

Aboriginal Legal Service of Western Australia Limited



Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

July 2023

The Aboriginal Legal Service of Western Australia Limited acknowledges the Traditional Custodians of the land on which we all live and work, and pay our respects to their elders past, present and emerging. We acknowledge and respect the continuing culture and contributions that our First Nations Peoples make to the life of this state and country.

EXECUTIVE SUMMARY

Aboriginal and Torres Strait Islander people face systemic racism and significant violation of their human rights on a daily basis. The Aboriginal Legal Service of Western Australia Limited ('ALSWA') therefore submits that critical reforms are needed to create a stronger human rights framework for Australia. In ALSWA's view, introducing a comprehensive Federal Human Rights Act is an important step forward to ensuring greater protection of our fundamental rights and freedoms. A Federal Human Rights Act will provide an important framework for greater protection of human rights, contribute to the development of a human rights culture and will give individuals access to remedies for violations of their rights. ALSWA also submits in order to provide comprehensive protection across all areas of public life, Western Australia must introduce a Western Australian Human Rights Act to complement a Federal Human Rights Act.

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA LIMITED

ALSWA is a community-based organisation which was established in 1973. ALSWA aims to empower Aboriginal and Torres Strait Islander people and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally matched and quality legal services to Aboriginal people throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal people as the First Peoples of Australia;
- Ensure that government and Aboriginal people address the underlying issues that contribute to disadvantage for Aboriginal people on all social indicators, and implement the relevant recommendations from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal people as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform, as well as providing a number of important support services.

ALSWA is governed by a Board of Directors who are all Aboriginal. ALSWA is company limited by guarantee registered with the Australian Securities and Investment Commission and a public benevolent institution registered with the Australian Charities and Not-for-Profits Commission.

ALSWA provides legal advice and representation to Aboriginal people in a wide range of practice areas including criminal law, family law, child protection, civil law and human rights law. Our legal services are available throughout Western Australia via 11 regional and remote offices and one head office in Perth. ALSWA also provides a number of additional services to support clients, including the Custody Notification Service, the Bail Support Service and Prison In-Reach Program, the Work and Development Permit Service, the Youth Engagement Service and the Your Story Disability Support program.

BACKGROUND TO THE INQUIRY AND TERMS OF REFERENCE

On 15 March 2023 the Attorney-General referred to the Parliamentary Joint Committee on Human Rights ('the Committee') the following matters for inquiry and report by 31 March 2024 (the 'Inquiry'):

- to review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- to consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- to consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and
- to consider any other relevant matters.

The Committee is seeking submissions in relation to these matters in particular:

- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission's recent Position Paper);
- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made, including:
 - to the remit of the Parliamentary Joint Committee on Human Rights;
 - the role of the Australian Human Rights Commission;
 - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland, including relevant case law, and relevant work done in other States and Territories.

OVERVIEW OF ALSWA SUBMISSION

Australia's historical background

Aboriginal people have occupied the land, known as Australia, for at least 65,000 years and Aboriginal people have the oldest continuing living culture in the world. European settlement occurred in 1788 under the notion of 'terra nullius'. 'Terra nullius' did not mean that the land was uninhabited, it meant that Aboriginal peoples' relationship with the land was not recognised as a proprietary one, due to a perceived lack of Eurocentric notions of cultivation, such as fencing. This was despite evidence that Aboriginal people across the continent were in fact using domesticated plants, sowing, harvesting, irrigating and storing practices.¹ Settlers appropriated Aboriginal land for the purposes of agriculture, forestry, fishing, pastoralism and

¹ Bruce Pascoe, *Dark Emu* (Griffin Press, 2014).

mining. This involved extensive frontier violence. In dispossessing the Aboriginal owners of their land, the settlers sexually abused, massacred and poisoned Aboriginal people.

Since colonisation, Aboriginal people have been marginalised from full participation in Australian life by successive government policies that did not recognise Aboriginal people as the original inhabitants of this land. Aboriginal people were first legislated against in the 1840s and, since then, they have been subjected to an increasing range of discriminatory laws which infringe basic human rights. The first law in Western Australia to officially sanction the removal of Aboriginal children was the *Industrial Schools' Act 1874 (WA)*. This was later followed by the introduction of the *Aborigines Act 1905 (WA)*, which gave broad powers to the 'Chief Protector of Aborigines' to remove Aboriginal children from their families and forcefully place them in homes or missions.² Many other Western Australian and Federal laws and practices have also had significant discriminatory impacts on Aboriginal people, including recent legislation such as the Cashless Debit Card legislation, and decisions such as the decision to withdraw Federal responsibility and funding for remote communities in Western Australia.

