



Proposal of a Human Rights Act for South Australia

16 February 2024

The Secretary
Social Development Committee
Parliament of South Australia
GPO Box 572
ADELAIDE 5001

Dear Secretary

Thank you for considering the Working Women's Centre SA's submission on the proposal of a Human Rights Act for South Australia.

The Working Women's Centre SA is a Community Legal Centre which is a gender focused, dynamic place for women to easily access timely and accurate workplace information, legal and industrial advice in their community.

The core practices of the WWC include:

- The advocacy and training work is informed by the issues experienced by the clients of the legal team. Patterns are identified in the legal and industrial work and the advocacy and education arms are used to address these issues at a systemic level.
- Working Women's Centre's consistently and unreservedly work in a women's centred approach, applying a gendered lens to work issues. WWC's are a safe place for women to gain support on issues such as domestic and family violence, sexual harassment, and assault.
- Women are supported and empowered through the legal and industrial work. Women are listened to and supported to make decisions that are right for them and are viewed holistically, with consideration given as to the intersectionality of vulnerabilities that often co-exist and create complex barriers in relation to their employment.
- Connection to grassroots movements. Communities are supported to address issues they are experiencing such as wage theft and exploitation. Connection is maintained with the community / women's service sector, unions, and campaigns to improve women's working lives.



South Australia has been a historically progressive right's-based state. Being the first state to legalise the formation of Trade Unions, the first state to pass the right to vote for women, including Aboriginal women, and the first state to decriminalise LGBTQIA+ people's autonomy over their own bodies. We think that a Human Right's Act is an opportunity to continue this progressive legacy.

The Working Women's Centre SA strongly supports this proposal for a Human Rights Act in South Australia, for the following reasons:

1. A Human Rights Act to enshrine basic overarching rights for all people in South Australia;
2. A Human Rights Act could, and we submit it should, set out a right of Aboriginal Peoples to self-determination and further, a right access to their social, financial, medical and political records held by the state.
3. A Human Rights Act to legislate a 'dialogue model', to ensure government decision makers consider existing rights when proposing law reforms. This would this promote integrity and democracy in South Australia and protect cohorts of people who are disproportionately prone to laws being made about them, such as people with a disability.
4. A Human Rights Act to facilitate state legislative reform to promote women's full participation in the workplace and to close existing loopholes within state legislation.

1. A Human Rights Act model

The Working Women's Centre SA submits that a Human Rights Act would benefit South Australia in a cohesive threefold way, as follows:

- A.** A Human Rights Act in South Australia could include an overarching right of a person. Examples of these overarching rights could include a right to expressing political opinion and a right to access personal records.
- B.** Once an overarching right is established within a Human Rights Act in South Australia, the Working Women's Centre SA submits that any Act should be designed to include a 'dialogue model'. This model would ensure that when laws and policy are formed, there would be an obligation on decision makers to consider any overarching right within any such Human Rights Act to ensure that laws are not made that are inconsistent with human rights, and whether any proposed law would extinguish an existing right.



An example of this in practice is in Queensland, under the *Human Rights Act 2019 (Qld)*, and introduction of a new law must include a Statement of Compatibility, which is a document that assesses any interaction and compatibility of the proposed law with human rights. This is the same mechanism that proposed laws at a federal level must address under the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*. A Human Rights Act in South Australia could facilitate holistic considerations and consultation of human rights in government decision making when designing new legislation, regulations, or policies.

- C. As a result of any overarching human rights enshrined in a Human Rights Act, in conjunction with the 'dialogue model', this would then facilitate future legislative reform within the state to align with human rights. The Working Women's Centre SA, as set out earlier in this submission, identifies areas for necessary law reform through the types of cases we see come through our legal work. A Human Rights Act in South Australia would be a catalyst for reforms to be made in relevant state industrial and discrimination legislation.

2. Rights set out for Aboriginal and Torres Strait Islander People

The historical systematic oppression of Aboriginal Peoples is prolonged by the absence of adequate human rights protections under South Australia's existing legislation. The current State discrimination legislation does not hold specific protections for Aboriginal people. The potential for a Human Rights Act for South Australia to promote the advancement of Aboriginal people could be established in the following ways:

a. Self Determination

Whilst it is best practice for decision makers to consider rights contained in United Nations Declaration on the Rights of Indigenous People, of which Australia is a signatory, in practical terms, these rights need to be adopted at a domestic level for effective and enforceable self-determination in matters that affect them.

