

The quest for revitalising human rights



Australia is the only Western liberal democracy in the world without a legislated, national human rights act. As a result, Australians enjoy very few legal protections for their human rights, such as the ability to hold government to account. So why have successive federal governments been so reluctant to enact this legislation? OLGA YOLDI reports.

The Universal Declaration of Human Rights says all people are born free and equal in dignity and rights, regardless of race, colour, sex, language, religion, politics, or where they are born. It is a milestone document that sought to establish a framework to prevent atrocities such as those seen in World War II. Proclaimed by the United Nations General Assembly in Paris on 10 December 1948, today the Universal Declaration stands as a leading light inspiring nations and organisations to advance human rights and freedoms.

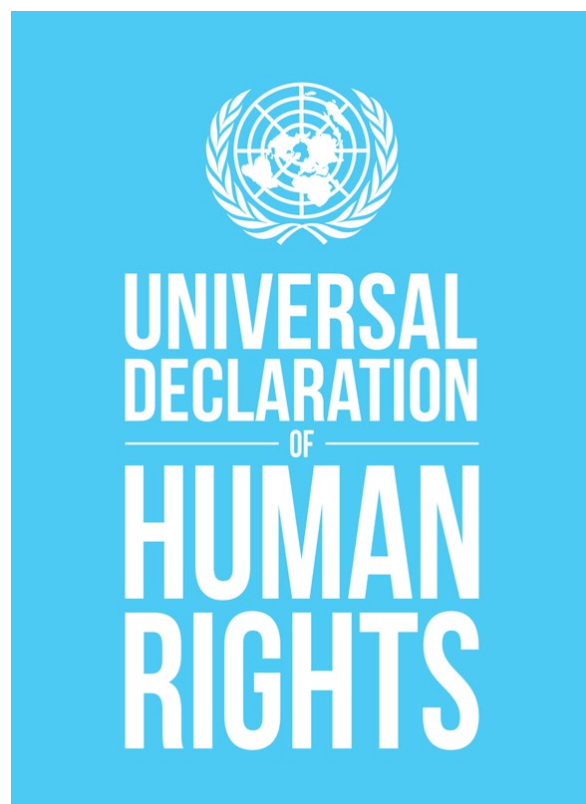
Michael Kirby, a former Justice of the High Court of Australia, said at a conference he had first learnt about the Universal Declaration in 1949 as a nine-year-old schoolboy: “The teacher said we had to learn about it at a young age because unless the human family knew of and observed these principles, we would keep on killing each other and the world would suffer grievously. So I grew up in the naive belief that in my country we were all born free and equal in dignity and rights ... but at some point I found that we were not free or equal.”

The Universal Declaration led to the adoption of more than 70 international human rights treaties applied today globally. While Australia ratified seven core treaties, none was ever enacted as domestic law. As a result, Australia has no federal human rights act or bill of rights and no legal framework to challenge human rights violations, so the federal government cannot be held accountable for protecting human rights.

Lawyer, academic and former Australian Human Rights Commission president Rosalind Croucher AM, who has for years advocated for such an act, defines human rights as those fundamental freedoms and protections that belong to all and which ensure that everyone is treated equally, justly and with respect. “A national human rights act will benefit us all as it will give power to the people, which is the essence of democracy,” she said. “It would ensure people’s rights are protected in law, including the right to health care, education, housing or a clean environment. Government would need to consider human rights when drafting laws and policies or in delivering services, [as well as] improving the quality of lawmaking, creating a rights-minded culture where human rights are considered and, most importantly, preventing human rights abuses.”

Croucher insists the act will substantially improve access to justice and accountability for government decision-making: “This is not the case at the moment. Human rights considerations are an afterthought.”

She warns that when governments get it wrong great harm can be caused, particularly to vulnerable groups. “Robodebt” (an automated government scheme that incorrectly demanded welfare recipients pay back



benefits between 2016 and 2019) is an example of what can happen when government policy is disconnected from human rights. More than 430,000 incorrect debt notices were sent to struggling welfare recipients (based off an incorrect algorithm), it drove people to despair, made victims feel like criminals and some even to suicide, as reported by a subsequent royal commission.

“We saw a lack of courage from some public servants in calling out egregious violations of human rights,” Croucher said. “The illegalities of the scheme were disregarded by ministers. I doubt this could have occurred if we had had an act that called for public servants to act in accordance with human rights principles. Those affected would have accessed the remedial legal framework to address such violations.”

A similar situation occurred during the COVID-19 pandemic when hundreds, if not thousands, of Australians were left stranded overseas, locked out of their own country. The Commission said it handled a significant number of complaints about the situation with very little response or action from the government, including for people seeking to be reunited with dying relatives or in need of critical medical support back

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home. “This lack of respect to our own citizens should not be repeated,” Croucher said.

