acts. For example, while incomplete, the recognition of cultural rights under UNDRIP has been included in the ACT, Victorian and Queensland human rights acts.²³ Other examples include:

- the right to non-discrimination
- the right to protection accorded to a child
- the right to education
- certain rights when children come into contact with the criminal justice system, including detained children being segregated from adults.

There are other examples in state and territory legislation where child rights principles have been incorporated to a limited extent, for example in youth justice laws and the best interests of the child.²⁴ However, recognition of children's rights remains piecemeal across all state, territory and federal legislation.

Accordingly, a federal Human Rights Act should make every effort to explicitly include all rights set out in the CRC and UNDRIP, beyond those already included in state and territory human rights acts, even if, for constitutional or other legal reasons, it is not possible for each of those specific rights to be associated with specific direct remedies.

ENSURE CHILDREN'S PARTICIPATORY RIGHTS ARE FULLY UPHELD

A federal Human Rights Act should include a strong focus on fully upholding children's participatory rights.

Participatory rights are of particular significance for children, as recognised in Article 12 and other relevant articles of the CRC. Indeed, as the Committee on the Rights of the Child has stated, Article 12 is '*a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights*'.²⁵

²³ Section 27, *Human Rights Act 2004* (ACT), section 19, *Charter of Rights and Responsibilities Act 2006* (Vic) and section 28, *Human Rights Act 2019* (Qld).

²⁴ For example, *Children Youth and Families Act 2005* (Victoria).

²⁵ Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, 20 July 2009, [1].

This unique significance means there should be particular attention to ensuring that children's participatory rights are fully upheld through a federal Human Rights Act. This can best be achieved by ensuring that the Act's treatment of children's participatory rights fully complies with the requirements of the CRC, including as explained by the Committee on the Rights of the Child in its General Comment No. 12, and with best practice for children's participation as established in comprehensive guidance provided by expert child rights and children's organisations, including Save the Children and others.

This includes children's participation in all decisions affecting them, both individually and as a group, including in policy-making and other decisions of government at a systemic level. It also includes scrutiny and oversight mechanisms, which themselves should facilitate and include children's participation.

For children's participation to be meaningful in this sense, it must be supported by legal requirements, as well as mechanisms (in the broad sense) that are sensitive and accessible to children of different ages, circumstances and lived experiences. This includes being trauma-informed, culturally sensitive and appropriate, and holistically safe. In turn this requires significant investment to ensure appropriate expertise is available for these purposes, at every relevant stage of decision-making.

In principle, a 'participation duty' on public authorities in a federal Human Rights Act, along with appropriate guidelines and other supporting material, as proposed by the AHRC in its position paper could contribute to these requirements being met, supported by other provisions and mechanisms.

RECOMMENDATION 2

The Australian Government should comprehensively protect the rights of children in a federal Human Rights Act, including provisions to:

- a. Recognise the Australian Government's responsibility for upholding children's rights, including by addressing root causes and underlying conditions leading to those rights being violated
- b. Include all rights set out in the CRC and UNDRIP
- c. Fully uphold children's participatory rights in line with the CRC.

Institutional measures to uphold children's rights

To fully uphold children's rights in Australia, other institutional measures are necessary to enable Australia's human rights framework to operate effectively. In this section, we summarise the most important of these measures.

INCORPORATE THE CRC INTO AUSTRALIAN LAW AND POLICY

Australia lacks a legislative framework to uphold children's rights as a whole. This absence manifests in the ongoing significant violations of children's rights seen across

Australia, and in the lack of direction and accountability by governments to address these violations.

To remedy this, Australian governments should commit to fully incorporating the CRC into Australian law and policy, led by the Australian Government. This should be informed by successful experiences of other countries and should reflect a recognition that incorporation of the CRC provides unique opportunities given:

- the nature of children's rights and their innate and close connection to the overall purposes and goals of society and government action relating to supporting children's development, wellbeing and flourishing, and promoting social opportunity and equity; and
- the particular value of establishing a comprehensive legislative and policy foundation for government action relating to children as a cohort within society, given the particular importance of holistic and integrated approaches to meeting their needs as well as the high social and economic returns on investment arising from doing so.

As a first step, governments should establish a clear process and timeframe for working towards CRC incorporation. Work to incorporate the CRC into Australian law and policy at all levels could occur in parallel with the development of a federal Human Rights Act, but does not necessarily depend on the approach or timing of such an Act.

