University of Sydney Policy Reform Project

Research Paper for NSW Council of Social Service: Use of human rights frameworks by national non-governmental organisations

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Authors: Ms Clarabel En Xin Chong, Ms Georgia Peters, Ms Disha Kouli and Mr Declan Sharp

Adviser: Dr Ihab Shalbak

Contact: Ms Nina Dillon Britton, Coordinator, Sydney Policy Reform Project <fass.studentaffairsandengagement@sydney.edu.au>

Table of Contents

About the Sydney Policy Reform Project 1

Copyright Notice 1

1. Executive Summary 2

2. Introduction and background 3

3. The use of HRFs within Australia and comparable jurisdictions 5

3.1 Australia 5

3.2 Victoria 7

3.3 Scotland 9

4. Limitations in the implementation of HRFs 12

4.1. Victoria 12

4.2. New Zealand 13

4.3. Scotland 16

5. Conclusion 18

References 19

About the Sydney Policy Reform Project

The Sydney Policy Reform Project ('Project') facilitates University of Sydney students to write research papers for policy organisations, and submissions to government inquiries, under supervision from University of Sydney academics. The Project is a volunteer, extra-curricular activity. The Project is an initiative of the Student Affairs and Engagement Team within the Faculty of Arts and Social Sciences, and the Division of Alumni and Development, at the University of Sydney. The Project is funded by a donor to the University of Sydney. Any inquiries about the Project or about this paper should be directed to the Coordinator, Ms Nina Dillon Britton, at the following email address: <fass.studentaffairsandengagement@sydney.edu.au>.

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1. Executive Summary

This submission examines existing academic literature on the use of human rights frameworks (HRFs) by national non-governmental organisations (NGOs). It compares the use of these frameworks in New South Wales (NSW) with similar jurisdictions, including the Australian state of Victoria (VIC) as well as New Zealand and Scotland.

This submission draws on Victoria, New Zealand and Scotland as comparable jurisdictions to NSW due to their similar level of economic development and the greater availability of academic literature on human rights as a result of having more active human rights organisations. This paper draws primarily on academic literature that describes and evaluates the use of HRFs using articles from journals such as The International Journal of Human Rights and the Journal of Human Rights Practice. Due to the limited academic literature available, grey literature was used to support descriptions and evaluate the use of human rights frameworks in these jurisdictions, particularly for NSW. For the purposes of this piece, HRFs are defined as a legally, politically, and morally binding set of principles for governments and/or their citizens.
The following were the findings:

1. NGOs can effectively cultivate a ‘human rights culture’ by localising human rights language, making it relevant for the everyday lived experience of ‘rights holders’.
2. There are gaps in the design of the human rights framework where specific issues such as domestic violence may not be considered human rights issues.
3. The socio-political realm of the state, accessibility of funding and resources to adopt a human rights-based approach plays a crucial role in determining the success of implementing the framework in non-governmental organisations.

2. Introduction and background

First and foremost, it is crucial to emphasise that human rights are often defined in a variety of ways. They are typically understood as a set of moral and legal guidelines that promote and protect a recognition of shared values, identity, and the ability to ensure an adequate standard of living. Debate over the question of 'what is a human rights violation?' persists within the human rights literature because human rights are 'inherently political' and have 'come to mean very different things to different actors' (Gready and Phillips 2009, p. 2-3). Therefore, unpacking what constitutes effective human rights practice is latent with nuance.

For the purposes of this piece, we define a human rights framework (HRF) as a legally, politically, and morally binding set of principles for governments and/or their citizens. These principles have been developed in a range of international human rights instruments, most notably the 1948 Universal Declaration on Human Rights. A HRF differs from a human rights-based approach (HRBA). The latter refers to the realisation of human rights principles. Still, there is much variety in what constitutes 'effective, transferable' human rights practice (Gready & Phillips 2009, p. 3). In the remarks that follow, we use these terms interchangeably.