The Commission describes Australia’s current legal framework of human rights protection as “incomplete, piecemeal, out of date, not comprehensive and falling behind practices across most other democratic nations”. Protections are scattered through different pieces of legislation such as the Constitution or Common Law. However, the Constitution covers limited specific areas such as the right to vote, the right to trial by jury for certain offences and some protections of freedom of religion and political communication. According to the Law Council of Australia, it lacks the entrenched guarantees of internationally-recognised human rights.

While there are laws that prohibit discrimination against people on the basis of race, disability, age and sex (under the Sex Discrimination Act 1984, the Age Discrimination Act 1975, the Racial Discrimination Act 1975 and the Australian Human Rights Commission Act 1986), such laws do not cover the right to health care, education, housing or a healthy environment, or the rights of children. Critics say that relying on anti-discrimination laws to set the standard, do not prevent

human rights violations because they only come into operation when harm has already occurred.

What is needed, say human rights experts, is a more proactive and preventative framework of human rights protections. Currently, if anyone suffers human rights abuses they can do nothing to hold those responsible accountable or to obtain remedies for abuses. They can lodge a complaint with the Australian Human Rights Commission, which can only try to resolve it through conciliation. There is no recourse to enforceable remedies through the courts.

“A human rights act would provide an effective remedial legal framework through the Australian Human Rights Commission, the Administrative Review Tribunal and ultimately the courts,” the Commission says.

Justine Nolan, director of the Australian Human Rights Institute, agrees. “Australia’s approach to human rights has historically been very ad hoc, making it difficult for people to understand what their human rights are and to seek recourse if those rights have been abused. There is no holistic approach to it,” she told the SBS.

All attempts to create a human rights act or a bill of rights have failed. The first proposal for a federal bill of rights to be enshrined in the Constitution, following the US model, was put forward before Australia became a nation state. In 1896 at the Pre-federation Constitutional Convention, it was put to a vote with 23 opposing and 19 in support. Kirby told the conference that delegates were concerned that a bill of rights would undermine the “discriminatory provisions of the law of that time”, especially those which “disadvantaged Aboriginal people and Chinese”.

According to the Law Council of Australia, in 1973, 1984 and 1985 three different Commonwealth attorneys-general introduced bills to establish a bill of rights. In each case the bills either lapsed or were withdrawn.

In 1988 the Constitutional Commission recommended adding a chapter to the Constitution— similar to the 1982 Canadian Charter of Rights and Freedoms – that would contain core freedoms, but it wasn’t actioned. In 2009 the Rudd government commissioned an inquiry, the National Human Rights Consultation. Chaired by human rights lawyer and academic Father Frank Brennan AO, it recommended that Australia adopt a federal human rights act modelled on legislation in the ACT and Victoria. However, the federal government chose not to draft a human rights act because of concerns that it would fail politically, and the proposal was rejected at a referendum and by Cabinet after a vigorous campaign against the idea by some media. In 2017, Independent MP Andrew

Wilkie introduced two private members bills that sought to establish an Australian bill of rights but they were not actioned by the major political parties.

In 2018 the Australian Human Rights Commission developed a model for what a national human rights act would look like. The Free and Equal project was launched to identify a national reform agenda for human rights. In 2023 Attorney-General Mark Dreyfus announced an Inquiry into Australia's Human Rights Framework. A coalition of 104 civil society organisations representing a wide cross-section of opinion nationally welcomed the Parliamentary Joint Committee of Human Rights. Its chair, Labor MP Josh Burns, tabled the Committee's report in May last year. Among its recommendation it included the establishment of an Australian Human Rights Act to improve human rights protections and to create transparency, accountability and tools for people to use if their rights were breached. No action has been taken since.

Why have successive governments been so reluctant to enact such law? After all, Australia was a leader in the framing of the Universal Declaration of Human Rights: it holds a seat on the United Nations Human Rights Council (UNHRC), has ratified seven core international human rights treaties and consistently advocates for human rights and freedoms on the global stage. There is also widespread support across Australia. A Human Rights Law Centre poll in 2021 found that 83 per cent of respondents believe there should be a document setting out the rights and responsibilities of all Australians. An Amnesty International poll showed three out of four Australians supported the initiative.

One problem, experts say, is that human rights are largely absent from the public debate. There is a widespread view that Australia does not have human rights issues, that violations occur in countries usually ruled by dictators, so therefore we don't need a human rights act or bill of rights. Government usually claim that the human rights provided under our political system are sufficient by the Australian political system.

Observers say the key problem is that a human rights act would place limits on the power of the federal government as well as federal police and security organs, which risk being held accountable for breaching those rights.

Former NSW Council for Civil Liberties president Stephen Blanks said, in a piece published on the Sydney Criminal Lawyers website, that all the major parties don't want to see parliamentary powers curtailed: "So long as the agenda is driven by people whose interest is primarily power, rather than the public good, then it is very difficult to get a coalition in favour of human rights legislation."