Aboriginal people continue to experience discrimination and human rights violations on a systemic and daily basis in a myriad of different contexts, including in the justice system, the child protection system, and by law enforcement, government workers, health professionals, business operators and other members of the community. Some specific examples of the systemic and pervasive human rights violations experienced by Aboriginal people are set out below.

Nature of complaints in relation to human rights violations brought to ALSWA

ALSWA regularly receives complaints relating to discrimination and human rights violations of Aboriginal and Torres Strait Islander people. Examples of the complaints ALSWA has received within the last several years include the following:

- Racial comments or slurs made by government employees, in particular law enforcement and prison officers, in their interactions with Aboriginal and Torres Strait Islander people;
- Racial comments and slurs made by staff of private businesses, including shops, petrol stations and real estate agencies;
- Practices which discriminate against Aboriginal and Torres Strait Islander people, including:
 - (a) requiring that Aboriginal and Torres Strait Islander people pre-pay for petrol at petrol stations and not requiring the same of non-Aboriginal people;
 - (b) checking the bags and conducting other security checks of Aboriginal and Torres Strait Islander people at retail stores and not conducting the same checks of non-Aboriginal people;

² South West Aboriginal Land and Sea Council, *Stolen Generations*
<https://www.noongarculture.org.au/stolen-generations/>

- (c) changing the ticketed seating arrangements of Aboriginal and Torres Strait Islander people to the back of a bus, in circumstances where non-Aboriginal people were all seated towards the front; and
- (d) refusing access to Aboriginal and Torres Strait Islander people at pubs, hotels and stores;
- Racial comments and practices being carried out against Aboriginal and Torres Strait Islander people in the course of their employment;
 - Racial comments and racially motivated decisions made against Aboriginal and Torres Strait Islander people in organised sports;
 - Excessive use of force by government officers, including police, prison officers, youth custodial officers and public transit officers;
 - Practices of solitary confinement in adult detention facilities;
 - Practices of solitary confinement in WA's juvenile detention facility, Banksia Hill Detention Centre, which have now been declared to be unlawful by the Supreme Court of Western Australia;³
 - Cruel, inhuman and degrading treatment in custody including inadequate access to medical services, psychological support, family visits, food, education, and hygiene facilities, in relation to both adults and young people;
 - Legislative practices at the State level which disproportionately impact Aboriginal and Torres Strait Islander people, such as mandatory sentencing;
 - Legislative practices at the Federal level which disproportionately impact Aboriginal and Torres Strait Islander people, such as the Cashless Debit Card Scheme and the Community Development Program Scheme (also known the "work for the dole scheme");
 - Issues with applying for the National Disability Insurance Scheme ('NDIS'), and issues with the quality of care received from NDIS service providers; and
 - Issues with the quality of care received from public health providers, including frequent instances of Aboriginal and Torres Strait Islander people being poorly assessed and disbelieved in health settings.

It is also important to note that Aboriginal and Torres Strait Islander people's experience of human rights violations and discrimination involves systemic oppression rather than isolated and individual acts, for example:

- Being over-policed and therefore more likely to be subjected to mistreatment in custody;

³ *VYZ by next friend XYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274.

