12

Human Rights

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INTRODUCTION

An occurrence of abuse, whether it be sexual, physical, emotional and/or psychological, between medical practitioners has immediate individual and collective impact. Providing adequate avenues for redress, as well as safeguarding workplaces and employment for practitioners, should be a priority in any instance where abuse has, or could, occur. The framework of human rights has the potential to add value to this endeavour. Having existed in many forms throughout history, human rights has developed into the commonly understood doctrine it is today and now permeates global discourse, featuring prominently in international, regional, and domestic laws and institutions.

Using the term 'instrument' to refer to various treaties, conventions, agencies, and institutions that operate within this framework, this chapter will begin with an examination of the core human rights instruments, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It is from these instruments that the specific rights which are arguably contravened in the instance of abuse between medical practitioners, such as the right to life, liberty and the security of person, freedom from torture and the right to physical and mental health, are articulated. The chapter will then consider particular international, regional, and domestic instruments stemming from these core instruments and the processes through which a rights violation can be alleged.

Perusing the strengths and weaknesses of the framework, it will be asserted that while there are limitations for what the human rights framework can offer an individual in terms of redress, the benefits on a collective measure are much greater. The human rights framework provides a common language, standards and processes that are understood globally. This allows for collective agitation on domestic, regional, and international levels which can result in real and substantial change such as through the implementation of standardised complaints procedures, unambiguous legislation, comparable penalties, and multilateral treaties. Utilising this framework in parallel with other redress schemes, such as legal criminal action, is

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therefore suggested to ensure the needs and desires of the individual survivor, as well as the needs of other practitioners and the wider society, are adequately addressed.

WHAT ARE HUMAN RIGHTS?

Systems of law throughout history have consistently featured, as stated by Geoffrey Robertson KC, 'the notion that individuals, wherever in the world they live, possess a few basic powers which no political order can remove'. (1) From the Code of Hammurabi to Magna Carta, religious texts to the Rights of Man, individuals have been afforded protection from the sovereign State, as well as their fellow citizens, concerning some areas of life. (2) The right to a fair and public hearing is arguably replicated from clause 40 of Magna Carta, 'to no man will we sell, to no man will we deny or delay justice or right', (3) while the right to private property can arguably be seen in the religious commandment 'thou shalt not steal'. (4)

The level of importance and respect granted to such rights has expanded over time. First formulated in the negative sense, that which an individual or the State was not permitted to do to another individual, the modern understanding of rights is often framed in the positive sense, that which the State must action in order to fulfil. (3) So too, what is recognised as a right has developed, with subjects previously considered to be privileges achieving rights status. These changes and fluctuations are clearly demonstrated in the experience of the last fifty years or so, with international human rights law transitioning from abstraction to a fully fledged area of law and expertise in its own right. (5)

This evolution of human rights has been accompanied by the debate around the universality of human rights. Are there rights that are automatically claimed by all individuals, and which cannot be abrogated? Are there rights that transcend culture, society, religion, and political structure? Human rights have been regularly criticised as a Western imperialistic notion that disregards the lived experiences of most of the global community. (6; 7) Proponents of human rights cite the commonality found in generally abhorred behaviours, such as murder, piracy and slavery, to bolster the argument in favour of universality. (8) This debate has prompted the creation of four schools of thought on the matter: the natural scholars (rights as given), the deliberative scholars (rights as agreed upon), the protest scholars (rights as fought for) and the discourse scholars (rights as talked about). (9)

This debate aside, it is inescapable that the human rights discourse has infiltrated the international, regional, and domestic spheres. Language concerning rights, and the subsequent protections that must be enacted to safeguard them, are prominent features of organisations, legislation, and treaties. (10) Whether or not individuals, institutions and/or States agree with the applicability, or even existence of certain rights, they are forced to engage with the notion. This forced engagement provides a unique opportunity for individuals to articulate their grievances using language

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that is widely understood and familiar. Such a position is useful when approaching an issue such as the topic of this book.

