



**Submission to the SA Parliamentary Social
Development Committee**

**Inquiry into the potential for a Human Rights Act for
South Australia**

12 February 2024

Submitted by
Amnesty International Australia

Contact: Kyinzom Dhongdue
Email: kyinzom.dhongdue@amnesty.org.au

Table of contents

| | |
|--|----|
| About Amnesty International | 3 |
| Overview of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms | 4 |
| The operation and effectiveness of human rights legislation in other jurisdictions | 5 |
| Human rights protections in the Act | 9 |
| Amnesty International Australia's human rights survey | 13 |
| Recommendations | 13 |

About Amnesty International

Amnesty International is a movement of 10 million people which mobilises the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account.

We are impartial and independent of any government, political persuasion or religious belief and do not receive funding from governments or political parties.

Amnesty International is a proud people-powered movement founded on the work of volunteers and activists all around the country. More than 500,000 Amnesty International supporters live in Australia, including the roughly 50,000 in South Australia.

1 Overview of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms

1.1 Amnesty International Australia (AIA) welcomes the opportunity to provide this submission to the Inquiry into the potential for a Human Rights Act for South Australia by the South Australian Parliament's Social Development Committee. We look forward to continuing our contribution to this Inquiry and would welcome future opportunities including participating in public hearings.

1.2 Human rights are the fundamental freedoms and protections that belong to everyone. Many of these basic rights and freedoms are not protected by law in South Australia. Currently, human rights in South Australia are protected through various laws, outlined in the Rights Resource Network SA's report *Designing a Human Rights Framework for South Australia* and found to be limited in scope and enforceability as well as lacking "any consistent framework or discourse to tie them together or to promote a broader community or public service understanding of their content and relevance to the lives of South Australians".¹ There are also mechanisms such as statutory commissions and office holders as well as the Charter of Rights and Freedoms, which are human rights statements and do not create legally enforceable rights. This piecemeal approach means some fundamental rights are protected, but many others are not.

1.3 In the Law Society Bulletin, December 2023, Dr Sarah Moulds, senior lecturer in law at the University of South Australia and co-founder of the Rights Resource Network SA, wrote:

"South Australia is presently in a black hole of rights scrutiny. Regardless of whether or not they are urgent, bills in the South Australian Parliament are rushed through without any systematic scrutiny of their rights impact on parts of the population. We have no explanatory memoranda to set out the aims of bills. We have no statements of compatibility which require the executive to turn their minds to how a bill engages with common law rights or internationally recognised rights."

1.4 Human rights groups including Amnesty International sounded the alarm when the *Summary Offences (Obstruction of Public Places) Amendment Bill 2023* was rushed through the Parliament. The law unfairly restricts people's rights to freedom of expression and assembly. It has a chilling effect on the right of citizens to peacefully protest and on South Australia's democracy. The fact that a Bill restricting people's fundamental human rights was rushed through Parliament, and became law with no scrutiny of its impacts on human rights, demonstrates the problems with South Australia's current mechanisms for protecting human rights.²

1.5 Amnesty International Australia believes that legislating overarching human rights protection in a Human Rights Act or Charter is the most important step to promote and protect human rights in South Australia. The certainty and clarity provided by one overarching document

¹ Rights Resource Network SA submission: Potential for a Human Rights Act for South Australia
https://assets.nationbuilder.com/hra4nsw/pages/58/attachments/original/1706574383/RRNSA_Sub_Potential_for_a_HRA_for_SA_-_21_Dec_23.pdf?1706574383

² Civil society condemns South Australia's anti-protest bill
<https://www.amnesty.org.au/civil-society-condemns-south-australias-anti-protest-bill/>

containing all human rights protected in South Australia would greatly assist public authorities in respecting human rights.

1.6 A Human Rights Act will help prevent human rights abuses by requiring public authorities to consider human rights when passing laws, making decisions about policies, and delivering services. It would provide a range of enforceable remedies for human rights breaches and enable everyone to seek justice if their rights have been violated.