- Being more likely to be subjected to excessive force by police during arrests. For example, a recent report by the Corruption and Crime Commission found that in the 2020-2021 financial year, 61% of all police dog deployments concerned Aboriginal and Torres Strait Islander persons.⁴ The use of police dogs often results in significant and permanent physical injuries and psychological trauma for the victim;
- Being overrepresented in the justice system due to discriminatory laws and practices such as mandatory sentencing laws, lack of access to Aboriginal language interpreters, lack of culturally appropriate rehabilitation programs, lack of access to diversionary options and over-policing;
- Young Aboriginal people are subject to significant disadvantage in their interactions with the justice system, for example being disproportionately impacted by the low age of criminal responsibility, and receiving insufficient support for disorders such as Foetal Alcohol Spectrum Disorder ('FASD'), which is diagnosed at higher rates in Aboriginal children;
- Being poorly assessed and disbelieved in health settings;
- Being unable to access culturally appropriate services in many areas of public life;
- Being unable to access culturally appropriate processes. For example, many people find it impossible to get through recruitment processes which they find intimidating and have a heavy emphasis on reading and writing in English. Public information is also often inaccessible because of the language or means used. For example, ALSWA clients frequently have difficulty accessing the internet or telephones, especially those living in regional and remote areas, and large amounts of written material can be difficult to understand;
- Being unable to access the growing number of services and processes being moved to online forums. For example, many complaints processes have online complaints forms, whereas many ALSWA clients have difficulty accessing the internet;
- Being 'conned' as a consumer. This occurs in various places and is a particular issue in regional areas. Examples include Aboriginal people being charged extra for goods or services, being talked into buying things they cannot afford, being offered credit on impossible terms, being signed up to burdensome direct debit arrangements, service providers taking and holding people's debit cards, and having to cash cheques in shops that require the money to be spent in that shop only.
- Being followed by security guards and store staff or otherwise treated with suspicion or disrespect;
- Being refused entry to shops, hotels, and nightclubs, or being allocated separate areas in pubs and bars;

⁴ Corruption and Crime Commission, *A Report on the Deployment of Police Dogs* (11 May 2022) [205].

- Children being called names and bullied at school until they either avoid attending school or retaliate and are suspended or expelled;
- Being avoided on public transport and people shrinking away if they have to share a seat;
- Living in a community where the media is often highly derogatory or biased;
- Being called racial slurs like n****r, black c**t, b***g and c**n and being verbally bullied or put down by strangers, or being likened to animals;
- Living in a community that strongly associates them with negative stereotypes regardless of their individual lifestyles and achievements. For example, ALSWA frequently receives reports of disparaging and derogatory comments being made about Aboriginal people on Facebook;
- Being subject to mistreatment and discrimination in relation to cultural heritage. For example, Aboriginal sacred sites and objects are not treated with the same respect granted to cathedrals, mosques, synagogues and temples and their associated religious objects. One recent example of the blatant disrespect for Aboriginal sites was the destruction of 46,000-year old culturally significant rock shelters at Juukan Gorge by Rio Tinto; and
- Being subjected to discrimination and mistreatment in relation to religion. Aboriginal and Torres Strait Islander religions are also very under-valued compared with other religions to the point that most Australians are unaware of their existence. Aboriginal and Torres Strait Islander spiritual beliefs are often dismissed and treated like fantasy rather than religion.

The above examples illustrate some of the many obstacles faced by Aboriginal and Torres Strait Islander peoples in their everyday lives. ALSWA has commenced formal complaints and litigation in relation to some of the above matters, but the lack of a comprehensive legal framework for protection of human rights means that many complaints cannot be pursued or do not result in sufficient outcomes for our clients.

Scope of ALSWA's submission

This submission is informed by ALSWA's extensive experience in representing Aboriginal and Torres Strait Islander people throughout the state of Western Australia.

Due to the breadth of this Inquiry and ALSWA's expertise, ALSWA's specific submissions are focused on considering some of the key gaps in Australia's current human rights framework for Aboriginal and Torres Strait Islander people, and specifically on how a Federal Human Rights Act could improve the lives of Aboriginal and Torres Strait Islander people.

ALSWA wishes to acknowledge that although it is highly supportive of the introduction of a Federal Human Rights Act, this is only one small step towards ensuring greater equality and fair treatment for Aboriginal and Torres Strait Islander people. Any Federal Act must also be complemented by comprehensive state-based human rights legislation, including a Human Rights Act for Western Australia that covers all of the areas of public life regulated by the WA Government.

These reforms must also be carried out in tandem with other critical reforms at both the Federal and State levels, such as the introduction of a Voice to Parliament and the fulfillment of the other objectives of the Uluru Statement from the Heart, including truth-telling processes and treaty making, implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, and increased commitments to policies and programs designed to assist in “closing the gap” and ensuring fair and equal treatment for Aboriginal and Torres Strait Islander people across Australia.

Where possible, ALSWA refers to case examples to provide evidence of the views expressed in this submission. Extremely busy and passionate ALSWA lawyers have provided these case examples. Many other examples exist but the tight timeframe for submissions coupled with the enormous workload of ALSWA lawyers has made it impossible to provide more. ALSWA asks the Committee to view the case examples included in this submission as a sample of cases rather than as the only evidence of the various problems discussed.