As Justine Nolan notes: "Australians have long clung to the notion that everything is fine here ... but the idea of human rights is that they protect the most vulnerable." Indeed, there is plenty of evidence of abuse and mistreatment of people with disabilities and children in juvenile detention. Elder abuse in age care facilities has been well documented, as has discrimination against First Nations people and LGBTIQ+ in the Australian community, while the

treatment of refugees and asylum-seekers in detention remains a problem.

In view of systematic human rights breaches Australian governments have set up royal commissions to investigate systemic human rights breaches, but experts say they are crisis-driven, costly and reactive as they provide evidence after human rights abuses occur, rather than preventing them and protecting people through human rights laws. Additionally, the recommendations that follow their hearings are not

always implemented by governments. There is consensus among legal experts that a policy shift towards a more holistic, preventative approach for human rights protections is needed.

It has been more than 40 years since Australia ratified the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) which covers the right to education, adequate standard of living, housing and health; the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD); the Committee on the Elimination of Discriminations Against Women (CEDAW); and the Convention Against Torture (CAT).

These treaties set out the international human rights obligations Australia has promised to protect. Yet, according to human rights organisations, Australia has

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only partially implemented obligations to prohibit discrimination while simply failing to fulfil other treaties' obligations. For instance, according to the Law Council of Australia, the rights guaranteed by the ICCPR have a small and almost random presence in Australia's law, while many of the IESCR rights are reflected in legislation such as education and social security. However such services are not considered a right, and at any time they can be withdrawn – in other words, the rights are not enforceable.

The Australian government must provide periodic reports to the various UNHRC Treaty Committees monitoring implementation on progress made. For years these committees have been advising successive Australian governments on actions needed to meet their international commitments.

In 1997 the CEDAW Committee recommended the government design a long-term strategy aimed at the full implementation of the Convention, and the CRC Committee recommended the government create a federal body responsible for drawing up programs and policies for implementing this Convention.

In its 2017 report the ICCPR committee again raised concerns over gaps in the ICCPR implementation. It said that without domestic human rights laws there may be limited awareness of the covenants among state officials, and as a result, there may not be effective implementation of ICCPR rules in Australia. The ICESCR Committee similarly recommended that Australia consider enacting comprehensive federal legislation to give full effect to these treaties across all jurisdictions.

According to Remedy Australia – which holds that Australia should comply with UN decisions on human rights complaints – Australia has breached ICCPR and other treaties 47 times since 1994. It found that of these 47 complaints, only 13 per cent have been fully remedied. As international human rights lawyer Gillian Triggs AC says: "This has left Australia increasingly isolated from the legal standards and jurisprudence of the countries with which we compare ourselves: an isolation and failure to meet international human rights standards that has been criticised by over 44 nations at the UNHRC."

Human rights acts have been passed in Victoria, the ACT and Queensland, and have delivered concrete benefits. The Law Council of Australia says it is incongruous that a form of "post-code justice" has developed in Australia where an individual's rights

are better protected depending on which state and territory people live in: "Western Australians and Tasmanians are no less deserving of human rights protections than Queenslanders or Victorians."

It is uncertain whether Albanese government will implement the recommendations outlined in the inquiry report *Revitalising Australia's Commitment to Human Rights, Free and Equal Final Report 2023* – an impressive document that includes model legislation on fundamental rights currently not well protected, as well as economic, social and cultural rights and rights to a healthy environment. The report builds on extensive consultations and research conducted over five years and is supported by 87 per cent of the 335 public submissions received.

The model recommends a human rights act where the three branches of government – the parliament, the executive and the judiciary – work together to uphold rights. Parliament will draft and enact human rights in law, the executive and ministers will implement these laws and the judiciary will interpret them, review them and ensure compliance. The human rights act will incorporate rights from the ICCPR and the ICES.

It may be challenging for the government to reject the recommendations as the report comes from its own parliamentary committee and has such a strong support from legal, human rights and civil society organisations who share their vision for Australia.

As journalist Paul Gregoire wrote on the Sydney Criminal Lawyers site: "The time is ripe for a national human rights act. Labor appears serious this time, with the support of Andrew Wilkie and the Greens, who have long called for rights protection to be enshrined in federal law, there is cross-bench support in Parliament negating any need for the Coalition to get on board." That could change following the elections. The question is whether or not there will be sufficient political will within the government.

As Croucher has repeatedly said, "Let's protect people's rights instead of having another generation of royal commissions forensically examining the damage we inflicted on people by not respecting their rights in the first place.

"A human rights act is about our future, about the type of Australia we want to live in and the kind of legacy we want to leave our children and our children's children."

This is a rare, even historic, opportunity to finally make human rights law in Australia happen. R