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CASTAN
CENTRE FOR
HUMAN RIGHTS
LAW

Inquiry into Australia's Human Rights Framework

*Answer to Question on Notice from Senator Lydia Thorpe -
Parliamentary Joint Committee on Human Rights*

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1. The Castan Centre received the following question on notice from Senator Thorpe on 30 August 2023:

Your submission notes how QLD and VIC have drawn an ill-informed line between civil and political rights and economic, social, and cultural rights where things like cultural rights may be characterised as 'entitlements'. How will this interact with the obligations under UNDRIP, and how is the ACT jurisdiction addressing this differently to Victoria.

2. As outlined in Section 3.4 of our submission to the Inquiry,¹ the Castan Centre considers that there is no basis for the drawing of an artificial distinction between civil and political rights (or so-called 'negative' rights) and economic, social and cultural rights (or so-called 'positive' rights). This is because all human rights are 'universal, indivisible and interdependent and interrelated'.²
3. Regrettably, however, existing state and territory human rights instruments in force in the Australian Capital Territory (**ACT**), Victoria and Queensland protect mainly civil and political rights, with some notable exceptions in the ACT Human Rights Act (the right to education and right to work and other work-related rights),³ and the Queensland Human Rights Act (the right to education and the right to health services). ACT is preparing to introduce another economic, social and cultural right, the right to a healthy environment, into the ACT Human Rights Act.
4. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* was adopted by the UN General Assembly in 2007.⁴ It is 'the most far-reaching comprehensive instrument concerning indigenous peoples, elaborated, and approved as a result of nearly three decades of active engagement of indigenous leaders within the United Nations system'.⁵ The UNDRIP reaffirms and illuminates international human rights law as it relates to Indigenous peoples. While it is not binding international law, its formal endorsement by a majority of Member States of the UN lends it significant normative weight. Australia formally supported the UNDRIP in 2009, despite initially not supporting the Declaration.⁶
5. The relationship between the UNDRIP and other human rights, including economic, social and cultural rights, is a complex one. Central to understanding this relationship is Australia's international legal obligation to respect, protect, and fulfil *all* human rights to which it has agreed to be bound.⁷ As we explain in our submission:

¹ Castan Centre for Human Rights Law, Submission No 160 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (July 2023) 11-15 ('Castan Centre Submission No 160').

² *Vienna Declaration and Programme of Action*, UN GAOR, UN Doc A/CONF.157/23 (12 July 1993) para 5.

³ *Human Rights Act 2004* (ACT) s 27A-27B.

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2008, adopted 13 September 2007) ('UNDRIP').

⁵ Expert Mechanism on the Rights of Indigenous Peoples, *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practice and Lessons Learned - 2007-2017*, UN Doc A/HRC/36/56 (7 August 2017) para 3.

⁶ Australian Human Rights Commission, 'Implementing UNDRIP' (Factsheet, 2021) <https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf>.

⁷ Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (Oxford University Press, 2nd ed, 2019) 181; UN Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 18th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (adopted 29 March 2004) paras 15-20. For a further

The **obligation to respect** is negative in character, and requires Australia to refrain from interfering with a guaranteed right. For example, the right to freedom from torture requires Australian governments to refrain from carrying out torture. The **obligation to protect** is positive in character, and requires Australia to take action to protect people from interference of their human rights by their parties. For example, the right to enjoy the benefits of science requires Australian governments to adopt measures to prevent any person from interfering with this right, such as through the dissemination of pseudoscience. The **obligation to fulfil** is also positive in character, and requires Australia to create the legal, administrative and procedural conditions for the enjoyment of human rights. For example, the right to health requires Australian governments to establish and maintain a public health system that is accessible and well- functioning. For Australia to fulfil this tripartite obligation, Australia must have a mechanism through which human rights can be protected and infringements of human rights can be scrutinised and remedied.⁸

6. We do not foresee that key rights of the UNDRIP (namely, the right to self-determination and the right to free, prior and informed consent) will be in conflict with other rights, including economic, social and cultural rights. Rather, the UNDRIP rights would inform the process by which human rights are realised. For example, under a Federal Human Rights Act, decisions by public authorities concerning healthcare will engage the right to health (an economic, social and cultural rights); and where that decision affects First Nations peoples, it will also simultaneously engage rights under the UNDRIP; and where that decision involves partnerships with local communities and community-controlled health organisations, it will engage the right to self-determination (a right under the UNDRIP which is a civil and political right). The obligation on public authorities under a Federal Human Rights Act to give proper consideration to, and act compatibly with, human rights (see Section 3.7.1 of our submission) would require public authorities to act in a manner consistent with these rights and also to ensure that the rights were considered in the decision-making process.
7. Very few rights are absolute and situations engage human rights in intersecting ways. In circumstances where rights conflict, then limitations provisions (see Section 3.7.2) and rules governing the conflict of rights provided for in a Federal Human Rights Act would operate to enable decisions to be made about the relationship between rights.

explanation of the tripartite obligation in respect to economic, social and cultural rights see, *Kaplan v State of Victoria (No 8)* [2023] FCA 1092 [86] (Mortimer CJ).

⁸ Castan Centre Submission No 160 (n 1) 9.