ALSWA is also the co-convenor of the Western Australia for a Human Rights Act Coalition (‘WA4HRA’) and a member of the Charter of Rights campaign coalition. ALSWA fully endorses the separate submissions made by WA4HRA and the Charter of Rights coalition to this Inquiry.

THE GAPS IN AUSTRALIA’S HUMAN RIGHTS FRAMEWORK

As the only Western Liberal Democracy without a Bill of Rights or federal human rights legislation, Australia is lagging woefully behind the rest of the world in providing legislative protection for human rights. As recently examined in detail by the Australian Human Rights Commission, Australia has a patchwork legal framework of human rights protection with a limited number of rights being protected in scattered pieces of legislation, the Constitution and the common law.⁵ The result is an incomplete and piecemeal legal framework which offers no consistent or comprehensive protection of human rights.

Importantly for Aboriginal and Torres Strait Islander people, very little has been done to implement the important rights set out in the *Universal Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’). UNDRIP sets out the rights of Indigenous peoples in a number of key areas with 46 articles covering rights to land, natural resources, cultural identity, self-government and self-determination. Australia initially opposed the UNDRIP when it was first introduced in 2007, and despite declaring formal support in 2009, has taken virtually no steps to implement any of the rights in the UNDRIP into its domestic laws.

The gaps in Australia’s human rights framework are very keenly felt by Aboriginal and Torres Strait Islander people. For example, in 2017 the United Nations Special Rapporteur on Indigenous Rights observed that many Federal Government policies and decisions failed to respect the rights to self-determination and effective participation, contributed to the failure to deliver on the targets in areas of health, education and employment, and fuelled the escalating and critical incarceration and child removal rates of Aboriginal and Torres Strait Islander peoples.⁶ In 2021 the Working Group on the Universal Periodic Review for Australia produced

⁵ Australian Human Rights Commission, *Free and Equal, Position Paper: A Human Rights Act for Australia* (2022) (‘Position Paper’), 11.

⁶ Victoria Tauli-Corpuz, Special Rapporteur, *Report of the Special Rapporteur on the Rights of Indigenous peoples on her Visit to Australia* UN Doc A/HRC/36/46/Add.2 (8 August 2017).

a report which included numerous recommendations for Australia to take steps to revise its national laws and policies to strengthen the rights of Aboriginal and Torres Strait Islander peoples, including through specific measures such as raising the age of criminal responsibility, undertaking further measures to 'close the gap' and implementing the UNDRIP.⁷

As a result of the lack of a comprehensive human rights framework, many of ALSWA's clients face discrimination and disadvantage and are unable to seek justice for violation of their rights. The below case studies illustrate some of the specific issues ALSWA's clients have encountered in areas that fall under the responsibility of the Federal Government.

Case study – disbelief and poor assessment in health settings

In 2014, 22-year-old Ms Dhu died whilst in WA Police custody in South Hedland after being imprisoned for fine default (a law which has now been largely abolished and which had a disproportionate impact on Aboriginal people). Ms Dhu was held in the lock up for three days, during which time she became gravely ill and eventually passed away from septicaemia caused by a previous rib fracture, in circumstances in which both the police and hospital staff dismissed the seriousness of her condition and made stereotypical assumptions about the cause of her distress. ALSWA represented Ms Dhu's mother and grandmother at the Coronial Inquest into her death, raising concerns about the quality of care received by Ms Dhu from both police and the public health system. The Coroner found that 'it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons.'⁸ A further investigation by the Medical Board of Australia also found that the doctor who treated Ms Dhu was guilty of professional misconduct.⁹

Case study – age of criminal responsibility

The current age of criminal responsibility throughout all Australian jurisdictions is just 10 years old, including under the Commonwealth *Crimes Act 1914*. This is significantly out of step with international standards: the most common age of criminal responsibility around the world is 14 years, and 14 years is also the age recommended by the United Nations. The practice of imprisoning such young children has been the subject of significant criticism from human rights advocates, legal professionals and health professionals. There is clear evidence that demonstrates that such young children have not formed the cognitive capacity to form criminal intent, and that jailing young children is not effective and results in long term impacts on their mental health.

⁷ Working Group on the Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review of Australia*, UN Doc A/HRC/47/8.