The predominant human rights organisation in NSW is currently the Anti-Discrimination NSW (ADNSW), a government business unit which "strives to eliminate discrimination by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change" (ADNSW, 2020, p. 14). In the 2019-2020 year, 1,005 complaints were finalised, yet less than 20% of these were settled, with the remaining complaints either being referred to the NSW

Civil and Administrative Tribunal, declined, withdrawn or abandoned (ADNSW, 2020, p. 29). Disability discrimination is most commonly reported, accounting for 27.8% of complaints in the 2019-2020 year, followed by racial discrimination (15.6%), victimisation (11%) and sexual harassment (8.6%) (ADNSW, 2020, p. 29).

The ADNSW seeks to eliminate discrimination in NSW by answering enquiries, investigating and conciliating complaints, raising awareness about the impacts of discrimination, granting exemptions to the Anti-Discrimination Act 1977 (the Act), and providing advice to the government (ADNSW, 2020, p. 14). However, the ADNSW has limited jurisdiction as their ability to accept claims is limited by the areas set out in the Act (ADNSW, 2020, p. 14).

The structure of the Act is confusing even for legal practitioners as it establishes separate Parts for different attributes, such as racial discrimination and sexual discrimination, each with its own areas where discrimination is prohibited and its own exceptions (PIAC, 2021, p. 14). This results in the Act's complex structure, as well as its inconsistencies and idiosyncrasies, reducing its accessibility and usefulness. This is particularly problematic as typically ADNSW receives enquiries from individuals, who lack the technical knowledge to understand such documents.

The Act is also limited in its coverage. This includes being outdated in its use of language, for example the use of the term 'homosexuality' fails to protect bisexual people (PIAC, 2021, p. 4); its coverage of public life as the Act only protects individuals against discrimination in specific locations such as the workplace or in accommodation (PIAC, 2021, p. 7); and its failure to impose a positive obligation on employers,

educators, providers of goods and services and others to support the equal participation of people with disability (PIAC, 2021, p. 6). Of all enquiries submitted in 2019-2020, approximately 37% were not covered by the Act, including issues pertaining to religion, criminal record and other workplace grievances not related to unlawful discrimination or harassment (ADNSW, 2020, p. 23).

Furthermore, the ADNSW has no particular focus on community groups. In the 2019-2020 year, 90% of enquiries were submitted by individuals (ADNSW, 2020, p. 22), and the ADNSW does not specify that community organisations are in a position to submit complaints, nor whether community organisations are included in its activities. Given the inconsistent application of HRBAs among NGOs in NSW, there is an urgent need to evaluate the ways in which this can be improved. This piece evaluates the ways in which HRBAs are implemented by NGOs in comparable jurisdictions in order determine best practice.

3. The use of HRFs within Australia and comparable jurisdictions

This section identifies and describes the implementation of HRFs by national NGOs across various jurisdictions.

3.1 Australia

Gready and Phillips (2009, p. 1) argue that '[as] the practical application of the human rights framework has grown exponentially over the last decade, so has the academic interest in this field'. Often human rights research places a HRF at the centre of research questions, but the research design and process fails to incorporate these

human rights concepts (Arstein-Kerslake et al. 2019, p. 594). In particular, developing suitable research methodology to evaluate the effectiveness of implementing human rights—especially in the context of the Australian criminal justice system—is important to understanding how best to enhance social impact and community inclusion through promoting research that is empowering and transformative to Australian communities.

For example, using participatory methods and emancipatory principles in order to create a new human rights-based research methodology is key to supporting the rights of people with disabilities. Arstein-Kerslake et al. (2019, p. 591) suggest using a social model of disability, which "treats all individuals as equal and identifies socially constructed barriers to the realization of equality", in order to prevent disabled people from being treated as 'objects' of research and to instead promote equality for people with disabilities.

Arstein-Kerslake et al. (2019) suggest the following principles of participatory human rights-based research methodology, which are broad enough to be used across various disciplines and fields:

1. The relevant community should lead or guide research, either through involvement in forming the base research questions or by being in leadership positions throughout the research process.
2. Researchers should aim to present solutions to a social problem and use their findings to promote a social justice cause, and not simply provide commentary on social injustices.

