

Constitutional and legislative framework



Australian
Human Rights
Commission

Australia's third UPR | 2021

Key issue – Positive human rights protections at a federal level

While some of our international human rights commitments have been enshrined in domestic law, many implementation gaps remain.

Since the last UPR, one Australian state, Queensland, has enacted a human rights act enshrining 23 rights in law. There are now three states or territories who have legislated protections to ensure human rights are considered by parliament, courts and public entities in decision making processes.

Australia does not have a federal Human Rights Act meaning that many fundamental human rights protections are not fully protected in Australia.

There are minimal protections in place to ensure that the government considers human rights as part of everyday law and policy making, and takes steps to prevent breaches before they occur. There are limited avenues to seek review of government decisions or actions that violate a person's human rights.

In recent years, migration and counter-terrorism legislation that conflict with human rights principles have been passed by Parliament.¹

Recommendation

Government ensure that Australia's international human rights obligations are comprehensively incorporated into law at the federal level

Key Issue – Parliamentary scrutiny against human rights standards

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), all legislation must be accompanied by a statement of compatibility, identifying any limitations on human rights and fundamental freedoms. This puts the human rights impact of legislation in front of politicians when they consider legislation. However, the effectiveness of this process depends on the quality of statements, their comprehensiveness, and the attention that is paid to them.

The [Parliamentary Joint Committee on Human Rights](#) (PJCHR), and other parliamentary committees, can raise concerns when they believe that legislation places an unjustifiable limitation on human rights. However, legislators are under no obligation to consider the views of committees and address concerns.

The Commission is concerned that statements of compatibility have led to a 'culture of justification' that explains away breaches of human rights as reasonable and justifiable limitations on rights, rather than using the process to seek to improve the design of policy and legislation to minimise or avoid breaches of human rights.

Recommendation

Government train public servants to ensure that Statements of Compatibility are of a consistently high standard and ensure that the views of the PJCHR are considered prior to enacting legislation

Key Issue – Protections against discrimination

Australia's discrimination laws provide the main vehicle for implementing our human rights obligations. These laws are complex, do not provide comprehensive protection and are largely reactive, placing significant emphasis on individual complaints. There are limited regulatory mechanisms to ensure compliance and promote equality.

[The Commission considers](#) that an effective anti-discrimination framework should have more emphasis on prevention, measures that will assist duty-holders to comply with the law, and more effective enforcement mechanisms when they don't.

Recommendation

Government reform federal discrimination laws to ensure comprehensive protection and improve effectiveness



Key Issue – National coordination of human rights

Following Australia's second cycle UPR, the Government made a voluntary commitment to designate a standing national mechanism to strengthen Australia's engagement with UN human rights reporting known as the Standing National Human Rights Mechanism (SNHRM).

Under the SNHRM, in 2017 the Government published a monitoring website for UPR recommendations made during the second cycle where the Government outlines its position on each of the 290 recommendations. The SNHRM also holds regular meetings between Commonwealth Government departments, with the Australian Human Rights Commission participating on a by-invitation basis. NGOs are also invited for certain thematic discussions.

The SNHRM meets 3 to 4 times annually and has improved coordination across departments inputting into human rights treaty review processes over the past 4 years or so. However, to date, the SNHRM has not played a role in implementation or monitoring processes to 'follow up' on international recommendations. It does not have a forward looking or agenda setting role.

The SNHRM could have the potential to better follow up on recommendations if it were given a broadened mandate in the future.

Endnotes

¹ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* (Cth); *National Security Legislation Amendment Act (No. 1) 2014* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth).

Case Study: Australia's response to the Committee on the Rights of the Child

Australia appeared before the Committee on the Rights of the Child in 2012. The government formally responded to the Concluding Observations of the committee in January 2018 – six years later.

The Government next appeared before the Committee in 2019. To date, there has been no response to the Concluding Observations made in 2019. In correspondence from the Attorney-General, he indicated Australia's next periodic report is due by 15 January 2024 and that there are no other required measures in the intervening period.

Recommendation

Government commits to formally replying to all treaty body recommendations within 12 months with civil society engagement, targets and identifying responsible government agencies for implementation