⁸ Finding in the Inquest into the Death of Julieka Invanna Dhu (11020-14) (15 December 2016) [860].

⁹ Louise Miolin and David Weber, 'Dr Vafa Naderi found guilty of professional misconduct over Ms Dhu death in custody' *ABC News Online* (30 April 2021) <https://www.abc.net.au/news/2021-04-30/dr-vafa-naderi-guilty-professional-misconduct-ms-dhu/100105402>

Aboriginal and Torres Strait Islander young people are also disproportionately impacted by the low age of criminal responsibility. In recent months ALSWA has assisted several children as young as 9 years old who have been arrested on suspicion of stealing, taken into police custody and searched.

Despite the overwhelming evidence that Australia should raise the age of criminal responsibility to at least 14 years, and repeated calls from the United Nations to do so,¹⁰ the Federal Government has so far refused to raise the age of Commonwealth criminal responsibility and has shifted responsibility to each individual State and Territory to individually raise the age in their respective jurisdictions. This will likely result in inconsistent and unjust approaches to juvenile justice throughout Australia, with several jurisdictions already committing to raising the age but others not showing any signs of implementing similar reforms.

Case Study - Cashless Debit Card Legislation

The Federal Government's now failed cashless debit card legislation was first rolled out in 2016 as a method of welfare quarantining and provided that a high percentage of welfare payments were to be quarantined on a card and could not be withdrawn as cash or used to gamble or purchase alcohol. The legislation was rolled out on a trial basis in several regional communities and was routinely criticised for having a disproportionate and discriminatory impact on Aboriginal and Torres Strait Islander people.¹¹

ALSWA received numerous complaints about the operation and impact of the cashless debit card legislation. ALSWA's clients raised a number of concerns including the many practical difficulties they experienced in accessing and using the card, their inability to pay for essential items due to many service providers not accepting the card, their inability to withdraw cash, and feelings of being demeaned and discriminated against, with many clients comparing the program to previous paternalistic government practices designed to control their lives. One client likened the program to "being on rations again" and another described how it made him feel like he was being "treated like a child" and that he had "never felt so stressed in his life."

Clients also had numerous difficulties in applying to have themselves removed from the trial. There were very narrow and onerous grounds for securing removal. In one particular instance, ALSWA assisted a client who had moved to the East Kimberley temporarily for a job and was placed on the cashless debit card. Once the job was finished the client moved back to Perth and wanted to be taken off the card, arguing that the East Kimberley was not

¹⁰ See e.g. Committee Against Torture, *Concluding Observations on the sixth periodic report of Australia* UN Doc CAT/C/AUS/CO/6 (5 December 2022) [41].

¹¹ See e.g. 'Cashless Debit Card Bill 'not compatible' with human rights' *Australian Human Rights Commission* (Media Release) <https://humanrights.gov.au/about/news/media-releases/cashless-debit-card-bill-not-compatible-human-rights#:~:text=The%20Australian%20Human%20Rights%20Commission,Australia%27s%20international%20human%20rights%20obligations> .

his usual place of residence. ALSWA assisted the client with a protracted and complicated review process to have him removed from the scheme which finally ended in the Administrative Appeals Tribunal determining he did not in fact fall under the ambit of the scheme.

Case study – failure to ratify OPCAT

In 2017 the Australian Government announced that it would ratify the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('OPCAT'), which provides (among other things) for the establishment of a National Preventive Mechanism for the oversight of detention facilities across Australia.

Oversight of detention facilities in Australia is currently managed differently by each individual State and Territory. In Western Australia the primary oversight body is the Office of the Inspector of Custodial Services ('OICS'). Whilst OICS has a well-established investigative function and produces comprehensive reports on conditions in detention, its recommendations are regularly ignored by the Western Australian Government and it lacks any real powers of enforcement. ALSWA routinely receives complaints about gross mistreatment of Aboriginal and Torres Strait Islander people in detention, including young people, in relation to a myriad of issues including:

- unlawful practices of solitary confinement;
- mistreatment by prison officers;
- improper maintenance of facilities and lack of hygiene;
- lack of access to medical services;
- lack of access to psychological supports;
- lack of access to culturally appropriate supports; and
- lack of access to education and work programs.