A final comment on human rights is necessary in the context of abuse between medical practitioners. While it is acknowledged that survivors of such abuse are diverse and include cis-gender males, the overwhelming majority of survivors identify as women, a reality that cannot be ignored and is reflected in the language and focus of many of the instruments canvassed in this chapter. This should not be interpreted to mean that other gender identities should not be afforded similar protection, nor that they escape the abuse that is the topic of this book; rather, such a derogation reinforces the fact that those who identify as women have historically been, and continue to be, targeted at a detrimentally higher proportion than other identities. Nevertheless, as the frameworks offered by human rights instruments are predicated on an idea of equality regardless of gender, the use of this lens can still positively impact the experience of all individuals. It is asserted, therefore, that the human rights framework has the potential to provide redress for any survivors of abuse.

OVERARCHING HUMAN RIGHTS INSTRUMENTS

Perhaps the most well-known international document concerning the articulation of a body of rights is the Universal Declaration of Human Rights (the Declaration; UDHR). (11) Established by the United Nations General Assembly Resolution 217A on 10 December 1948, (12) the Declaration names thirty rights as those which are declared to be universal, such as the right to security and liberty, the right to education, and the right to freedom of thought.

In 1966, the United Nations General Assembly further espoused the doctrine of human rights by adopting two treaties that complemented the Declaration: The International Covenant on Economic, Social and Cultural Rights (ICESCR) (15) and the International Covenant on Civil and Political Rights (ICCPR) (12; 13). While some rights appear in all three instruments, this simply further demonstrates the fundamental importance of these rights in all spheres of human engagement. Together, these three instruments are considered the 'International Bill of Human Rights', establishing human rights law globally, and resulting in an additional eighteen international human rights treaties (12; 15). Table 12.1 outlines the rights identified from the International Bill of Human Rights which are those arguably involved in the instance of abuse between medical practitioners.

It is important to comment on a few of the rights in Table 12.1. The right to privacy enshrined in these instruments includes the right to judicial protection against attacks on privacy. Article 7(b) of the ICESCR specifically notes the right to safe and healthy working conditions, while article 12 includes both physical and mental health. Finally, the right to life, liberty, and security in article 3 of the UDHR is much broader than article 9 of the ICCPR, which relegates this right to detention situations.

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TABLE 12.1 *Nominated rights from the three instruments of the International Bill of Human Rights (i.e. UDHR, ICCPR and ICESCR) that are relevant to the issue of abuse between medical practitioners.*

INSTRUMENT	ARTICLE	RIGHT
UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)	3	Right to life, liberty, and the security of person
	5	Freedom from torture or cruel, inhuman, or degrading treatment or punishment
	6	Right to recognition before the law
	7	Right to equality before the law
	8	Remedy through law for violation of rights
	12	Right to privacy
	23	Right to work
	25	Right to health and wellbeing
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	7	Freedom from torture or cruel, inhuman, or degrading treatment or punishment
	9	Right to life, liberty, and the security of person
	16	Right to recognition before the law
	17	Right to privacy
	26	Right to equality before the law
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)	6	Right to work
	7	Right to just and favourable conditions at work
	12	Right to health

OTHER INTERNATIONAL INSTRUMENTS

Stemming from the UDHR, ICCPR and ICESCR are specialised instruments, such as treaty bodies, UN agencies and international agreements, that are tasked with managing and monitoring, in a more specific and nuanced manner, particular rights. Membership or ascension to these instruments often requires States to submit regular reports and allow compliance monitoring, from which invaluable data and statistics are gained. This information then provides the foundation for the formulation and development of global policies and procedures to instigate change. The following are those considered to be most applicable concerning the topic of this chapter.