ESTABLISH A NATIONAL CHILDREN'S PLAN

To uphold children's rights, children and young people themselves must be at the centre of all decision-making affecting them. A coordinated approach and plan for children that bridges across departmental portfolios, service systems and jurisdictions is needed to achieve this, led by the Australian Government.

A National Children's Plan is needed to establish a clear vision for children – aged up to 18 – in Australia and a practical roadmap to achieve it. This Plan would establish a long-term and comprehensive framework for how governments organise all policies, services, investments and decisions that affect children. It would unify across existing arrangements, with a child-centred focus, and strongly focus on addressing underlying causes and drivers of risk and harm to children. Each state and territory should also develop a coordinated children's plan in its own jurisdiction.

The implementation of a National Children's Plan, and analogous state and territory plans, could also begin and outline a clear pathway to comprehensive incorporation of the CRC in Australia.

FACILITATE A NATIONAL CONVERSATION ON CHILDREN'S RIGHTS

Children's rights will only be properly upheld where they are understood and respected by everyone. This includes adults and children. When correctly understood, respect for children's rights is a foundational value for Australian society and its application is a significant source of social and individual good.

The Australian Government should institute and support a national conversation on children's rights. This could relate to, and provide a particular focus within, a broader conversation about human rights and their value and meaning. It would include establishing and resourcing an extensive program of child rights education that is calibrated to reach children of all ages in meaningful ways and accessible settings (such as schools) as well as adults, including – without being limited to – those who work directly with children, and particular children who face the greatest barriers to accessing their rights. It should include funding for civil society organisations for the development and delivery of community education and engagement programs to promote a greater understanding of children's rights. Additionally, it should involve education and training for the Commonwealth public sector, including guidance to support policy development and the implementation of government programs.

There are positive examples to draw upon from previous educational and rights focused campaigns. That includes the suite of education initiatives under the previous Human Rights Framework,²⁶ as well as more recent examples, such as the Racism it Stops With Me campaign, which was originally launched in 2012 and relaunched in 2022.

ENABLE CHILDREN'S PARTICIPATION IN DECISIONS ABOUT THEM

As noted above, children's participation in decisions affecting them, at both an individual and collective or systemic level, is a fundamental right of children. The right to participate is particularly significant for children given the particular challenges they face in exercising their basic right to shape their own lives.

Australia's existing institutional arrangements to support children's participation are very limited and require significant reform and expansion. However, there are some existing arrangements that could provide a starting point, including the Australian Government's current Youth Engagement Model.

The Australian Government should lead and support the establishment of institutions, mechanisms and measures to ensure that all children can participate meaningfully – including being heard and taken seriously – in decisions that affect their lives. This should include children of all ages up to 18 and have a particular focus on those facing greater challenges in accessing their rights.

²⁶ See page 3, Commonwealth Government, *Australia's Human Rights Framework*, 2010.

RECOMMENDATION 3

The Australian Government should implement the key human rights institutional reforms needed to uphold children's rights in Australia and meet Australia's obligations under the CRC:

- a. Fully incorporate the CRC into Australian law and policy
- b. Establish a National Children's Plan
- c. Facilitate a national conversation on children's rights, including a national program of child rights education, which incorporates community based education, education in school settings, and training and education for the Commonwealth public sector
- d. Create and support mechanisms for children's meaningful participation in decisions affecting them.

Accepting Australia's child rights obligations

Australia has agreed to be bound by many of the human rights treaties, instruments and provisions that collectively set out the international consensus on global minimum standards for human rights. The CRC, like other human rights treaties, places obligations on all governments within our federal system.

However, there remain concerning gaps where Australia has, to date, declined to accept international norms relating to children's rights. That includes gaps which the Australian Government has a distinct role to play in filling.

First, the Australian Government should withdraw its reservation to **Article 37(c) of the CRC**. Article 37(c) prohibits the detention of children in the same settings as adults, unless it is in the child's best interests.

Australia has historically refused to be bound by this obligation, and continues to detain children in adult facilities and with adults in violation of the standard that the article requires. Australia has previously argued that the country's geography and demography make it difficult to always detain children in juvenile facilities while also allowing them to maintain contact with their families.²⁷ The UN and Australia's peers have repeatedly criticised Australia for its reservation.²⁸ The Committee on the Rights of the Child has highlighted that Australia's reservation is "unnecessary" because the supposed basis for the reservation is "well taken care of" by Article 37(c) itself, which specifically provides that the prohibition only applies where it is in the child's best interests and that children have the right to maintain contact with their

²⁷ United Nations, *Second and third periodic reports of States parties due in 1998 and 2003: Australia*, 29 December 2004, CRC/C/129/Add.4, [466]-[467].