3. Where researchers identify that a certain right is not being realised to a particular community, recommendations for reform should be made.
4. Research findings should be made available and accessible to the relevant community.

3.2 Victoria

The Victorian Charter of Human Rights and Responsibilities Act 2006 protects ‘ordinary citizens' fundamental rights and freedom (Victorian Equal Opportunity & Human Rights Commission 2008, p.05) [VEOHRC]. The charter implements a HRBA in community organisations as the work of these organisations are already based on ‘human rights and social justice principles’ (VEOHRC 2008, p.06). The HRF enables, empowers and delivers ‘…sustainable services that are respectful of the inherent dignity of individuals’ (VEOHRC 2008, p.06). The introduction of the charter obliges the community organisation to abide by and conduct processes according to the framework. Additionally, the Victoria government monitors and measures the community organisations effectively on work via ‘human rights compatibility lens’ (VEOHRC 2008, p.08). The following are the implementation tools that can help organisations to embed human rights approaches in their operations (VEOHRC 2008, p. 18-45):

1. **Human Rights Impact Assessment** – To assess the human rights impact of the organisation
2. **Human Rights Matrix** – To help identify and map the ‘policies and practice against the individual rights in the Charter’

3. **PANEL Matrix** – To help organisations identify risks, priorities and opportunities concerning specific rights and areas of operation.'
4. **Human Rights Awareness Checklist** – A checklist to identify whether human rights components have been applied to the organisations
5. **Stakeholder Capacity Checklist** – To identify the capacity of the 'stakeholders' to strategise and identify barriers to meeting the obligations
6. **Dignity in Care Checklist** – The list of crucial operational processes to deliver dignity in care
7. **Lines of Enquiry Checklist** – To help organisations improve their 'complaint handling processes'
8. **Contractor/Partner Checklist** – To help organisations identify whether the external partners have complied with the HRF.

The Victorian Council of Social Service (2010) report outlines and assesses the successes and areas of improvement of community sector organisations implementing the HRF. One of the case studies in the information focuses on how third sector organisations such as NGOs under the Victorian Charter 2008 can empower civil society. The Centre for Human Rights & Social Justice provides advocacy services to 'individuals and communities under the 'Victorian Charter'; it ensures accountability so as to limit human rights violations. As a result, the case study of Women's Health Goulburn North East in 2008, 'Raped by a Partner: A research report' reflects how salient issues can be resolved by identifying that 'partner rape' is a violation of a women's human rights (Atkins & Gurner 2010, p.18). However, the 2010 Human Rights Charter survey revealed that the Aboriginal Community Controlled Organisations (ACCOs) had limited understanding, or were unaware of the existence,

of the charter. The survey reflects the minimal engagement between ACCO's and Victorian Government and other arms around the Charter. Hence, the Aboriginal organisations underwent a 'review process' to ensure that every Victorian has the basic rights to life – 'the right to adequate housing, health care, education and many other dimensions of life' (Atkins & Gurner 2010, p.12). Secondly, the Inner South Community Health Services (ICHS) have embedded the human rights charter principles in their organisation. The implementation of the charter has led to the creation of the 'Human Rights Action Group' among young, local activists to advocate and address human rights issues in the community (Atkins & Gurner 2010, p.18). The group promotes discussion of the human rights issues related to 'domestic violence, gender and healthy relationships' as well as the development of education sessions to deliver at school and 'alternative learning programs' (Atkins & Gurner 2010, p.18)

3.3 Scotland

In 2013, Scotland's National Action Plan for Human Rights (SNAP) launched, lasting four years with the plan to ensure human rights for all people in Scotland. The HRF implemented under this action plan by the Scottish Human Rights Commission (SHRC) is pertinent for NSW NGOs in both practical and political terms. The human rights-approach of the SHRC is carried out in the 'PANEL' principles:

Participation (of everyone in decisions which affect their human rights);

Accountability (of those responsible for the respect, protection and fulfilment of human rights);

Non-discrimination;

Empowerment (of rights holders to know and claim their rights);

Legality (an explicit application of human rights law and standards)
(SHRC 2021).