Treaty Bodies

There are ten treaty bodies in operation with the focus of each being a particular treaty. (16) The Committee on the Elimination of Discrimination against Women

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(the Committee) oversees the implementation of the Convention on the Elimination of Discrimination against Women (CEDAW) (17; 18). Adopted by the United Nations General Assembly in December 1979, CEDAW calls on State parties to eliminate discrimination against women in all areas of life, ensure the development and advancement of women, and permit the Committee to scrutinise the compliance of the State through regular reporting and accounting. (19) CEDAW articles of interest include articles 2 and 5, which speak directly to the protection of women in the workforce. These articles require signatories to eliminate cultural or social patterns of conduct which affect women. In addition, article 11 calls for the protection of the workspace so that women can realise the right to protection of health and safety in working conditions. In addition to the primary document, CEDAW also has the Optional Protocol to the Convention, which permits individuals or groups to complain to the Committee directly and also allows the Committee to initiate inquiries into 'grave or systematic violations of women's rights'. (20) For these options to be actionable, the relevant State must have signed up to the Optional Protocol separately. At the moment, 189 States have ratified CEDAW, (20) with 115 States signed up to the Optional Protocol. (21)

Agencies

Specialised agencies of the United Nations operate to enhance certain rights. The International Labour Organization (ILO) is one such agency. Established in 1919 as part of the Treaty of Versailles at the end of the First World War, the ILO is the overarching global agency of the United Nations that unites governments, employers, and workers in programmes to ensure decent working conditions for everyone. (22; 23) The aims of the ILO, highlighted in the 1944 Declaration of Philadelphia, are to ensure that 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity', as in article II, and that the ILO should aim to guarantee 'adequate protection for the life and health of workers in all occupations', as in article III(g) (24). The ILO itself has conceived other conventions, again concerning the rights of workers, such as the adoption in 1958 of the Discrimination (Employment and Occupation) Convention, aimed at removing discriminatory behaviours and practices in the workplace. Currently, the ILO has 187 member states, including States such as China, Russia, Iran, and the United States. (22)

UN Women is an entity created by the United Nations General Assembly in July 2010 to address the issue of gender equality and the empowerment of women. (25) A specific area of concern for UN Women is the economic empowerment of women. UN Women supports programmes and policies that encourage women into the workforce, but also highlights the multiple barriers that women face upon entrance. (25) Aligning with the ILO, CEDAW and the Beijing Declaration, UN

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Women emphasises the requirement of protections in the workplace for women in order to achieve their full potential.

International Agreements

Closely aligned with the aims of CEDAW is the international agreement the Beijing Declaration and Platform for Action. (26) This declaration was adopted at the Fourth World Conference on Women in September 1995, and nominated twelve areas that were deemed crucial in order to rectify the global state of inequality. (27) A topic of concern is the intersection of women and the economy, which highlights the need for women to have access to properly paid work in conjunction with safe and harassment-free workspaces. (27) The notable difference about this particular declaration was the accompanying Platform for Action, which set out clear actions that could be taken to achieve success. Concerning women and the economy, strategic objective F.6(180)(c) calls for governments and businesses 'to enact and enforce laws against sexual and other forms of harassment in all workplaces'. (25) Since the adoption in 1995 by 189 States, the Beijing Declaration has been reviewed every five years with successes and failures duly noted. (27)

Asserting Rights through the International System

The human rights framework has multiple instruments aimed at protecting the rights of individuals; however, the practical steps which must be undertaken to make a complaint and therefore enforce these rights is complicated. In the international sphere, whether or not an instrument is binding on a State depends on its categorisation. For example, of the three overarching instruments, the ICCPR and the ICESCR are treaties, as opposed to the Declaration, which is not. The ICCPR and the ICESCR therefore provide a more solid avenue for recourse than the Declaration because when a State ratifies a treaty, they agree to be bound by its contents. Essentially, while the Declaration announces that which States can recognise, the ICCPR and ICESCR nominate that which States have to recognise post-ratification and places an obligation on the State to respect, protect and fulfil those rights. (28) The Beijing Declaration and the Platform for Action, along with UN Women, are as limited as the Declaration in regard to enforcement in this sense too.

There are some instruments that defy this trend. While the ILO is an agency, it has a complaints mechanism in its constitution and so does have the ability to receive and manage complaints. There are also additional complaint pathways, through the Human Rights Council and the Special Procedures Mechanism, which do not require ratification of a particular treaty to be accessed, although as demonstrated below, such avenues have their own practical limitations.