Self-determination in this context refers to the ability to freely determine political status and freely pursue economic, social and cultural development and the right to preserve one's cultural identity. Employment is a significant contributor to one's economic and social participation.

If a Human Rights Act were to be formed in South Australia, which recognised Aboriginal right to self-determination, it would facilitate, through the threefold model, improved legislative rights to adequate, culturally sensitive consultation on matters that affect one's livelihood, such as in respect to one's employment. Examples of this could be an Aboriginal Person's request for cultural leave, and bereavement leave that aligns with relevant cultural sensitivities.



We recognise that the government has legislated a Voice to parliament however we suggest that a Human Right's Act would provide an overarching requirement for all laws to account for self-determination and could work in cohesion with the voice.

b. **Access to records**

Employees covered by the national workplace relations system have a legislated entitlement to request their employment records under section 535(3) of the *Fair Work Act 2009 (Cth)*. Any request should be actioned expeditiously, with a timeframe set in the Regulations stating a record must be made readily available on premises 3 business days after receiving the request or posted within 14 days of the request. ²

It is unacceptable that similar provisions do not apply to Aboriginal People when accessing their government records, which often may also relate to their historical employment.

The Tandanya Declaration is an international document that outlines key principle on decolonising archives. The Declaration was endorsed in Adelaide in 2019. Its key principles in relation to archive access include:

1. The need for indigenous peoples to gain a degree of control over the access to information;
2. The incorporation within legislation of indigenous data sovereignty, right of reply and redress;
3. Any access to records containing traditional indigenous cultural expression, sacred belief, social and legal knowledge should be in consultation with the affiliated community.

The Working Women's Centre SA submits that any Human Rights Act should include the right for Aboriginal people to have timely access to records that relate to them. Best practice treatment of indigenous archives needs to be formalised at a legislative level, to ensure Aboriginal people are not being systematically disempowered by the withholding of information that relates to them and their families.

For South Australia to take a meaningful step towards decolonising its historical treatment of Aboriginal people, and to move past the discriminatory idea that colonial systems know what is 'best' for indigenous communities, this barrier in accessing records needs to be addressed at a legislative level as a matter of priority.



3. Rights set out for people with a disability

The current process of law making in South Australia does not have a requirement for human rights to be taken into consideration when drafting such new laws. People with disabilities are disproportionately subject to laws being made about them, whether this be in healthcare, criminal justice system or within the NDIS framework.

In an employment context, an example of laws being made disproportionately about people with disabilities is in the *Supported Employment Services Award 2020*, which provides for employees with a disability to be paid below the minimum wage. This Award clearly does not align with international human rights of people with a disability, which protects the right to equal remuneration for work of equal value.

We do not suggest that a South Australian Human Rights Act would impact on federal awards, however any state-based awards and industrial decisions would need to adhere to any state Human Rights Act. This would prevent industrial instruments such as the *Supported Employment Services Award 2020* from being formed at a state level. This would ultimately set a higher standard of rights for state employees with a disability, which would be a stepping stone towards improved rights for people with a disability on a universal level.

Where vulnerable cohorts of people are disproportionately subject to laws being made about them, it is crucial that any proposed laws be subject to scrutiny and careful consideration of any interactions with human rights to ensure these laws do not overreach and prevent the equal participation of people with disabilities within society. This is an example where the 'dialogue model' would be highly effective to ensure laws are made consistently with a human rights approach.

4. Advancement of legislative reforms at a state level

A Human Rights Act will provide South Australia with a set of enshrined rights that are important to South Australians, which should be upheld at all times. Once South Australia has established these rights, they will assist us to ensure that any law reforms in the future would fit within this framework and would not depart from any legislated human rights framework.

For example, a right to just and favourable conditions of work in line with Article 23 of the Universal Declaration of Human Rights, and a right to a standard of living adequate for the health and well-being of himself and of his family in line with Article 25 of the Universal Declaration of Human Rights, would ensure any state law reform in the future would fit within this human rights framework.