1.7 Three states and territories have passed Human Rights Acts or Charters; the ACT in 2004, Victoria in 2006, and Queensland in 2019. This submission will share some case studies demonstrating the positive difference these laws have made in protecting the rights of those living in these jurisdictions.

1.8 Along with the Australian Human Rights Commission and civil society partners including the Human Rights Law Centre, Amnesty International Australia has long advocated for enacting a federal Human Rights Act to protect the rights of all people, and provide avenues to seek justice if people's rights are breached. In our submission to the ongoing Parliamentary Inquiry into Australia's Human Rights Framework, Amnesty International supported the Commission's proposed model for a federal Human Rights Act, which builds on the recommendations contained in the 2009 report by the National Human Rights Consultation Committee (NHRCC), chaired by Fr Frank Brennan SJ.³

1.9 Amnesty International Australia acknowledges the great work by the Rights Resource Network SA over many years, bringing together experts and advocates in designing a Human Rights Framework for South Australia, clearly articulating "*South Australia needs a Human Rights Framework, including a Human Rights Act, to secure the dignity and equality of all South Australians and to facilitate our active participation in the democratic life of our State*".⁴ We value the expertise they bring to bear on this issue and endorse the recommendations in their submission to the SA Inquiry into Potential for a Human Rights Act for South Australia, which has addressed all the terms of reference.⁵

2 The operation and effectiveness of human rights legislation in other jurisdictions

2.1 The ACT, Victoria and Queensland have passed Human Rights Acts or Charters concerning the actions of those state's public authorities that protect the human rights of people in these states.⁶ These Acts are dialogue models that require public authorities to consider human

³ National Human Rights Consultation Report

<https://alhr.org.au/wp/wp-content/uploads/2018/02/National-Human-Rights-Consultation-Report-2009-copy.pdf>

⁴ Designing a Human Rights Framework for South Australia

https://www.rightsnetworksa.com/_files/ugd/8cf77c_33045f4455014d5aa55dc22c40a39d92.pdf

⁵ Submission: Potential for a Human Rights Act for South Australia

https://assets.nationbuilder.com/hra4nsw/pages/58/attachments/original/1706574383/RRNSA_Sub_Potential_for_a_HR_A_for_SA_-_21_Dec_23.pdf?1706574383

⁶ Human Rights Act 2004 (ACT) <https://www.legislation.act.gov.au/a/2004-5>, Charter of Human Rights and Responsibilities Act 2006 (Vic),

<https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/015>, Human Rights Act 2019 (Qld) <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2019-005>

rights when making decisions and to act compatibly with the rights contained in the Act. These Acts and Charters require that new laws must be assessed in Parliament against human rights standards. In some circumstances, they allow governments to limit or restrict human rights. They also give people the power to take action if they believe the public authorities have not acted compatibly with the Act, with a focus on complaints, although the exact mechanisms differ in each State and Territory. Courts are required to interpret consistently with human rights.

2.2 The Human Rights Charter Coalition's 101 Cases report demonstrates the difference these Acts have made in people's lives.⁷ They put human rights at the heart of decision-making, ensure that the actions of public authorities are guided by human rights, and in doing so, helped to prevent human rights abuses. They have also empowered people to take action to realise their rights.

2.3 The rights they all protect include the right to equality before the law, right to life, right to protection from torture and cruel, inhuman or degrading treatment or punishment, freedom from forced work, freedom of movement, right to privacy and protection of reputation, freedom of thought, conscience, religion and belief, freedom of expression, right to peaceful assembly and freedom of association, right to protection of families and children, right to take part in public life, cultural rights including distinct Aboriginal and Torres Strait Islander cultural rights, property rights, right to liberty and security of person, right to humane treatment when deprived of liberty, right to a fair hearing, certain rights in criminal proceedings, the right not to be punished more than once, and protection from retrospective laws.