²⁸ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, [6]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 24 March 2021, [146.39], [146.142].

family.²⁹ Even as far back as 1998, several years after ratifying the CRC, the Joint Standing Committee on Treaties recommended that the reservation should be removed.³⁰

Second, the Australian Government should ratify the **Third Optional Protocol to the CRC**. The Third Optional Protocol enables individual children to raise concerns about their rights directly with the UN.

Australia has not ratified this Protocol, despite being repeatedly urged to do so by the UN and by Australia's peers.³¹ This reflects poorly on Australia's commitment to children's rights and to international human rights norms and UN engagement, and denies children in Australia access to this ultimate forum for upholding their rights.

RECOMMENDATION 4

The Australian Government should accept Australia's international human rights obligations affecting children:

- a. Ratify the Third Optional Protocol to the CRC
- b. Withdraw Australia's reservation to Article 37(c) of the CRC.

Self-determination of Aboriginal and Torres Strait Islander peoples

Indigenous peoples have a fundamental right to self-determination. This is recognised in UNDRIP and in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which bind Australia.

UNDRIP also emphasises the right to be free of discrimination of all kinds and the right to culture, along with its affirmation of other specific rights to which all Indigenous peoples are entitled, including in Australia.

There is a crucial intersection between children's rights and other rights of Aboriginal and Torres Strait Islander peoples. UNDRIP contextualises children's right to culture and the importance of this right to the realisation of other rights of children. It also provides a framework for enabling genuine self-determination as a fundamental right and a principle that can secure access to other rights.

²⁹ Committee on the Rights of the Child, *Concluding observations: Australia*, 20 October 2005, CRC/C/15/Add.268, [7]-[8].

³⁰ Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child*, 17th Report, August 1998. Available at: https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/reports/report17/intro.pdf.

³¹ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 1 November 2019, [52]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 24 March 2021, [146.8], [146.9], [146.26], [146.28]-[146.30], [146.40].

As one example, Aboriginal and Torres Strait Islander children's unacceptable over-representation in out-of-home care is well known.³² The unconscionable number of children who continue to be removed from their families today reflects a systemic failure by governments. Governments have failed to recognise and address the structural forces affecting Aboriginal and Torres Strait Islander families, the effects of intergenerational trauma, the cultural biases undermining how child protection systems operate and assess children's best interests, and the need for genuine community control of services and systems for children.

Genuinely community-controlled services and systems, grounded in the principle of self-determination, would lead to better outcomes for children. Importantly, this control must be comprehensive, and accompanied by the resources of all kinds that are needed to exercise it. Self-determination requires a recognition and transfer of power at a systemic level, so that Aboriginal and Torres Strait Islander peoples and communities themselves have the ability to decide on the systems that apply to their children, to avoid intervention and removal of children in the first place.

These considerations should be reflected in Australia's human rights framework, particularly the foundational importance of supporting self-determination.

We refer to and support SNAICC's recommendations in this respect. In relation to Australia's human rights framework, we highlight the importance of ensuring:

- Alignment with the National Agreement on Closing the Gap
- Adequate resourcing for Aboriginal community-controlled organisations (ACCOs) including the ACCO legal sector
- Shared decision-making with Aboriginal and Torres Strait Islander people and communities via Aboriginal and Torres Strait Islander peak bodies
- Meaningful involvement of Aboriginal and Torres Strait Islander children in this Inquiry and in all decisions affecting them.

RECOMMENDATION 5

The Australian Government should ensure Australia's human rights framework supports self-determination of Aboriginal and Torres Strait Islander peoples and aligns with decision-making of Aboriginal and Torres Strait Islander people and communities.

A National Commissioner for Aboriginal and Torres Strait Islander Children

Aboriginal and Torres Strait Islander children are disproportionately likely to experience violations of their rights across virtually every domain. This is a failing of governments extending from colonisation to the present day, the devastating

³² See generally Family Matters and SNAICC – National Voice for Our Children, *The Family Matters Report 2022*.

consequences of which are impossible to adequately convey, for Aboriginal and Torres Strait Islander communities and particularly for children, as well as for society as a whole.

International human rights and child rights principles are clear that national governments must ensure strong, independent oversight of children's rights through a national institution that is legislatively entrenched, suitably resourced and empowered, and has an appropriate mandate. In Australia, there is a compelling case for a dedicated National Commissioner for Aboriginal and Torres Strait Islander Children that meets these requirements.