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Treaty Bodies

Submitting an individual complaint to a treaty body requires treaty ratification and, as in the case of the treaties in this chapter, ratification of the Optional Protocol permitting individual complaints. Where to submit a complaint depends upon which treaty an individual is asserting their rights through: the Human Rights Committee receives individual complaints concerning the ICCPR; the Committee on Economic, Social and Cultural Rights receives complaints concerning the ICESCR; and the Committee on the Elimination of Discrimination against Women receives complaints concerning CEDAW.

For a complaint to be accepted by a treaty body, domestic avenues must have first been exhausted. (29) If accepted, the complaint process remains confidential until finalised, in which a report makes it public. (29) The complainant can request interim measures to protect the complainant against reprisal or harm while the complaint is being decided. (29) As the decision has the weight of a treaty behind it, the outcome is quasi-judicial and legally enforceable. (29) The decision takes on average two to three years to be handed down; however interim measures can be enacted within forty-eight hours. (29)

Human Rights Council

Submitting a complaint to the Human Rights Council can be made by an individual who is a national of a member State of the United Nations. (29) There are strict eligibility criteria, however, such as the complainant having exhausted all domestic options before the complaint can be accepted. (29) The complaint must be part of a consistent pattern of gross and reliably attested violations of human rights – a hurdle that may be impassable regarding the topic of this book. (29) The complaint remains confidential; however the process is long and a positive outcome for the complainant is in no way guaranteed. (29)

Special Procedures

Like the Human Rights Council, ratification by a State of a particular treaty is not needed for an individual to submit a complaint; the complainant just must be a national of a member State of the United Nations. (29) To submit to the Special Procedures mechanism, the complaint must be covered by a Special Procedures Mandate. (29) The mandate holder may then elect to accept the complaint or not. (29) If accepted, the complaint becomes public and is incorporated into one of three annual reports. (29) Response times can be as little as twenty-four hours; however, the process can be lengthy depending on the amount of detail received in the complaint. (29) There is no need for domestic remedies to be exhausted. However, as there is a gatekeeper to this process (the mandate holder), success is in no way guaranteed. (29)

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Complaints to the International Labour Organization (ILO)

Sometimes the only way for a complaint to be made is by another member State. This is the process with the ILO, as outlined in articles 26 to 34 of the ILO Constitution. (30) Receipt of a complaint leads the ILO to determine whether or not a Commission of Inquiry should be instituted. (30) There have been fourteen Commissions of Inquiry in response to a total of sixty-seven complaints. (31)

EVALUATING THE INTERNATIONAL HUMAN RIGHTS ENFORCEMENT CAPABILITY

How useful are these processes to address the issue of abuse between medical practitioners? It is evident from the discussion above that there are numerous avenues through which a complaint could proceed. What is also evident is that the complaint process is complicated, is guarded by barriers and gatekeepers, and often, is used as a last resort. In the situation of the ILO, the individual ability to complain is non-existent. The process is also lengthy, requiring a complainant to endure potentially years of uncertainty, and in the end, publicity, in order to assert their rights.

The remedies available may also not be desired by an individual complainant. Treaty body decisions are final and cannot be appealed; however, the decision only contains recommendations on how the State should rectify the breach and is not a directive. (32) Should a breach be found and no action be taken by the State, the treaty body has no enforcement recourse; rather the case is simply left open until the treaty body is content that satisfactory actions have been taken. (32) In a similar vein, the mandate holder of the Special Procedure mechanism can only offer views or recommendations and has no enforcement potential. (33)

The Human Rights Council's strongest option is to recommend that the High Commissioner for Human Rights provide technical cooperation, capacity-building assistance or advisory services to the State concerned. (34) Under the ILO, article 33 permits a member State to impose sanctions if the recommendations required by the Commission of Inquiry are not fulfilled. Parties to the complaint under the ILO also have the ability to refer the matter to the International Court of Justice (ICJ), under article 29, the decision of which is final. (35) The practical implementation of an ICJ decision, however, still falls to the State in question and is unenforceable by the ICJ itself. (36)

Another limitation of the international enforcement of human rights is that the rights enshrined in these documents are broad. Interpretation must therefore be undertaken to apply the right to the situation of the complaint, an interpretation which may not be shared by the decision maker. In this same manner, an individual may have to rely on a combination of rights and may need to research extensively the purpose and intent of drafters in order to successfully lodge their complaint. In

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considering the complaint procedure, remedies and application, the limits of pursuing action under the international sphere of this framework become stark.