2.4 The right to education is protected in the ACT and Queensland Human Rights Acts. The right to work and related workplace rights are protected in the ACT Act. The right to access health services is protected in the Queensland Act. The ACT became the first jurisdiction in Australia in 2023 to include the right to a healthy environment in its Act.

2.5 Victoria's Charter does not protect economic, social, and cultural rights derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is both inconsistent with international law and presents issues for the efficacy of the Charter, as human rights are equal in nature, indivisible, mutually reinforcing and best realised when applied together.

2.6 The Victorian Charter's limitations clause, s7(2), applies to all rights, including those under international standards no derogations are permitted, such as the right to recognition of equality before the law and protection from torture, cruel, inhumane, or degrading treatment.

2.7 The Queensland Act and Victorian Charter do not create independent causes of action for human rights. Rather Charter claims must be 'piggybacked' on another cause of action. This limits the effectiveness of parties to be able to enforce their human rights. The ACT Act does provide a freestanding cause of action. Legal action is also only available in the state's Supreme Courts, which is not accessible, or appropriate, for many complaints.

⁷ Charter of Rights: 101 cases
<https://charterofrights.org.au/101-cases>

2.8 Under these Acts and Charters, people cannot receive compensation if their rights are breached, except in limited circumstances, such as the right to compensation from wrongful conviction in the ACT.

2.9 Amnesty recommends that the Acts consider expanding the rights protected to include rights articulated in the ESCR, such as the right to housing, health, and education, if they are not currently protected, as well as the right to a healthy environment. States should also consider amending limitations clauses, so it is clear what rights are *jus cogens* and cannot be limited, if this is not clear. States should also ensure that human rights complaints can create an independent cause of action, and that compensation is available as a remedy, if appropriate.

2.10 Nevertheless, as demonstrated below, these Acts and Charters have made a difference in people's lives, as demonstrated below. They have changed the culture of decision-making by public authorities, centering human rights in decisions. They have allowed people to challenge injustice when their rights are breached and receive remedies for the breaches.

2.11 Today, there are active campaigns in South Australia, New South Wales, Western Australia and Tasmania for Human Rights Acts to protect human rights in law.

Case studies from ACT, Victoria and Queensland

Australian Capital Territory Human Rights Act 2004

2.12 The ACT Human Rights and Discrimination Commissioner raised concerns with the ACT Education and Training Directorate about its policies to charge certain international students to attend ACT public schools. International students affected by these policies included children and young people granted refugee status, and those seeking asylum. The Commissioner worked with the Directorate over two years to develop policies and procedures that met the obligation to *protect* the right to education in the ACT Act, including policies confirming that ACT public education is free for asylum seekers.⁸

Victoria Charter of Human Rights and Responsibilities Act 2006

2.13 The Victorian Government developed and published an 'LGBTIQ inclusive language guide' for the Victorian Public Service explaining how to use language respectfully and inclusively when working with, and referring to, LGBTIQ people. The Guide notes Victorian public authorities' obligation under the Charter of Human Rights and Responsibilities to act in ways that are compatible with human rights.⁹

2.14 Organisations supporting people experiencing family violence have used the Charter to educate clients about their rights. Workers at these organisations have expressed that women are surprised to hear that they have a right to live free from violence, alongside other human rights. Workers are able to refer to laws and policies that protect these rights.¹⁰

⁸ ACT Human Rights Commission Annual Report 2013-14

⁹ 2019 Report on the Operation of the Charter of Human Rights and Responsibilities

¹⁰ Western Region Health Centre and Women's Health West, Submission to the Review of the Victorian Charter, 2011

Queensland Human Rights Act 2019

2.15 The Office of the Public Guardian used the Queensland Human Rights Act to ensure siblings in family-based care were able to communicate regularly. The siblings had been placed with the same family, but one was moved, and consequently, the siblings did not have regular contact. The Public Guardian lodged a formal complaint that highlighted how this breached the children's human rights.¹¹