These principles have been implemented in the organisation's functions in relation to housing, poverty and health.

The SHRC's PANEL principles for human rights implementation were put into practice in a 2015-19 project concerning residents living in poor council-owned housing conditions. These homes had problems with dampness, mould and broken heating which were not being adequately addressed in line with human rights standards. The SHRC empowered people to know their rights and facilitated active participation through resident surveys, collaborative discussion of survey results and a presentation of findings to the community and Council (SHRC 2020a).

In the organisation's advocacy related to care homes, COVID-19 and the protection of human rights, SHRC employs 'legality' by centring the human rights obligations of care homes to protect vulnerable inhabitants. This approach places pressure on social services to conduct its affairs in line with the legal and procedural obligations required by law. It promotes responsibility and accountability for deaths preventable by the state and demonstrates the positive obligations of the state demanded by human rights in novel conditions, such as a pandemic.

In 2017-18, the Scottish Programme for Government announced that 2018 was Scotland's Year of Young People. This initiative was dedicated to the objective of making children's rights 'real' by highlighting the importance of incorporating children

and young people in the "implementation, monitoring and education of children's rights" into legislation (Gadda et al. 2018, p. 401). However, this participatory approach has limited success in the legal and practical implementation of children's rights (Gadda et al. 2018, p. 401). Byrne and Lundy (2018) propose a six-P framework to children's rights-based policy which goes beyond formalistic mentions of the *Convention on the Rights of the Child 1989* (CRC) and consultations with children on policies which concern their rights. The framework is as follows:

A. **Principles/provisions** of the CRC (Byrne & Lundy 2018) ;
    1. Process of children's rights impact assessment;
    2. Participation of children and young people;
B. Partnership;
    1. Public budgeting to ensure adequate resources;
    2. Publicity so that policies are known to children and young people

The six-P framework to children's rights-based policy is transferable to other human rights concerns. For instance, application of the framework for disability rights-based policy would entail:

1. Carrying out a disability rights impact assessment (process);
2. Meaningful involvement of people with disabilities in policymaking (participation and partnership);
3. Explicit spending on people with disabilities in which they are involved (public budgeting); and,
4. Accessible publication of policies (publicity) (Byrne & Lundy 2018, p. 368).

4. Limitations in the implementation of HRFs

4.1. Victoria

The Human Rights Charter of Victoria design is in accordance with the Victorian people's community values and ‘contemporary aspirations’ (William 2007, p.6). Despite the charter’s numerous advantages, the charter does have limitations. For example, the ‘law of abortion’ is categorised as a ‘legal debate and political matter’ instead of solving it by ‘judicial determination under the charter’ (William 2007, p.7). Rather than including human rights that concern areas of ‘food, housing, education and health’, the charter looks at ‘broad’ human rights that are commonly applied to everyone. Additionally, the Human Rights Charter 2006 Victoria does not act as a vital instrument in addressing ‘health and disability services’ (West et al. 2017, p.28). Disability Rights Promotion International conducted qualitative research using a human rights monitoring tool. The data reflected an ‘absence of human rights to health’ in the Victorian Human Rights Charter (West et al. 2017, p.37). Thus, individuals with disabilities continue to face discrimination within the health system. The charter applies to specific areas of human rights and only addresses violations within these areas.

Papoutsis (2017) explores the nexus of the HRFs and family violence in Victoria. In 2016, Victoria Police's Risk Assessment and Risk Management Report reported 76,259 instances of family violence, with 78% of the victims being female and 22% male. Although it is difficult to conclude that women are more often victims and men are more often perpetrators, this article focuses on case studies based on male perpetrators (Papoutsis 2017, p.3). Victoria has an act dedicated explicitly to concentrating on the challenges of family violence – ‘Family Violence Protection Act

2008'; however, it fails to recognise the human rights aspect of this problem. The 'Charter of Human Rights and Responsibilities Act 2006' implemented in Victoria is not used as an instrument to address family violence issues. Although the charter acknowledges the 'children's right to safety, including safety from all forms of violence' and inherent laws and campaigns exist, the solutions do not reflect a 'human rights discourse' (Papoutsis 2017, p.10). Article 18 in the UN Convention on the Rights of the Child states that both the parents should be responsible for co-parenting in raising the child. However, co-parenting is not possible in family violence when either one of the parents is the 'perpetrator' (Papoutsis 2017, p.10).