REGIONAL HUMAN RIGHTS INSTRUMENTS

Turning to the potential of utilising human rights through a regional instrument, options are readily available. Many regions have initiated human rights recourse options such as the African Court on Human and Peoples' Rights (ACHPR), (37) the European Court of Human Rights (ECtHR), (38) and the Inter-American Court of Human Rights (IACtHR). (39) These instruments safeguard many of the same rights already enumerated in the instruments above (prohibition on discrimination, right to personal liberty, right to physical and mental health, etc.); however, they are also notably creations of their regional tendencies; the African Court, for example, has the right to self-determination from colonialism enshrined in article 20.

These regional instruments mirror many of the same benefits and challenges experienced by the international sphere. The rights are broadly articulated, the process is barred to individuals unless the mechanism has been permitted access by the nominated State (only eight States have allowed the ACHPR to receive complaints from non-governmental organisations [NGOs] and individuals), (40) and enforcement is reliant on State compliance (the ECtHR openly declaring that 'the Court is not responsible for the execution of its judgement'). (41) The remedies available, however, are more appealing; both the IACtHR and the ECtHR can offer compensation to address the physical and, at times, moral harm inflicted on the individual. (42) The ECtHR also often orders that the declaration of a violation is a sufficient remedy. (42) The ACHPR can order compensation or reparations, and in situations of 'extreme gravity and urgency' is authorised to order provisional measures under article 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. (43) Such remedies are focused on the individual, rather than the vague and ambiguous requirement to 'review', as offered by the international sphere.

It is also through cases using such instruments that the interpretation of broad rights to suit the facts of a particular situation are exposed. At the ECtHR in the case of Buturugă v Romania, the Court upheld that cyberbullying is a breach of article 3 (prohibition on torture and inhuman or degrading treatment or punishment) and article 8 (right to respect for private and family life). (44) Though the core issue was domestic violence, this case holds potential precedential value. The situation could be deemed analogous, and therefore provide a blueprint of language, nomination of rights in breach and remedies, that could be utilised by a complainant in the instance of abuse between medical practitioners. With an immense case load (the ACHPR has finalised 172 cases since 2009), (45) these instruments may reveal a number of cases that can act as a guide to prospective complainants in regard to law interpretation, rulings and remedies. Having first needed to exhaust domestic

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options before turning to the regional instruments, (46; 47) however, it is to this sphere that attention must now be turned.

DOMESTIC HUMAN RIGHTS INSTRUMENTS

The possibilities offered by the human rights framework through domestic instruments are quite different to the options explored above. At once, human rights at this level can be both subtle and explicit. Protection and enforcement can be maintained through legislation, the criminal justice system, dedicated organisations, and NGOs, as well as through policies and standards instilled in individual employment sectors and workplaces. Noting that the abuse between medical practitioners often occurs in the workplace, the examples proffered below focus solely on this arena.

First and foremost, domestic legislation can be connected with the international treaty ratification process or may stand alone. As explained above, where a treaty is ratified, the State agrees to be bound by its contents. This offers two-pronged protection: first through the domestic law which has been authorised to protect that right and second through the complaint mechanism of the international treaty. Domestic legislation concerning rights may appear as constitutional enshrinement, such as the Bill of Rights in the United States, (48) or through specific rights legislation, such as in New Zealand. (49) It may also appear through employment legislation, such as the federal Fair Work Act 2009 in Australia, or through work, health and safety legislation. Enforcement of legislated rights occurs through the judicial system, with the apex court of the State being the final arbiter. As chapter 11 is exploring the legal avenues available, it is not necessary to explore that particular route here, except to mention that these processes are often arduous and should not be proffered lightly.