2.16 Tenants Queensland used the Act to help a single mother who had experienced domestic violence to avoid eviction. The tenant's housing provider had sought to terminate her lease for serious breaches caused by her ex-partner who refused to leave the premises. Tenants Queensland assisted the mother to draft a letter of complaint under the Human Rights Act, which led to the housing provider withdrawing the application for termination.¹²

2.17 An Aboriginal man requested a Magistrate Court in country Victoria to transfer his criminal charge to a Koori court. When the Magistrate Court refused, on the basis of the Magistrate's understanding of the "proper venue principle" where a case is to be heard at the venue closest to the place where the offence was allegedly committed or the place of residence of the defendant, the Aboriginal man appealed the decision on the ground that his cultural rights and right to equality as guaranteed under the Charter were not properly considered. The Supreme Court found that the Magistrate Court erred by giving primacy to the proper venue principle and should have considered the Aboriginal man's rights as the Charter requires that all statutory provisions be interpreted in a way that is compatible with human rights so far as it is possible to do so consistently with their purpose. The magistrate's decision was overruled, allowing the Aboriginal man to have a different Magistrate to consider his transfer request.¹³

¹¹ The First Annual Report on the Operation of Queensland's Human Rights Act 2019-20

¹² The First Annual Report on the Operation of Queensland's Human Rights Act 2019-20

¹³ 2018 Report on the Operation of the Charter of Human Rights and Responsibilities, *Cemino v Cannan* [2018] VSC 535

3 Human rights protections in the Act

3.1 Amnesty International supports the “dialogue model” proposed by the Australian Human Rights Commission (Commission). Similar models are found in the United Kingdom, New Zealand, and in the three Australian States and Territories that have legislated Human Rights Acts or Charters.

3.2 This model preserves Parliamentary supremacy, focusing on a formal ‘dialogue’ between authorities who share responsibility for respecting and protecting human rights. A dialogue model requires authorities including Parliament to consider human rights at the early stages of the development of law and policy.

3.3 Amnesty recommends that the Human Rights Act incorporates all the rights contained in the Commission’s model; those in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the overarching principles derived from the thematic treaties relating to particular subsections of the population, such as children (Convention on the Rights of the Child/CRC) and persons with disability (Convention on the Rights of Persons with Disabilities/CRPD) as well as principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

3.4 A Human Rights Act should contain, as proposed in the Commission’s model, the right to recognition and equality before the law and freedom from discrimination, to life, to protection from torture and cruel, inhuman or degrading treatment, the protection of children, protection of families, the right to privacy and reputation, to freedom of movement, freedom of thought, conscience, religion and belief, peaceful assembly and freedom of association, freedom of expression, take part in public life, right to liberty and security of person, humane treatment when deprived of liberty, the rights of children in the criminal process, the right to a fair hearing, rights in criminal proceedings, the right to compensation for wrongful conviction, the right not to be tried or punished more than once, the right to not be subject to retrospective criminal laws, freedom from forced work, cultural rights, the cultural rights of First People, the right to education, to health, to an adequate standard of living, to a healthy environment, to work and other work related rights, and to social security.

3.5 The Commission has proposed a narrower articulation of economic, social, and cultural rights than those contained in the ICCPR. This approach recognises that courts are not always best placed to realise these rights, rather their realisation should happen when public authorities consider human rights, and consult with impacted communities, while decisions are being made about laws, policies, and the delivery of services. However, this does not mean there is not an obligation to protect, respect, and fulfill these rights. Human rights bodies have repeatedly recognised the need for states to take action to ensure the realisation of these rights. In the Commission’s model, economic, cultural and social complaints can lead to a cause of action if these rights are breached, in line with similar approaches in Queensland and the United Kingdom.