We refer to and support SNAICC's recommendations in this respect. We also refer to the detailed Options Paper prepared by SNAICC and King & Wood Mallesons outlining the relevant considerations,³³ including the application of the minimum standards in the Paris Principles³⁴ and the right to self-determination.

We also note the importance of establishing equivalent roles that are fully empowered, resourced and legislated in each state and territory.

RECOMMENDATION 6

The Australian Government should establish a National Commissioner for Aboriginal and Torres Strait Islander Children.

Resourcing for the Australian Human Rights Commission and role of the National Children's Commissioner

The Australian Human Rights Commission (AHRC) faces significant challenges in fulfilling its mandate due to a lack of resources. As Australia's national human rights institution, its status is mandated through the Paris Principles. These principles require the Australian Government to ensure that the AHRC's independence is guaranteed by statute, that it has a broad human rights mandate, adequate powers and sufficient resources.

In 2013, the role of National Children's Commissioner (NCC) was established as a Commissioner within the Australian Human Rights Commission. The NCC's role is to ensure effective monitoring and accountability of the Australian Government's obligations under the CRC to uphold children's rights in Australia. Since its establishment in 2013, the role of NCC has been unable to properly fulfil its statutory functions, due to a lack of appropriate resourcing.

³³ SNAICC – National Voice for Our Children and King & Wood Mallesons, 2020, *Options Paper: Models for a National Commissioner for Aboriginal and Torres Strait Islander Children and Young People*.

³⁴ *Principles relating to the Status of National Institutions (The Paris Principles)*, adopted by UN General Assembly resolution 48/134.



As a result, the NCC's ability to act to uphold children's rights and hold the government to account through independent monitoring and reporting is very limited. In addition, the NCC has no independent capacity to consult directly with children (except when funded through external fundraising), which is a core aspect of its role. The NCC should not be dependent on external fundraising to consult with children.

When the NCC was established in 2013, \$3.5 million was allocated in funding over four years. Significant concerns were expressed that this was insufficient. The Senate Standing Committee on Legal and Constitutional Affairs report into the Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012 stated that:

*"The committee acknowledges concerns around the allocation of funding for the National Children's Commissioner, and agrees that adequate resourcing is critical for the office to deliver optimally against its objectives. At the same time, however, the committee is cognisant of the fact that the new office is being established in a tight fiscal climate. For this reason, the committee believes it would be worthwhile to revisit the question of funding for the new role once the office is operational and its optimal operating budget can be more accurately judged"*³⁵

The House of Representatives Committee inquiring into the Bill recommended:

*"...that the Attorney-General review the funding allocated to the National Children's Commissioner before June 2013 and that any necessary funding increase be made to ensure the Commissioner can appropriately fulfil its functions"*³⁶

More than 10 years on, there has still not been a review into the NCC's funding. Any human rights framework or substantive reform that impacts on child rights, including the establishment of a Human Rights Act, should ensure that appropriate resourcing is provided to the AHRC and in particular, the NCC.

³⁵ Legal and Constitutional Affairs Legislation Committee, Inquiry into Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012, 18 June 2012, [2.49], available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/nationalchildrenscommissioner/report/index.

³⁶ Standing Committee on Social Policy and Legal Affairs, Advisory report for the Inquiry into Australian Human Rights Commission Amendment (National Children's Commissioner) Bill 2012, 21 June 2012, available at

https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20childrens%20commission/report.htm.

RECOMMENDATION 7

Ensure that the Australian Human Rights Commission is provided with appropriate resourcing to fulfil its mandate. This should include a review of the funding provided to the National Children's Commissioner, consistent with recommendations from Senate Standing Committee on Legal and Constitutional Affairs.

Children's participation in developing Australia's human rights framework

As described throughout this submission, children have the right to be heard, taken seriously and participate in all decisions affecting them, including policy-making.

No process to develop or refresh a human rights framework can be effective, comprehensive or legitimate unless the process itself is conducted fully in line with human rights requirements. It follows that children must be supported and enabled to participate meaningfully at all stages of governments' decision-making process relating to Australia's human rights framework. This includes the current Inquiry by the PJCHR, as well as all subsequent stages of the decision-making process.

Children's participation in the development of Australia's human rights framework would also result in a substantively stronger human rights framework and better implementation of the framework itself, once designed. Children have unique expertise and insight into their own lives and their experiences of their rights, and a unique understanding of the priorities that should be addressed and what would be effective in doing so. This expertise should be respected, valued and incorporated as part of the process of developing Australia's human rights framework.

RECOMMENDATION 8

The Australian Government should ensure children meaningfully participate in developing Australia's human rights framework.