Additionally, the socio-political realm can act as a barrier to viewing family violence as violating human rights. There is no implementation of a 'human-centred approach' to address the needs and acknowledgement of domestic violence 'victim-survivors' (Papoutsis 2017, p.8). Given the gaps in the design and implementation of the Victoria human rights charter, there is a failure to recognise family and domestic violence as a human rights issue.

4.2. New Zealand

The two starting points of human rights in NZ are the Bill of Rights Act 1990 and the Human Rights Act 1993. The Human Rights Act 1993 does two important things: establishes the Human Rights Commission and various grounds of prohibited discrimination against a person. The Human Rights Act establishes the grounds of discrimination with regard to: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation. It then sets out how it is unlawful to discriminate

on these grounds against a person with regard to: employment, education, access to public places, provision of goods and services, housing and accommodation. The Human Rights Tribunal deals with complaints set out above from either the aggrieved person or the person about whom the complaint was made - and establishes whether there was a settlement of the complaint and whether the parties complied with it.

All bills are reviewed for consistency with the Bill of Rights Act before they are introduced into Parliament. If there is an inconsistency, the Attorney-General must inform Parliament. The courts have the implied authority under New Zealand law to make a declaration of inconsistency between new laws passed and the NZ Bill of Rights and the Human Rights Act. The interpretation of this power was set out in the case of *Moonen v Film and Literature Board of Review* [1999] NZCA 329 [17]-[20] by Tipping J, who stated that judges should ask themselves whether the provision 'constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society'. If the answer to this question is affirmative than the court may make a declaration of inconsistency. Since this time, the courts and tribunals have developed extensive jurisprudence on the area but a significant issue (Gerringer 2009) is that there are not sufficient remedies nor structured courses of action for claimants to bring an action. The process is ad hoc and can be considered a trade-off for individual justice. New Zealanders often may not know what sort of compensation is possible from a human rights claim (Gerringer 2009). This may lead to a lack of incentive to bring such a claim.

Fundamentally, there is an issue with NGOs operating in NZ given the population size and the significant coverage that the commission and the tribunal give for the

aggrieved. However, the NZ Human Rights Foundation provides private analysis and evaluation of NZ human rights issues. Their last significant review of NZ policy was in 2014, called the NZ Second Periodic Review. They recommended that the human rights commissioner appointment process be established in a legislative process with greater parliamentary involvement. They further suggested that the New Zealand Public Health and Disability Amendment Act (No 2) be repealed as it prohibited review by the NZHRC. In lieu of this example, the foundation noted that the two aforementioned acts are entrenched such that laws cannot have a privative clause excluding the ability for a person to seek remedy from the tribunal. Moreover, the foundation highlights that as part of the NZBORA, there is no entrenched procedure or remedy and recommends amendment to rectify this to both statutorily entrench the right of judicial review and remedies. Moreover, it was suggested in various examples including homelessness, childhood poverty and juvenile offending that supportive and proactive policies instead of punitive should be adopted. With regard to the former, instead of punitive legislation, the foundation suggested NZ 'adopt a national housing plan [that allows for] adequate infrastructure to meet the housing needs of all New Zealanders, including the most vulnerable groups' (NZ Foundation of Human Rights, 2014, p. 9).