Limitations clause

3.6 A central tenet of human rights is there is no hierarchy of rights. They co-exist, intersect and come with inbuilt limitations to accommodate the protection of other rights. A comprehensive Human Rights Act should include a limitations clause to govern when limitations on human rights are permitted, to ensure an appropriate balance of rights where rights compete.

3.7 The clause should allow certain rights to be limited in accordance with strict criteria. Such a clause must specify that any limitations on rights are reasonable, proportionate, in accordance with the Siracusa principles, necessary to protect another right, and to consider the nature of the right, the purpose of the limitation, the extent of the limitation, whether the limitation achieves the purpose, whether there are other, less restrictive measures, to achieve the purpose, the importance, whether there are safeguards or controls over the means adopted to achieve the purpose.

3.8 The clause should also specify rights that cannot be limited, jus cogens in international law; freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from forced work, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal laws and the right to recognition before the law.

3.9 This clause will guide public authorities when faced with decisions to limit human rights, and to resolve issues of competing rights. It would enable a holistic understanding of when and how competing rights can be addressed so that everyone understands how and when rights can be limited.

Interpretation clause

3.10 A Human Rights Act should include an interpretation clause to enable the judiciary to interpret rights in the Act, and the compatibility of federal laws, policies, and services, with human rights. The judiciary would be able to issue a declaration of incompatibility for any inconsistencies concerning laws, respecting Parliamentary supremacy.

3.11 The clause should prescribe that courts are to prefer an interpretation consistent with international human rights instruments by courts, but also by Parliament and the Executive, as proposed by the Commission.

3.12 The clause should include an interpretation in accordance with UNDRIP where the rights of First Nations people have been impacted. Instruments concerning certain groups, namely the Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Rights of the Child (CRC), Committee on the Elimination of Racial Discrimination (CERD) and Convention on the Elimination of All Forms of Discrimination against Women, should be considered in the interpretation of rights that concern these groups.

Positive duty

3.13 The model proposed by the Commission places a positive duty on public authorities to properly consider human rights when making decisions, and to act compatibly with human rights. This model would embed human rights considerations at all stages of public decision-making. Public authorities would be required to give proper consideration to human rights in decision-making, and by doing so, this positive duty should prevent potential human rights abuses. If, when considering human rights in accordance with the positive duty, a public authority realises that this decision will impact people's human rights, and makes changes accordingly, the duty will have prevented a human rights abuse. The duty should thus create cultural change within public authorities.

3.14 Public authorities within the scope of this duty include government departments, agencies, offices, the police, and private business, non-government organisations, and contractors who exercise functions of a public nature.

3.15 A failure to consider human rights by public authorities when making decisions, or a failure to act compatibly with human rights, could be subject to mediation or a review by the courts.

Participation duty

3.16 The Act should also include a duty to participation duty drawn from principles in the CRC, CRPD and UNDRIP, that would require public authorities to consult First Nations people and communities, children, and people with disability, where the public authorities' decision would impact the rights of those communities. Participation should be active, free, meaningful, and accessible.

3.17 The participation processes for First Nations people should be facilitated in line with principles and standards in UNDRIP. The AHRC proposed model contains a requirement to list steps taken to ensure the participation of First Nations people in the Statement of Compatibility.

3.18 The duty would be to consult with as a group and as individuals if a decision would impact the rights of that individual. For example, for individual children the child should be consulted and have their best interests considered. The Commission has developed a set of guidelines that encompass key considerations for determining the quality of a general participation process. Guidelines can be referred to by the AHRC or a court when determining if there has been a breach.

Equal access to justice

3.19 Alongside the participation duty, the Commission's model proposes a duty to facilitate equal access to justice, in line with principles in UNDRIP, CRPD and CRC. This duty means public authorities will be required to take action to ensure people have equal access to the justice system through, for example, providing interpreters, disability support, and sufficient access to legal assistance.