The following case study (a real-life example of types of matters we see in our practice) provides an example of the practical approach of how this would affect women in the workplace:

Maggie is a woman working in the manufacturing industry. She is breastfeeding and makes a request for her breaks to be taken frequently so she can express often enough to avoid mastitis and inflammation of her breast tissue. Under the Fair Work Act (Cth) 2009, there is no positive obligation for an employer to provide lactation breaks, and therefore Maggie must express breastmilk in her regular breaks. Similarly, state industrial and discrimination laws do not provide for the right to take breaks. Maggie's relevant Award sets out that her employer can direct when breaks are taken to facilitate production timelines.*

If relevant discrimination and industrial laws took a human rights approach, this would afford safer working environments and facilitate equitable participation in the workforce for parents upon their return to the workplace from parental leave. Therefore, in Maggie's case, she would be afforded a safer working environment without the risk of mastitis or breast tissue inflammation arising as a result of directions received in her employment on when to take her breaks.

Should a Human Rights Act be formed, we submit that it should include:

1. An overarching right to just and favourable conditions of work in line with Article 23 of the Universal Declaration of Human Rights;
2. A right to a standard of living adequate for the health and well-being of people and their families in line with Article 25 of the Universal Declaration of Human Rights.

These overarching rights could operate as a catalyst for reforms to be made in relevant state industrial and discrimination legislation.

4.1 Closing of discrimination and industrial legislation loopholes

The following case study (a real-life example of types of matters we see in our practice) provides an example of where state discrimination and industrial laws require reform.



a) political opinion

Susan works in retail and one evening at a work drinks, her boss was highly intoxicated and expressed her support for the “No” vote in the referendum on a voice to parliament. Susan initially tries to change the subject without success, and then proceeds to express the opposite view, and that she supported the voice to parliament referendum. She is told by her boss that “anyone who voted “Yes” to the voice is sacked” or words to that effect.*

To make a General Protections claim in the Fair Work Commission on the grounds of discrimination, section 351 of the *Fair Work Act 2009 (Cth)* states that general protections do not apply to any action that is not unlawful under any anti-discrimination law in force in the place where action is taken. This means that where the federal anti-discrimination laws are silent on a particular act, it is dependent on the relevant state ant-discrimination laws as to whether someone can make a claim for general protections under the national industrial laws.

If Susan’s* situation was to have occurred in a jurisdiction with more favourable discrimination legislation, such as the ACT, where it is unlawful to discriminate against someone for expressing a political opinion under their *Human Rights Act 2004 (ACT)*, Susan would have had more options available to her, such as making a general protections claim in the Fair Work Commission, to pursue a claim against her employer for unfavourable treatment based on discrimination.

Should a Human Rights Act be formed, we submit that an overarching right to express political opinion should be included. This overarching right could be a catalyst for reforms to be made in relevant state industrial and discrimination legislation.

Conclusion

The Working Women’s Centre SA sees a practical approach in addressing the above issues would be to adopt a Human Rights Act in South Australia. An overarching right would support legislative reform in relation to employment and the closing of the current loopholes that exist in South Australia’s current discrimination framework.

We know that discrimination occurs in our society. This is made clear in our legal practice area at the Working Women’s Centre SA. Prevention of these behaviours at a legislated level is essential to minimise harm to vulnerable groups of people. Decision makers have the power to make meaningful change in these areas. The formation of a Human Rights Act in South Australia would guide decision makers to take a human rights approach when forming new laws and policies.



We recommend the following:

1. A Human Rights Act be enacted within South Australia to increase the rights of individuals;
2. That any Human Rights Act include a 'dialogue model' to anchor human rights in all proposed law reforms

The Working Women's Centre SA has focused this submission on employment as we are experts in this area, however, we acknowledge that any proposed Human Rights Act could, and we submit it should, encapsulate human rights beyond employment for people interacting with various areas of society. This may include housing, healthcare, goods and services, and education. Ultimately this would provide for the improved advancement of vulnerable people to have equal participation in all areas of society.

The proposal of a Human Rights Act has the potential to recognise the importance of consultation, prevention, and considerations for government to follow when making new laws and policy. This would ultimately promote democracy within South Australia and be a significant step forward in aligning our state laws with society's intolerance for discrimination in all forms and areas of society. This would take a proactive approach in minimising the harm to people as a result of experiencing discrimination, of which we see in our clients matters on a regular basis.

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