In the past several years in particular ALSWA has received a staggeringly high level of complaints in relation to horrific conditions at Banksia Hill Detention Centre, including highly concerning practices of 'rolling lockdowns' which have resulted in young people being held in solitary confinement for prolonged periods of time. These practices have continued despite ALSWA bringing a successful administrative law claim that the practices were unlawful.¹²

As part of its ratification of OPCAT the Federal Government undertook to establish a federated model of National Preventive Mechanisms and committed funding to support the implementation of OPCAT, which it has said will "lead to better outcomes for detainees and support greater confidence in the justice system by helping to reduce Aboriginal and Torres

¹² *VYZ by next friend XYZ v Chief Executive Officer of the Department of Justice* [2022] WASC 274.

Strait Islander deaths in custody and ensuring safe conditions of detention.”¹³ However, progress in implementing this system has been extremely slow and has still not been completed.¹⁴ In addition, the UN Sub-Committee on Prevention of Torture, which is responsible for monitoring compliance with OPCAT, recently undertook a visit to Australia which had to be terminated in early 2023 due to the failure of several states to allow access to places of detention.

As a result, Australia has still not met its obligations under OPCAT and there are insufficient systems in place to assist people in detention.

Case study – The Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability

The *Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability* (‘DRC’) has exposed shocking treatment of people with disability. ALSWA has made extensive written and oral statements to the DRC, including in relation to the experiences of Aboriginal and Torres Strait Islander people with disabilities within the prison system, out of home care facilities, and in relation to guardianship and administration matters. ALSWA has also received complaints from clients both in custody and in the community in relation to the lack of support provided for applying for the National Disability Insurance Scheme, especially within regional and remote areas, and complaints about the level of support and quality of care provided by NDIS service providers.

THE NEED FOR A FEDERAL HUMAN RIGHTS ACT

Benefits of a Federal Human Rights Act

The case studies set out above demonstrate some of the gaps in Australia’s human rights framework and highlight that recognition and respect for human rights needs to be embedded in Australian culture. In ALSWA’s view a Federal Human Rights Act would improve the lives of all Australians, including Aboriginal and Torres Strait Islander peoples, in a number of key ways:

1. It will list human rights and freedoms in one place so that individuals have a full understanding of their rights and freedoms.
2. It will ensure Australia acts consistently with its international human rights obligations.
3. It will assist in preventing human rights violations from occurring by ensuring that Parliament and the Government pass laws, make decisions and deliver services in accordance with people’s human rights.

¹³ Attorney-General’s Department, ‘Closing the Gap’, <https://www.ag.gov.au/legal-system/closing-the-gap>

¹⁴ See e.g. comments made by the Committee Against Torture, *Concluding Observations on the sixth periodic report of Australia* UN Doc CAT/C/AUS/CO/6 (5 December 2022) [41].

4. It will promote transparency in government decision making and create greater trust in government.
5. It will provide individuals with the power to act and get justice for violations of their human rights.

By way of some specific examples in relation to the case studies set out above, if we had a Federal Human Rights Act we would have a stronger system of parliamentary scrutiny for new laws, which would assist in ensuring that programs like the Cashless Debit Card Scheme are either not implemented or amended to ensure they do not infringe on human rights. A Federal Human Rights Act would also ensure that executive decisions made in relation to matters such as raising the age of criminal responsibility and the implementation of OPCAT are properly guided by consideration of key rights such as the rights of young people and the rights of people in detention. Finally, a Federal Human Rights Act would provide a much-needed additional level of appropriate judicial oversight of laws, decisions and practices impacting human rights.

The effectiveness of human rights legislation has been clearly demonstrated by the experiences of the ACT, Victoria and Queensland. Human rights legislation in those jurisdictions has resulted in significant improvements in the ways state government entities interact with Aboriginal and Torres Strait Islander peoples and has provided individuals with important remedies for breach of their rights. There are many case study reports which examine these benefits in more detail, including the Charter of Rights Campaign's 101 Case Studies Project,¹⁵ and past reviews and reports on the ACT, Victorian and Queensland Acts. The below is a brief summary of some of the tangible benefits of human rights legislation as demonstrated by these case studies.

1. Greater human rights training for public officers, leading to better outcomes in the provision of government services.
2. Greater scrutiny of human rights issues when passing legislation, leading to changes in proposed legislation to ensure greater compliance with human rights.
3. Provision of clear policy directions for government decision making, leading to decisions that better respect the human rights of individuals.
4. Improvements in government service delivery for individuals, including the ability for individuals to advocate for themselves to ensure their human rights are properly protected.
5. Effective remedies for breach or violation of human rights, including achieving favourable outcomes through complaints and court actions.