3.20 We also suggest the South Australian Human Rights Act make clear who is responsible for upholding human rights, including explicit reference to the responsibility of companies in respecting human rights throughout their corporate activities, for example including an 'opt-in' clause for businesses and organisations to voluntarily accept responsibility to comply with the Human Rights Act. The Act may make reference to the UN's Guiding Principles For Business and Human Rights

Remedies

3.21 A Human Rights Act in South Australia must ensure people whose rights have been abused have access to effective, enforceable remedies. An Act should prescribe enforceable remedies where public authorities fail to consider, or act compatible, with human rights. All rights contained in the Act should give rise to a cause of action to courts and complaints bodies such as Human Rights Commissions that currently exist in the ACT, Victoria and Queensland.

3.22 South Australia should consider creating a similar Human Rights Commission, so that people, when their rights are breached, can make a complaint to this body who can provide a one stop shop for dispute resolution. Mediation is a low-cost means to achieve redress for human rights violations. Under this system, people would first make a complaint to the commission, and if that complaint fails to be resolved through mediation, or if mediation is inappropriate, then the complainant could make an application to the relevant court.

3.23 People should be able to raise all rights in the Act in administrative review processes, and other legal proceedings. Amnesty recommends that an individual should be able to instigate an independent cause of action against a public authority for a breach of the human rights contained in the Act.

3.24 Remedies should be available to people whose rights have been breached. These remedies should include injunctions, orders requiring actions, and setting aside administrative decisions. If a complaint is taken to court, the court should be able to provide the usual suite of remedies including monetary damages, and the remedy should be at the discretion of the court.

3.25 A Human Rights Act would also be educational as it clearly states all rights in one document for everyone in South Australia. By requiring public authorities, courts and Parliament to refer to the Act, greater public awareness is drawn to the rights and freedoms of all.

3.26 While an overarching Human Rights Act will benefit all people in South Australia, it will be a powerful tool for the most vulnerable members of the community to ensure their rights are protected. The current lack of strong legal human rights protections affects people who experience disadvantage, marginalisation and discrimination the most.

4 Amnesty International Australia's human rights polling

4.1 Amnesty International Australia's annual human rights survey has consistently shown that awareness of which rights are currently protected under Australian law remains poorly understood. 55% of those surveyed believed Australia has a Human Rights Act, demonstrating a significant misunderstanding in the public's knowledge of human rights protections in Australia. When informed Australia does not currently have a Human Rights Act, support for its introduction is strong, 75% expressing support, 3% opposing and the remaining unsure or uncommitted.¹⁴

4.2 For supporters, the Human Rights Act is seen as a fundamental part of any democracy to protect vulnerable people and provide simple standards around human rights. Other reasons for support focussed on themes of equality, fairness, inclusivity, increased freedoms and safety. Knowing that Australia is the only Western democracy without an Act again bolsters the case for its introduction: 60% of the sample become more supportive when they know this.¹⁵

4.3 Right to privacy, right to free, or low-cost healthcare, right to work and to equal pay for equal work, freedom of speech and rights of children are personally of the highest importance to the respondents. Those with disability, children and older people were seen as the groups in need of most protections when it came to human rights.¹⁶

5 Recommendations

5.1 Amnesty International Australia recommends that the Parliament of South Australia:

- Enacts a state Human Rights Act so values of fairness, respect, equality, and dignity are at the heart of government laws, policies, services, and decision-making in South Australia, and so that everyone understands their rights and have avenues for redress when their rights are breached.
- Ensures that the Human Rights Act incorporates all the rights guaranteed under the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the overarching principles derived from the thematic treaties relating to particular subsections of the population, such as children (Convention on the Rights of the Child/CRC) and persons with disability (Convention on the Rights of Persons with Disabilities/CRPD) as well as principles from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

¹⁴ Amnesty polling: Human Rights Act

<https://drive.google.com/file/d/14x32a63PKS6G50JAGO5Mybyeb3bmnB9S/view?usp=sharing>

¹⁵ Ibid

¹⁶ Ibid