At a domestic level, human rights are often safeguarded by various organisations. Some of these organisations have the ability to accept complaints and conduct a dispute process, while others focus on advocacy. The Australian Human Rights Commission (AHRC), for example, has a dedicated sex discrimination team, regularly releasing reports including on workplace abuse and harassment. (50) The AHRC can accept complaints, utilising conciliation to resolve disputes. (51) Should a complainant not be satisfied with the outcome, the Federal Courts are the final arbiter in the matter. (51) Organisations which focus on advocacy include NGOs such as Amnesty International, Human Rights Watch and United for Human Rights. These organisations monitor specific human rights and use grassroots tactics and strategies to agitate for change.

A final domestic avenue regarding human rights is through industry-specific advocacy. These are very local, and sometimes employer specific, options, which have the benefit of knowledge concerning working conditions, standards, and practices. The Royal Australasian College of Surgeons, for example, works to provide training and standards-setting in Australia and New Zealand, and has

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a dedicated advocacy arm. (52) Industry unions, such as the Australian Medical Association, represent doctors in their employment rights. (53) Enterprise bargaining agreements, which are documents dictating conditions of work and standards applicable at a nominated workplace, are also useful tools to commence a complaint, as they often contain a dispute resolution mechanism which the employer is required to follow.

Having documented the options above, it is clear that the domestic sphere offers avenues that are more specialised and nuanced than those proffered by the regional or international sphere. In this way, it is almost difficult to identify the rights that are being protected as they are often enmeshed within standards, legislation and polices. Using one or more of the options mentioned above may assist a complainant in resolving their particular issue in a manner more palatable than that which may occur through a regional or international instrument. In any event, it is worth remembering that such domestic routes, particularly legal when available, are often required to be pursued before escalation to a global instrument is permitted.

DISCUSSION

The question becomes: is the human rights framework an appropriate lens through which to view and tackle the issue of abuse between medical practitioners? The answer depends on what the survivor seeks. If the survivor wishes to act in an individual manner, seeks specific remedies such as compensation or their abuser to be penalised through incarceration or financial means, the ability of the human rights framework to achieve this in a practical and efficient manner appears underwhelming at best. Such a result is really only possible through the legal enforcement of such rights, and therefore only available where the State has afforded the survivor such legal recourse through domestic legislation.

The benefits offered by this framework are evident when used in a collective fashion. Human rights can be used to lobby States and advocate for specific change, utilising the language, global standards and data that are collected through the instruments in conjunction with the lived experience of survivors. Through such agitation, individuals may be able to achieve change on a local level, such as harassment and abuse being included in enterprise bargaining agreements, to a more national or regional level, including the development of legislation or memoranda of understanding between States regarding standards of behaviour.

The rights framework is evidently reactive rather than proactive. Experiences lead to change for future generations, rather than immediate and satisfying results for the wronged individual. Success may also be incremental, with changes and societal shifts slowly taking form over years and decades. It cannot be ignored that there has been significant success in utilising the rights framework for various campaigns: equal pay between women and men, abolition of the death penalty and climate action have used the rights framework and substantial agitation to bring global

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actors, including States and corporations, into agreement about standards. Of course, even collective action has its drawbacks; some survivors may not wish to publicise their experience, national defamation laws may affect what survivors can release without a criminal conviction, and overall the process is lengthy.

In this way, perhaps the best method of utilising the rights framework is in conjunction with other means, such as through the criminal law pathway. Using the framework, language and statistics offered by human rights may bolster other recourse actions taken by the individual and complement both the need for immediate action and inspire collective change. The power of human rights can no doubt be harnessed to achieve results in one way or another.

CONCLUSION

Human rights language and standards have permeated the lived reality of most States. The interpretation and enforcement of these rights is where the framework lacks the ability to achieve immediate and effective individual change. While the individual may not receive the benefits, collective agitation using the language and information collected globally can affect national legislations and laws that may prevent future individuals from experiencing the same abuse that their predecessors did. In order to be completely effective, the use of this framework may best be utilised in partnership with a more definitive lens, such as through legal recourse. Ultimately, this framework offers something to the project of addressing the issue of abuse between medical practitioners but cannot provide a definitive silver bullet.

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