¹⁵ Position Paper, 284 -286.

Key features of a Federal Human Rights Act

ALSWA considers that the next step following this Inquiry will be to produce a draft bill to go into the details of what an Act should contain and how it should work. Although it is beyond the scope of this submission to consider all the potential features of a proposed Act in detail, ALSWA is broadly supportive of the model of the Human Rights Act proposed by the Australian Human Rights Commission in its Position Paper on a Human Rights Act for Australia ('Position Paper'). This model generally follows the dialogue model of human rights legislation adopted in several overseas jurisdictions, including the United Kingdom and New Zealand, as well as in the ACT, Victoria and Queensland.

In particular, ALSWA wishes to emphasise the importance of including the rights set out in the UNDRIP in any eventual Act. As noted in the Position Paper, the right to self-determination is an important foundational right contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the UNDRIP. ALSWA agrees with the Commission's position that the partial references to this right in the preambles to the ACT, Victorian and Queensland Acts are insufficient and submits that it is critical that a full articulation of this right be included in the preamble to the Federal Human Rights Act.¹⁶ ALSWA also supports the inclusion of cultural rights, non-discrimination rights and economic, social and cultural rights which incorporate key UNDRIP principles into the Act, as well as the Commission's proposal to include two overarching participation duties in an Act, which further reflect important principles of self-determination.¹⁷

Similarly, ALSWA is strongly supportive of including economic, social and cultural rights in any eventual Federal Human Rights Act. Economic, social and cultural rights are important foundational rights upon which the enjoyment of many other rights necessarily depend. For example, the right to adequate housing has an important bearing on the enjoyment of many other rights, such as the right to health, the right to privacy and the protection of families and children. Lack of housing, education, health and adequate protection of cultural heritage were also some of the key underlying issues identified by the Royal Commission on Aboriginal Deaths in Custody as to why there is such a significant overrepresentation of Aboriginal people in the criminal justice system – underlying issues which continue to contribute to overrepresentation today.¹⁸ A lack of equitable access to services such as housing, education and health is also particularly prevalent in regional and remote areas and has a detrimental impact on the Aboriginal communities living in those areas. As such, ALSWA strongly supports the proposal of the Commission that the Act include the core economic, social and cultural rights enumerated in the *International Covenant of Economic Social and Cultural Rights*.¹⁹

In ALSWA's view, it is also crucial that the Act includes accessible, efficient and effective remedies for violations of human rights. ALSWA has assisted many clients in navigating inaccessible, complex and lengthy complaints processes which often result in unfavourable or

¹⁶ Position Paper, 133.

¹⁷ Position Paper, 132-133.

¹⁸ See e.g. Royal Commission on Aboriginal Deaths in Custody, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991).

¹⁹ Position Paper, 128.

insufficient outcomes. As such, ALSWA is highly supportive of the proposal that the Act include stand alone causes of action for individual breaches of human rights and a complaints process which incorporates an accessible conciliation mechanism, as well as the availability of court proceedings.²⁰ ALSWA similarly supports the proposal that a full range of remedies be made available to individuals seeking redress for breach of their human rights, including damages. ALSWA often receives complaints relating to systemic and widespread discrimination and as such also strongly supports the Commission's proposal for representative standing to bring complaints, including standing for organisations such as ALSWA to bring claims on behalf of communities.²¹

CONCLUSION

ALSWA receives complaints about human rights violations from clients on a daily basis, however Australia's piecemeal and inconsistent human rights framework means there are very limited options for clients to seek redress for violation of their rights, and no effective mechanisms in place to prevent human rights violations occurring in the future. Introducing a Federal Human Rights Act is an important step towards ensuring greater legislative protection of human rights for everyone, and especially for marginalised groups such as the Aboriginal and Torres Strait Islander community. It is critical that the Federal Government takes immediate steps to introduce a Federal Human Rights Act and leads the way in ensuring greater respect for the fundamental rights and freedoms of everyone throughout Australia.

Aboriginal Legal Service of Western Australia Limited

²⁰ See <https://charterofrights.org.au/101-cases>

²¹ Position Paper, 267-284.