This leads to the question of whether there is a possibility of incorporating economic and social rights through the courts. The legal profession often views human rights as its own domain and this may have created a blind spot in the largely successful system. Wilson and others discuss New Zealand's Compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it is a signatory. Given that NZ has tried to comply through administrative and social policies, the focus

for NZ has shifted away from legal rights in this area. This has led to a failure of the NZ legal system to capture and protect this area of human rights. A legalisation of the concept and framing of human right programmes has inhibited economic and social policies that will contribute to the ICESCR. Instead, it forces a system where change happens through claims - a negative reaction to a failure or absence of policy, where social and economic policies may be proactive. In a study of this dynamic Wilson, McGregor and Bell (2015, p159) concluded:

> *A review of the case law under the Human Rights Act suggests that until there is a clear statutory commitment to incorporate the Articles of the ICESCR into the NZBORA, it will be very difficult to pursue economic and social rights through the courts in New Zealand. It has become clear that the inclusion of the ICESCR into the NZBORA is necessary to ensure effective and sufficient compliance with the obligations so that citizens can claim full expression of their economic and social rights.*

4.3. Scotland

Non-state actors have become increasingly important for the implementation of international human rights norms within the state system of international politics (Tonkiss 2016). However, their funding - and by extension - autonomy and ability to function, is contingent on public and political support (Tonkiss 2016, p. 492; Samuels 2020, p. 712). In the UK, the post-Brexit political climate and financial austerity imposed by the Conservative Party, as well as their opposition to the *Human Rights Act 1998* poses a debilitating barrier to human rights protection (Bell & Cemlyn 2014; Daly & Connolly 2021; Daly 2021). Political hostility to rights has infiltrated community views of rights, with many viewing rights as a “cosmopolitan luxury for a metropolitan

elite… or a conspiracy to erode national values and destroy national identity" (Hopgood 2016, cited in Daly & Connolly 2021, p. 147). This is reinforced by misleading media coverage (Bell & Cemlyn 2014). The SHRC's advocacy for human rights in care homes during COVID-19 is limited in effectiveness for this reason. Setbacks that occur in these settings are often out of services providers control, since the realisation of these rights in healthcare settings depend on the availability of sufficient government resources (SHRC 2020b, p. 15). In an atmosphere of scepticism around human rights, these resources are unlikely to be available.

Relatedly, human rights implementation demonstrably falls short when disproportionate focus is dedicated to the empowerment of 'rights holders', rather than the obligations and capacity of the 'duty bearers' (Broberg & Sano 2018). For instance, the SHRC's housing project encountered insufficient communication from the Council which limited the change achieved by the advocacy of 'rights holders'. Accordingly, empowerment of 'rights holders' can only be achieved alongside 'duty bearers', using their power differently (SHRC 2020a, p. 36).

Social workers in Scotland have changed the theoretical outlook of their work from a psychological understanding to one based on developing political rights. In residential care, a children's rights framework frames children as right bearers who have the potential to exercise agency (Punch et al. 2012, p. 1252). However, in the fulfilment of everyday activities such as food practices, an incongruity between rights in theory and practice emerges. Agency over food practices is necessary to cultivate a safe living environment for children, as well as promote their right to self-determination. However, Punch et al. (2012, p. 1260) finds that if a human rights approach dominates

interactions rather than the building of relationships, it may be detrimental. In an interview with a staff member of a residential unit in Lifton, UK, this ambiguity is aptly stated: “(i)t’s this thin line between you have a right to be nourished and fed, but do I have a right to make sure you eat your food? Where does my right to make sure you’re fed stop and your right to refuse to eat begin and where’s that middle ground?” (Punch et al. 2012, p. 1254). Competing interpretations of rights by different groups point to the need to streamline standards and guidelines.

5. Conclusion

The Anti-Discrimination Act 1977 in NSW is limited in its ability to protect rights, as it places significant burden on the people who have experienced discrimination to make complaints to obtain a remedy, when there is often already an imbalance of power between the complainant and the respondent (PIAC, 2021, p. 13). Its ‘traditional’ approach to defining discrimination makes it difficult for individuals who have experienced discrimination to file a complaint and receive conciliation (PIAC, 2021, p. 5). Furthermore, enforcing human rights through the legal system poses challenges as it is difficult to define “where to stop protecting human rights” (Dickson 2011, p. 369) - that is, defining a clear set of guidelines to evaluate whether an individual has had their rights violated.

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